

MICHIGAN REPORTS
—————
CASES DECIDED
IN THE
SUPREME COURT
OF
MICHIGAN

FROM
November 1, 2019 through July 17, 2020

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

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FIRST EDITION



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SUPREME COURT

	TERM EXPIRES JANUARY 1 OF
CHIEF JUSTICE	
BRIDGET M. McCORMACK.....	2021
CHIEF JUSTICE PRO TEM	
DAVID F. VIVIANO.....	2025
JUSTICES	
STEPHEN J. MARKMAN.....	2021
BRIAN K. ZAHRA.....	2023
RICHARD H. BERNSTEIN.....	2023
ELIZABETH T. CLEMENT.....	2027
MEGAN K. CAVANAGH.....	2027

COMMISSIONERS

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STACI STODDARD	LIZA C. MOORE

KAREN A. KOSTBADE

STATE COURT ADMINISTRATOR

MILTON L. MACK, JR.¹
THOMAS P. BOYD²

CLERK: LARRY S. ROYSTER
REPORTER OF DECISIONS: KATHRYN L. LOOMIS
CRIER: JEFFREY A. MILLS

¹ To March 23, 2020.

² From March 23, 2020.

COURT OF APPEALS

	TERM EXPIRES JANUARY 1 OF
CHIEF JUDGE	
CHRISTOPHER M. MURRAY	2021
CHIEF JUDGE PRO TEM	
JANE M. BECKERING	2025

JUDGES	
DAVID SAWYER	2023
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2025
JANE E. MARKEY	2021
PATRICK M. METER	2021
KIRSTEN FRANK KELLY	2025
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2025
DEBORAH A. SERVITTO	2025
ELIZABETH L. GLEICHER	2025
CYNTHIA DIANE STEPHENS	2023
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2025
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2025
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2023
THOMAS C. CAMERON	2023
JONATHAN TUKEL	2021
ANICA LETICA	2021
JAMES R. REDFORD	2021

CHIEF CLERK: JEROME W. ZIMMER, JR.
RESEARCH DIRECTOR: JULIE ISOLA RUECKE

CIRCUIT JUDGES

		TERM EXPIRES
		JANUARY 1 OF
1.	MICHAEL R. SMITH.....	2021
2.	DONNA B. HOWARD	2021
	CHARLES T. LaSATA	2023
	ANGELA PASULA	2025
	JENNIFER L. SMITH	2021
3.	DAVID J. ALLEN	2021
	MARIAM BAZZI.....	2021
	ANNETTE J. BERRY.....	2025
	GREGORY D. BILL.....	2025
	ULYSSES W. BOYKIN.....	2021
	KAREN Y. BRAXTON.....	2025
	JEROME C. CAVANAGH	2025
	ERIC WILLIAM CHOLACK.....	2023
	JAMES R. CHYLINSKI.....	2023
	KEVIN J. COX.....	2025
	MELISSA ANNE COX	2023
	PAUL JOHN CUSICK	2025
	CHRISTOPHER D. DINGELL.....	2021
	PRENTIS EDWARDS, JR.	2025
	CHARLENE M. ELDER	2021
	WANDA EVANS.....	2023
	EDWARD EWELL, JR.	2025
	HELAL A. FARHAT	2021
	PATRICIA SUSAN FRESARD.....	2023
	SHEILA ANN GIBSON.....	2023
	JOHN H. GILLIS, JR.	2021
	ALEXIS GLENDENING.....	2023
	TRACY E. GREEN	2025
	DAVID ALAN GRONER	2023
	ADEL A. HARB	2025
	BRIDGET MARY HATHAWAY.....	2025
	CYNTHIA GRAY HATHAWAY	2023
	DANA MARGARET HATHAWAY	2025
	THOMAS M.J. HATHAWAY	2023
	CHARLES S. HEGARTY	2025
	CATHERINE HEISE.....	2025
	NOAH P. HOOD	2021
	SUSAN L. HUBBARD	2023
	MURIEL D. HUGHES	2023

	TERM EXPIRES JANUARY 1 OF
EDWARD JOSEPH	2021
TIMOTHY M. KENNY	2023
DONALD KNAPP	2021
QIANA D. LILLARD	2025
KATHLEEN M. McCARTHY	2025
CYLENTHIA LaTOYE MILLER	2021
BRUCE U. MORROW	2023
JOHN A. MURPHY	2023
LYNNE A. PIERCE	2021
LITA MASINI POPKE	2023
KELLY RAMSEY	2023
MARK T. SLAVENS	2023
LESLIE KIM SMITH	2025
MARTHA M. SNOW	2023
CRAIG S. STRONG	2021
BRIAN R. SULLIVAN	2023
LAWRENCE S. TALON	2021
CARLA TESTANI	2021
DEBORAH A. THOMAS	2025
REGINA DANIELS THOMAS	2025
MARGARET M. VAN HOUTEN	2021
SHANNON N. WALKER	2021
DARNELLA DENISE WILLIAMS-CLAYBOURN	2021 ¹
4. SUSAN BEEBE JORDAN	2023
RICHARD N. LaFLAMME	2023
JOHN G. McBAIN, JR.	2021
THOMAS D. WILSON	2025
5. VICKY ALSPAUGH	2021 ²
6. JAMES M. ALEXANDER	2021
MARTHA ANDERSON	2021
LEO BOWMAN	2025
MARY ELLEN BRENNAN	2021
RAE LEE CHABOT	2023
JACOB JAMES CUNNINGHAM	2025
KAMESHIA D. GANT	2021
LISA ORTLIEB GORCYCA	2021
NANCI J. GRANT	2021
HALA Y. JARBOU	2023
SHALINA D. KUMAR	2021

¹ From April 6, 2020.

² From January 1, 2020.

	TERM EXPIRES JANUARY 1 OF
DENISE LANGFORD-MORRIS.....	2025
LISA LANGTON.....	2023
JEFFREY S. MATIS.....	2021
CHERYL A. MATTHEWS.....	2023
JULIE A. McDONALD.....	2025
PHYLLIS C. McMILLEN.....	2025
DANIEL PATRICK O'BRIEN.....	2023
VICTORIA ANN VALENTINE.....	2023
MICHAEL D. WARREN, JR.	2025
7. DUNCAN M. BEAGLE.....	2023
CELESTE D. BELL.....	2025
JOSEPH J. FARAH.....	2023
JOHN A. GADOLA.....	2021
ELIZABETH ANNE KELLY.....	2025
MARK W. LATCHANA.....	2021 ³
DAVID J. NEWBLATT.....	2023
BRIAN S. PICKELL.....	2025
MICHAEL J. THEILE.....	2021
RICHARD B. YUILLE.....	2021 ⁴
8. SUZANNE KREEGER.....	2021
RONALD J. SCHAFER.....	2023
9. PAUL J. BRIDENSTINE.....	2025
GARY C. GIGUERE, JR.	2021
STEPHEN D. GORSALITZ.....	2023
PAMELA L. LIGHTVOET.....	2025
ALEXANDER C. LIPSEY.....	2023
10. JANET M. BOES.....	2025
JAMES T. BORCHARD.....	2023
ANDRÉ R. BORRELLO.....	2023
DARNELL JACKSON.....	2025
MANVEL TRICE, III.....	2021
11. WILLIAM W. CARMODY.....	2021
12. CHARLES R. GOODMAN.....	2021
13. KEVIN A. ELSENHEIMER.....	2021
THOMAS G. POWER.....	2023
14. TIMOTHY G. HICKS.....	2023
KATHY HOOGSTRA.....	2021
WILLIAM C. MARIETTI.....	2023
ANNETTE ROSE SMEDLEY.....	2025

³ From March 5, 2020.

⁴ To January 5, 2020.

	TERM EXPIRES JANUARY 1 OF
15. P. WILLIAM O'GRADY.....	2021
16. JAMES M. BIERNAT, JR.	2025
RICHARD L. CARETTI.....	2023
DIANE M. DRUZINSKI.....	2021
JENNIFER FAUNCE.....	2025
JULIE GATTI.....	2027
JAMES M. MACERONI.....	2021
CARL J. MARLINGA.....	2023
RACHEL RANCILIO.....	2023
EDWARD A. SERVITTO, JR.	2025
MICHAEL E. SERVITTO.....	2023
MARK S. SWITALSKI.....	2025
MATTHEW S. SWITALSKI.....	2021
JOSEPH TOIA.....	2021
KATHRYN A. VIVIANO.....	2023
TRACEY A. YOKICH.....	2025
17. CURT A. BENSON.....	2025
PAUL J. DENENFELD.....	2023
CHRISTINA ELMORE.....	2025
KATHLEEN A. FEENEY.....	2021
DEBORAH McNABB.....	2023
GEORGE JAY QUIST.....	2023
J. JOSEPH ROSSI.....	2023
PAUL J. SULLIVAN.....	2021
MARK A. TRUSOCK.....	2025
CHRISTOPHER P. YATES.....	2025
DANIEL V. ZEMAITIS.....	2021
18. HARRY P. GILL.....	2023
JOSEPH K. SHEERAN.....	2021
19. DAVID A. THOMPSON.....	2021
20. KENT D. ENGLE.....	2023
JON H. HULSING.....	2021
KAREN J. MIEDEMA.....	2023
JON VAN ALLSBURG.....	2025
21. MARK H. DUTHIE.....	2025
SARA SPENCER-NOGGLE.....	2021
22. ARCHIE CAMERON BROWN.....	2023
PATRICK J. CONLIN, JR.	2021
TIMOTHY P. CONNORS.....	2025
CAROL A. KUHNKE.....	2025
DAVID S. SWARTZ.....	2021
23. DAVID C. RIFFEL.....	2023
24. DONALD A. TEEPLE.....	2021

	TERM EXPIRES JANUARY 1 OF
25. JENNIFER A. MAZZUCHI.....	2021
26. KEITH EDWARD BLACK.....	2021 ⁵
MICHAEL G. MACK.....	2021 ⁶
27. ROBERT D. SPRINGSTEAD	2025
28. WILLIAM M. FAGERMAN.....	2021
29. MICHELLE M. RICK.....	2023
RANDY L. TAHVONEN	2021
30. ROSEMARIE E. AQUILINA	2021
LAURA BAIRD	2025 ⁷
CLINTON CANADY, III	2023
JOYCE DRAGANCHUK.....	2023
JAMES S. JAMO	2025
JANELLE A. LAWLESS	2021
LISA K. McCORMICK.....	2021 ⁸
WANDA M. STOKES	2021
31. DANIEL J. KELLY.....	2021
CYNTHIA A. LANE.....	2023
MICHAEL L. WEST.....	2025
32. MICHAEL K. POPE.....	2021
33. ROY C. HAYES, III	2021
34. ROBERT BENNETT	2023
35. MATTHEW J. STEWART	2021
36. KATHLEEN M. BRICKLEY.....	2025
JEFFREY J. DUFON.....	2021
37. JOHN A. HALLACY.....	2025
TINA YOST JOHNSON	2023
BRIAN KIRKHAM	2023
SARAH SOULES LINCOLN	2021
38. MARK S. BRAUNLICH	2025
MICHAEL A. WEIPERT.....	2023
DANIEL S. WHITE	2021
39. ANNA MARIE ANZALONE	2025
MICHAEL R. OLSAVER.....	2021
40. NICK O. HOLOWKA	2023
BYRON KONSCHUH	2021
41. MARY BROUILLETTE BARGLIND	2023

⁵ From March 2, 2020.

⁶ To January 3, 2020.

⁷ To February 1, 2020.

⁸ From March 2, 2020.

	TERM EXPIRES JANUARY 1 OF
CHRISTOPHER S. NINOMIYA	2021
42. MICHAEL J. BEALE	2021
STEPHEN CARRAS.....	2025
43. MARK A. HERMAN	2023
44. L. SUZANNE GEDDIS	2027
MICHAEL P. HATTY	2025
MATTHEW J. McGIVNEY	2021 ⁹
45. PAUL E. STUTESMAN	2025
46. COLIN G. HUNTER	2023
GEORGE J. MERTZ	2021
47. JOHN B. ECONOMOPOULOS	2023
48. MARGARET ZUZICH BAKKER.....	2023
ROBERTS KENGIS	2021
49. KIMBERLY L. BOOHER.....	2021
SCOTT P. HILL-KENNEDY.....	2025
50. JAMES P. LAMBROS	2025
51. SUSAN K. SNIEGOWSKI	2021
52. GERALD M. PRILL	2021
53. AARON J. GAUTHIER.....	2021
54. AMY G. GIERHART	2025
55. THOMAS R. EVANS	2021
ROY G. MIENK.....	2025
56. JANICE K. CUNNINGHAM	2025
JOHN DOUGLAS MAURER.....	2021
57. CHARLES W. JOHNSON	2025

⁹ From July 22, 2019.

DISTRICT JUDGES

		TERM EXPIRES
		JANUARY 1 OF
1.	MICHAEL C. BROWN	2021
	WILLIAM PAUL NICHOLS	2025
	JACK VITALE	2023
2A.	JONATHAN L. POER	2021
	LAURA J. SCHAEGLER	2023
2B.	SARA S. LISZNYAI	2021
3A.	BRENT R. WEIGLE	2021
3B.	JEFFREY C. MIDDLETON	2021
	ROBERT PATTISON	2025
4.	STACEY A. RENTFROW	2021
5.	GARY J. BRUCE	2023
	ARTHUR J. COTTER	2021
	GORDON GARY HOSBEIN	2021
	STERLING R. SCHROCK	2025
	DENNIS M. WILEY	2023
7.	ARTHUR H. CLARKE, III	2021
	MICHAEL T. McKAY	2023
8.	ANNE E. BLATCHFORD	2025
	CHRISTOPHER T. HAENICKE	2025
	KATHLEEN P. HEMINGWAY	2021
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2023
10.	PAUL K. BEARDSLEE	2021
	JASON C. BOMIA	2021
	FRANKLIN K. LINE, JR.	2021
	TRACIE L. TOMAK	2025
12.	JOSEPH S. FILIP	2023
	DANIEL GOOSTREY	2025
	MICHAEL J. KLAEREN	2021
	R. DARRYL MAZUR	2021
14A.	ANNA M. FRUSHOUR	2021 ¹
	J. CEDRIC SIMPSON	2025
	KIRK W. TABBEY	2023
14B.	CHARLES J. POPE	2021
15.	JOSEPH F. BURKE	2025
	ELIZABETH POLLARD HINES	2023
	KAREN Q. VALVO	2021
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2025
17.	KRISTA LICATA HAROUTUNIAN	2021
	KAREN S. KHALIL	2023

¹ From January 13, 2020.

	TERM EXPIRES JANUARY 1 OF
18. SANDRA A. FERENGE CICIRELLI.....	2025
MARK A. McCONNELL	2021
19. L. EUGENE HUNT, JR.	2023
SAM A. SALAMEY.....	2025
MARK W. SOMERS	2021
20. MARK J. PLaweCKI	2021
DAVID TURFE	2025
21. RICHARD L. HAMMER, JR.	2021
22. SABRINA L. JOHNSON.....	2025
23. GENO D. SALOMONE.....	2025
JOSEPH D. SLAVEN.....	2021
24. JOHN T. COURTRIGHT	2021
RICHARD A. PAGE.....	2023
25. GREGORY A. CLIFTON.....	2021
DAVID J. ZELENAK.....	2023
27. ELIZABETH L. DISANTO	2025
28. JAMES A. KANDREVAS	2021
29. LAURA REDMOND MACK.....	2025 ²
BREEDA K. O'LEARY	2021 ³
30. BRIGETTE OFFICER HOLLEY.....	2023
31. ALEXIS G. KROT	2021
32A. DANIEL S. PALMER.....	2021
33. JENNIFER COLEMAN HESSON	2023
JAMES KURT KERSTEN	2021
MICHAEL K. McNALLY	2025
34. TINA BROOKS GREEN	2025
BRIAN A. OAKLEY	2023
DAVID M. PARROTT	2021
35. MICHAEL J. GEROU	2023
RONALD W. LOWE	2025
JAMES A. PLAKAS	2021
36. LYDIA NANCE ADAMS	2023
ROBERTA C. ARCHER.....	2025
CHRISTOPHER MICHAEL BLOUNT	2025
NANCY McCAUGHAN BLOUNT	2021
DEMETRIA BRUE	2021
ESTHER LYNISE BRYANT	2021
DONALD COLEMAN	2025
KAHLILIA YVETTE DAVIS.....	2023
DEBORAH GERALDINE FORD	2023
RUTH ANN GARRETT.....	2025
KRISTINA ROBINSON GARRETT	2023
WILLIAM AUSTIN GARRETT	2023
RONALD GILES	2021
ADRIENNE HINNANT-JOHNSON.....	2021
SHANNON A. HOLMES	2021

² To March 1, 2020.

³ From June 8, 2020.

	TERM EXPIRES JANUARY 1 OF
PATRICIA L. JEFFERSON	2021
KENYETTA STANFORD JONES	2023
ALICIA A. JONES-COLEMAN	2025
KENNETH J. KING	2021
DEBORAH L. LANGSTON	2025
JACQUELYN A. McCLINTON.....	2021 ⁴
WILLIAM C. McCONICO.....	2025
DONNA R. MILHOUSE	2025
B. PENNIE MILLENDER	2023
KEVIN F. ROBBINS	2025
DAVID S. ROBINSON, JR.	2025
ALIYAH SABREE	2025
MICHAEL E. WAGNER	2021
LARRY D. WILLIAMS, JR.	2023
37. JOHN M. CHMURA	2025
MICHAEL CHUPA.....	2021
SUZANNE M. FAUNCE	2023
MATTHEW P. SABAUGH	2025
38. CARL F. GERDS III	2021
39. JOSEPH F. BOEDEKER	2021
ALYIA MARIE HAKIM.....	2021 ⁵
KATHLEEN E. TOCCO.....	2025
40. MARK A. FRATARCANGELI.....	2025
JOSEPH CRAIGEN OSTER	2021
41A. ANNEMARIE M. LEPORE	2021
DOUGLAS P. SHEPHERD	2025
STEPHEN S. SIERAWSKI	2023
KIMBERLEY ANNE WIEGAND	2025
41B. JACOB M. FEMMININEO, JR.....	2021
CARRIE LYNN FUCA	2023
SEBASTIAN LUCIDO	2025
42-1. DENIS R. LEDUC.....	2021
42-2. WILLIAM H. HACKEL, III.....	2025
43. CHARLES G. GOEDERT	2021 ⁶
BRIAN C. HARTWELL	2021 ⁷
KEITH P. HUNT	2025
JOSEPH LONGO	2023
44. DEREK W. MEINECKE	2025
JAMES L. WITTENBERG.....	2023
45. MICHELLE FRIEDMAN APPEL	2023
DAVID M. GUBOW	2021
46. CYNTHIA ARVANT.....	2023
SHEILA R. JOHNSON	2021

⁴ From January 13, 2020.

⁵ From December 2, 2019.

⁶ To March 16, 2020.

⁷ From June 9, 2020.

	TERM EXPIRES JANUARY 1 OF
	2025
47. DEBRA NANCE	2021
47. JAMES B. BRADY	2023
47. MARLA E. PARKER	2023
48. MARC BARRON.....	2025
48. DIANE D'AGOSTINI	2021
48. KIMBERLY F. SMALL.....	2025
50. RONDA FOWLKES GROSS.....	2021
50. MICHAEL C. MARTINEZ.....	2023
50. PRESTON G. THOMAS	2021
50. CYNTHIA THOMAS WALKER.....	2025
51. TODD A. FOX	2021
51. RICHARD D. KUHN, JR.	2025
52-1. ROBERT BONDY.....	2023
52-1. THOMAS DAVID LAW	2021
52-1. TRAVIS REEDS.....	2021
52-2. JOSEPH G. FABRIZIO.....	2021
52-2. KELLEY RENAË KOSTIN	2023
52-3. LISA L. ASADOORIAN.....	2025
52-3. NANCY TOLWIN CARNIAK	2023
52-3. JULIE A. NICHOLSON.....	2021
52-4. KIRSTEN NIELSEN HARTIG.....	2023
52-4. MAUREEN M. MCGINNIS.....	2021
53. DANIEL B. BAIN	2021
53. SHAUNA MURPHY	2023
54A. LOUISE ALDERSON.....	2023
54A. STACIA J. BUCHANAN	2021
54A. KRISTEN D. SIMMONS	2021
54A. CYNTHIA M. WARD	2025
54B. RICHARD D. BALL	2023
54B. ANDREA ANDREWS LARKIN	2025
55. DONALD L. ALLEN	2023
55. THOMAS P. BOYD.....	2021 ⁸
55. RICHARD L. HILLMAN.....	2021 ⁹
56A. JULIE O'NEILL	2023
56A. JULIE H. REINCKE.....	2021
56B. MICHAEL LEE SCHIPPER.....	2025
57. WILLIAM A. BAILLARGEON	2025
57. JOSEPH S. SKOCELAS	2021
58. CRAIG E. BUNCE	2025
58. SUSAN A. JONAS.....	2021
58. BRADLEY S. KNOLL	2021
58. JUDITH K. MULDER.....	2023
59. PETER P. VERSLUIS	2023
60. HAROLD F. CLOSZ, III.....	2021

⁸ To March 22, 2020.

⁹ From April 13, 2020.

	TERM EXPIRES JANUARY 1 OF
MARIA LADAS HOOPES	2021
RAYMOND J. KOSTRZEWA JR.	2025
GEOFFREY THOMAS NOLAN	2023
61. NICHOLAS S. AYOUB	2023
DAVID J. BUTER	2021
MICHAEL J. DISTEL	2025
JENNIFER FABER	2023
JEANINE NEMESI LAVILLE	2025
KIMBERLY A. SCHAEFER	2021
62A. PABLO CORTES	2021
STEVEN M. TIMMERS	2025
62B. WILLIAM G. KELLY	2021
63. JEFFREY J. O'HARA	2021
SARA J. SMOLENSKI	2021
64A. RAYMOND P. VOET	2021
64B. DONALD R. HEMINGSSEN	2021
65A. MICHAEL E. CLARIZIO	2021
65B. STEWART D. McDONALD	2021
66. WARD L. CLARKSON	2025
TERRANCE P. DIGNAN	2021
67-1. DAVID J. GOGGINS	2021
67-2. JESSICA J. HAMMON	2021 ¹⁰
MARK W. LATCHANA	2023 ¹¹
JENNIFER J. MANLEY	2021
67-3. VIKKI BAYEH HALEY	2021
67-4. MARK C. McCABE	2021
CHRISTOPHER R. ODETTE	2025
67-5. WILLIAM H. CRAWFORD, II	2025
G. DAVID GUINN	2021
HERMAN MARABLE, JR.	2025
NATHANIEL C. PERRY, III	2021
70-1. TERRY L. CLARK	2025
M. RANDALL JURRENS	2023
70-2. ELIAN FICHTNER	2021
ALFRED T. FRANK	2021
DAVID D. HOFFMAN	2025
71A. LAURA CHEGER BARNARD	2021
71B. JASON ERIC BITZER	2021
72. MONA S. ARMSTRONG	2021 ¹²
MICHAEL L. HULEWICZ	2023
JOHN D. MONAGHAN	2025

¹⁰ From April 13, 2020.

¹¹ To March 4, 2020.

¹² From March 13, 2020.

	TERM EXPIRES JANUARY 1 OF
CYNTHIA SIEMEN PLATZER	2021 ¹³
74. MARK E. JANER	2023
TIMOTHY J. KELLY	2025
DAWN A. KLIDA.....	2021
75. MICHAEL CARPENTER.....	2021
76. ERIC R. JANES	2021
77. PETER M. JAKLEVIC.....	2021
78. H. KEVIN DRAKE.....	2021
79. PETER J. WADEL.....	2021
80. JOSHUA M. FARRELL.....	2021
82. RICHARD E. NOBLE.....	2021
84. AUDREY D. VAN ALST	2021
86. ROBERT A. COONEY	2025
MICHAEL S. STEPKA	2023
89. MARIA I. BARTON	2021
90. ANGELA LASHER.....	2021 ¹⁴
92. BETH A. GIBSON.....	2021
93. MARK E. LUOMA.....	2021
94. STEVE PARKS	2021
95A. ROBERT J. JAMO	2021
95B. JULIE A. LACOST	2021
96. ROGER W. KANGAS	2021
KARL WEBER.....	2023
97. NICHOLAS J. DAAVETILA.....	2021 ¹⁵
MARK A. WISTI.....	2021 ¹⁶

¹³ To December 31, 2019.

¹⁴ From February 17, 2020.

¹⁵ From April 13, 2020.

¹⁶ To March 15, 2020.

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RUSSELL F. ETHRIDGE.....	2024
CARL F. JARBOE	2022
THEODORE A. METRY	2024
MATTHEW R. RUMORA	2022

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COUNTY		TERM EXPIRES JANUARY 1 OF
Alcona.....	LAURA A. FRAWLEY	2025
Alger/Schoolcraft	CHARLES C. NEBEL	2025
Allegan	MICHAEL L. BUCK.....	2025
Alpena	THOMAS J. LACROSS.....	2025
Antrim.....	NORMAN R. HAYES.....	2025
Arenac	RICHARD E. VOLLBACH, JR.....	2025
Baraga.....	TIMOTHY S. BRENNAN.....	2025
Barry	WILLIAM M. DOHERTY.....	2025
Bay.....	JAN A. MINER	2025
Benzie.....	JOHN D. MEAD	2025
Berrien	BRIAN BERGER	2025
Berrien	MABEL JOHNSON MAYFIELD	2021
Branch.....	KIRK A. KASHIAN	2025
Calhoun.....	MICHAEL L. JACONETTE.....	2023
Cass	SUSAN L. DOBRICH	2025
Cheboygan.....	DARYL P. VIZINA	2025
Chippewa	ERIC BLUBAUGH	2021
Clare/Gladwin.....	MARCY A. KLAUS	2025
Clinton.....	LISA SULLIVAN.....	2025
Crawford	MONTE J. BURMEISTER.....	2025
Delta	PERRY R. LUND	2025
Dickinson	THOMAS D. SLAGLE.....	2025
Eaton	THOMAS K. BYERLEY	2025
Emmet/Charlevoix.....	VALERIE K. SNYDER	2025
Genesee	JENNIE E. BARKEY	2021
Genesee	F. KAY BEHM	2025
Gogebic	ANNA ROSE TALASKA.....	2025
Grand Traverse.....	MELANIE STANTON	2025
Gratiot.....	KRISTIN M. BAKKER.....	2025
Hillsdale.....	MICHELLE SNELL BIANCHI	2025
Houghton.....	FRASER T. STROME	2025
Huron	DAVID L. CLABUESCH	2025
Huron	DAVID B. HERRINGTON.....	2021
Ingham	SHAUNA DUNNINGS	2025
Ingham	RICHARD J. GARCIA.....	2021
Ionia.....	ROBERT S. SYKES, JR.....	2025
Iosco.....	CHRISTOPHER P. MARTIN	2025
Iron	DONALD S. POWELL	2025
Isabella.....	STUART BLACK	2025
Jackson.....	DIANE M. RAPPLEYE	2025
Kalamazoo.....	TIFFANY ANKLEY	2021
Kalamazoo.....	CURTIS J. BELL.....	2025

COUNTY		TERM EXPIRES JANUARY 1 OF
Kalamazoo	G. SCOTT PIERANGELI	2023
Kalkaska	LYNNE M. BUDAY	2025
Kent	TERENCE ACKERT	2023
Kent	PATRICIA D. GARDNER	2025
Kent	G. PATRICK HILLARY	2025
Kent	DAVID M. MURKOWSKI	2021
Keweenaw	KEITH WARREN DeFORGE	2025
Lake	MARK S. WICKENS	2025
Lapeer	JUSTUS C. SCOTT	2025
Leelanau	MARIAN F. KROMKOWSKI	2025
Lenawee	CATHERINE ANN SALA	2025
Livingston	MIRIAM A. CAVANAUGH	2025
Luce/Mackinac	W. CLAYTON GRAHAM	2025
Macomb	KATHRYN A. GEORGE	2021
Macomb	SANDRA A. HARRISON	2025
Manistee	THOMAS N. BRUNNER	2025
Marquette	CHERYL L. HILL	2025
Mason	JEFFREY C. NELLIS	2025
Mecosta/Osceola	TYLER O. THOMPSON	2025
Menominee	DANIEL E. HASS	2025
Midland	DORENE S. ALLEN	2025
Missaukee	MELISSA J. RANSOM	2025
Monroe	FRANK L. ARNOLD	2021
Monroe	CHERYL E. LOHMEYER	2025
Montcalm	CHARLES W. SIMON, III	2025
Montmorency	BENJAMIN T. BOLSER	2025
Muskegon	GREGORY C. PITTMAN	2025
Muskegon	BRENDA E. SPRADER	2023
Newaygo	MELISSA K. DYKMAN	2025
Oakland	JENNIFER S. CALLAGHAN	2023
Oakland	LINDA S. HALLMARK	2025
Oakland	DANIEL A. O'BRIEN	2021
Oakland	KATHLEEN A. RYAN	2023
Oceana	BRADLEY G. LAMBRIX	2025
Ogemaw	SHANA A. LAMBOURN	2025
Ontonagon	JANIS M. BURGESS	2025
Oscoda	CASSANDRA L. MORSE-BILLS	2025
Otsego	MICHAEL K. COOPER	2025
Ottawa	MARK A. FEYEN	2025
Presque Isle	ERIK J. STONE	2025
Roscommon	MARK JERNIGAN	2025
Saginaw	PATRICK J. McGRAW	2025
Saginaw	BARBARA L. METER	2021
St. Clair	ELWOOD L. BROWN	2021

COUNTY		TERM EXPIRES JANUARY 1 OF
St. Clair	JOHN D. TOMLINSON	2025
St. Joseph	DAVID C. TOMLINSON	2025
Sanilac	GREGORY S. ROSS	2021
Shiawassee	THOMAS J. DIGNAN	2025
Tuscola	NANCY THANE	2025
Van Buren	DAVID DiSTEFANO	2025
Washtenaw	DARLENE A. O'BRIEN	2025
Washtenaw	JULIA OWDZIEJ	2021
Wayne	DAVID BRAXTON	2021
Wayne	FREDDIE G. BURTON, Jr.	2025
Wayne	JUDY A. HARTSFIELD	2021
Wayne	TERRANCE A. KEITH	2021
Wayne	LISA MARIE NEILSON	2023
Wayne	LAWRENCE PAOLUCCI	2023
Wayne	DAVID PERKINS	2025
Wayne	FRANK S. SZYMANSKI	2025
Wexford	EDWARD VAN ALST	2025

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Alger	Munising	11	Lake	Baldwin	51
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Berrien	St. Joseph	2	Marquette	Marquette	25
Branch	Coldwater	15	Mason	Ludington	51
Calhoun	Marshall, Battle Creek	37	Mecosta	Big Rapids	49
Cass	Cassopolis	43	Menominee	Menominee	41
Charlevoix	Charlevoix	33	Midland	Midland	42
Cheboygan	Cheboygan	53	Missaukee	Lake City	28
Chippewa	Sault Ste. Marie	50	Monroe	Monroe	38
Clare	Harrison	55	Montcalm	Stanton	8
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Genesee	Flint	7	Ontonagon	Ontonagon	32
Gladwin	Gladwin	55	Osceola	Reed City	49
Gogebic	Bessemer	32	Oscoda	Mio	23
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Hillsdale	Hillsdale	1	Presque Isle	Rogers City	53
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AMENDED ADMINISTRATIVE ORDER No. 2014-23

AMENDMENT OF ADMINISTRATIVE ORDER NO. 2014-23

Entered December 18, 2019, effective February 1, 2020 (File No. 2019-37)—REPORTER.

AO No. 2014-23 — E-filing System for the Michigan Supreme Court and the Michigan Court of Appeals.

On order of the Court, effective February 1, 2020, all documents filed by or on behalf of attorneys who are licensed to practice law in the State of Michigan or who are admitted to temporarily appear and practice under MCR 8.126(A), must be filed electronically with the Michigan Supreme Court (MSC) and the Michigan Court of Appeals (COA) using the MiFILE system unless excused by court order upon a motion showing good cause. Self-represented litigants may, but are not required to, electronically file their documents with the Court immediately, the Michigan Supreme Court (MSC) and the Michigan Court of Appeals (COA) are authorized to implement an electronic filing and electronic service system.

~~Although the Court of Appeals has had an e-filing system available for several years, this new system by ImageSoft, Inc., called TrueFiling, will enable filers to e-file documents with either the MSC or COA. The TrueFiling system allows for initiating a new case or e-filing a document into an existing case. The system is~~

~~designed to maximize ease of its use and promote utility for e-filers, whether they are attorneys or self-represented litigants.~~

~~Under this system, e-filing will initially be voluntary for filers in all case types, but the Court anticipates that e-filing will eventually become mandatory in both courts. The experience gained from this voluntary program will help determine the future parameters of an expected mandatory program.~~

Although this order sets out the manner in which e-filed documents are submitted to the courts or served on other parties to an action, it does not change the time periods required for taking action under the Michigan Court Rules, except as explicitly provided.

I. Definitions

For purposes of this order:

(A) “Authorized user” means a party, a party’s attorney, or court staff who is registered in the ~~MiFILE~~TrueFiling system (<https://mifile.courts.michigan.gov/www.truefiling.com>) and who has satisfied the requirements imposed by the courts relating to electronic filing and service procedures. A court may revoke user authorization for good cause as determined by the court, including but not limited to a security breach or failure to comply with system requirements. An authorized user must notify the court and ImageSoft, Inc., of any change in the authorized user’s firm name, delivery address, telephone number, fax number, e-mail address, or other required registration information. This notice must occur as soon as practicable but no later than 7 days after the effective date of the change.

(B)-(D) [Unchanged.]

II. Scope

(A) [Unchanged.]

(B) Registered users agree to accept e-service through the MiFILETrueFiling system unless and until the user's registration is terminated. Service on nonregistered users must be accomplished in a manner allowed under the court rules, such as by first-class mail, hand delivery, or e-mail under MCR 2.107(C)(4).

III. Signatures [Unchanged.]

IV. Retention of Documents [Unchanged.]

V. Official Case Record [Unchanged.]

VI. Payment of Filing Fees and Costs

(A) [Unchanged.]

(B) Fees and costs are paid electronically through the MiFILETrueFiling system.

VII. Transmission Failures and System Outages

(A) [Unchanged.]

(1) [Unchanged.]

(2) the transmission failed because of the failure of the MiFILETrueFiling system to process the electronic document or because of the court's computer system's failure to receive the document; and

(3) [Unchanged.]

(B) Scheduled system outages, such as for system maintenance, shall be posted on the court and MiFILETrueFiling websites and will be scheduled before 9:00 a.m. or after midnight on business days whenever feasible.

(C) Notice will be provided on the court and MiFILETrueFiling websites if the MiFILETrueFiling system becomes unavailable for an extended or uncertain period. The notice shall indicate whether filers are

responsible for filing the documents conventionally in order to meet the deadlines imposed by statute or court rule.

VIII. Filing Completion

(A) A document filed electronically shall be considered filed with the court when the transmission to the MiFILETrueFiling system is complete and the system reflects a “Filed” status.

(B) [Unchanged.]

(C) Upon completion of an e-filing transmission to the MiFILETrueFiling system, the system shall issue to the filer and to the court a notification that includes the date and time of the transmission.

IX. Time for Filing

Filings may be transmitted to the MiFILETrueFiling system twenty-four hours a day, seven days a week (with the exception of the system’s downtime required for periodic maintenance). However, a document electronically filed or served after 11:59 p.m. Eastern Time, or on a Saturday, Sunday, or court holiday (see MCR 8.110[D][2]) shall be deemed to have been filed or served on the next business day. See MCR 1.108.

X. Format of Documents

The MiFILETrueFiling system accepts the following file types for e-filed documents: Microsoft Word (DOC and DOCX), PDF, text files (TXT), images such as a TIFF, PNG or JPG. The courts strongly prefer that original pleadings be submitted as Word documents, text files, or searchable PDFs. Nonoriginal documents may be scanned into PDF as nonsearchable images.

ADMINISTRATIVE ORDER
No. 2020-1

IN RE EMERGENCY PROCEDURES IN COURT FACILITIES

Entered March 15, 2020, effective immediately (File No. 2020-08)—
REPORTER.

Governor Whitmer having declared a state of emergency in response to the serious health risks posed by COVID-19, trial courts are authorized to implement emergency measures to reduce the risk of transmission of the virus and provide the greatest protection possible to those who work and have business in our courts. In support of this goal, on order of the Court, each trial court judge may implement emergency measures regarding court operations to enable continued service while also mitigating the risk of further transmission of the virus. Subject to constitutional and statutory limitations, such emergency measures may include:

1. Trial courts may adjourn any civil matters and any criminal matters where the defendant is not in custody; where a criminal defendant is in custody, trial courts should expand the use of videoconferencing when the defendant consents;
2. In civil cases, trial courts should maximize the use of technology to enable and/or require parties to

participate remotely. Any fees currently charged to allow parties to participate remotely should be waived;

3. Trial courts may reduce the number of cases set to be heard at any given time to limit the number of people gathered in entranceways, lobbies, corridors, or courtrooms;

4. Trial courts should maximize the use of technology to facilitate electronic filing and service to reduce the need for in-person filing and service;

5. Trial courts should, wherever possible, waive strict adherence to any adjournment rules or policies and administrative and procedural time requirements;

6. Trial courts should coordinate with the local probation departments to allow for discretion in the monitoring of probationers' ability to comply with conditions without the need for amended orders of probation;

7. Trial courts should take any other reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to the COVID-19 virus;

8. In addition to giving consideration to other obligations imposed by law, trial courts are urged to take into careful consideration public health factors arising out of the present state of emergency: a) in making pretrial release decisions, including in determining any conditions of release, b) in determining any conditions of probation;

9. If a Chief Judge or the court's funding unit decides to close the court building to the public, the Chief Judge shall provide SCAO with the court's plan to continue to provide critical services, including handling emergency matters.

The emergency measures authorized in this order are effective until close of business Friday, April 3, 2020, or as provided by subsequent order.

During the state of emergency, trial courts should be mindful that taking reasonable steps to protect the public is more important than strict adherence to normal operating procedures or time guidelines standards. The Court encourages trial courts to cooperate as much as possible with the efforts of the Governor and other state and local officials to mitigate the spread of COVID-19, consistent with our duty to provide essential court services, protect public safety, and remain accessible to the public.

It is so ordered, by unanimous consent.

ADMINISTRATIVE ORDER No. 2020-2

ORDER LIMITING ACTIVITIES/ASSEMBLAGES IN COURT FACILITIES

Entered March 18, 2020, effective immediately (File No. 2020-08); rescinded by Administrative Order No. 2020-19, entered June 26, 2020—REPORTER.

To confront this unprecedented public health crisis, Michigan trial courts must ensure that court facilities are taking every measure possible to protect the public and court personnel. In EO 2020-11, Governor Whitmer ordered restrictions on assemblages to no more than 50 people. President Trump has issued guidelines urging the public to avoid assemblages of more than 10 people and practice social distancing.

Pursuant to 1963 Const, Art VI, § 4, which provides for the Supreme Court's general superintending control over all state courts, **trial courts are ordered to limit access to courtrooms and other spaces to no more than 10 persons, including staff, and to practice social distancing and limit court activity to only essential functions**, which include the following:

I. CIRCUIT COURTS

A. **Criminal Proceedings**

1. To the extent possible and consistent with MCR 6.006 and a defendant's constitutional and statutory

rights, courts should conduct the following hearings remotely using two-way interactive video technology or other remote participation tools:

a. For in-custody criminal defendants, pleas, sentencing, arraignments on the information under MCR 6.113 (unless waived), probation violation arraignments under MCR 6.445(B), and emergency motions regarding bond. If the defendant is not in custody, these matters should be adjourned.

b. Processing of criminal extradition matters for in-custody defendants pursuant to MCL 780.9. The issue of bail should be addressed for those eligible defendants as provided in MCL 780.14.

2. All other criminal matters, including all non-emergency matters where the defendant is not in custody, shall be adjourned. All criminal jury trials shall be adjourned until after April 3, 2020.

3. With regard to matters involving forensic evaluations of juveniles or adults for competence to stand trial, competence to waive Miranda rights, and criminal responsibility, courts shall permit the use of video technology. The evaluator shall note in the forensic opinion whether the use of video technology impeded an impartial and accurate clinical assessment, and, if so, notify the court that an in-person evaluation must be scheduled.

B. General Civil and Business Court Cases

1. Infectious disease (ID) proceedings under MCL 333.5201 *et seq.*

2. Limited proceedings regarding personal protection orders (PPOs):

a. Review and determination of requests for personal protection orders (PPO) under MCL 600.2950 and 600.2950a;

b. Review and determination of emergency request to extend a PPO pursuant to MCR 3.707(B);

c. Initial hearing for in-custody respondent arrested for alleged violation of PPO to allow court to address issue of bond under MCL 764.15b.

3. All other civil and business court matters, including trials, must be conducted remotely using two-way interactive video technology or other remote participation tools or they must be adjourned until after April 3, 2020.

C. Family Court Matters

1. Review and determine requests for ex parte relief in domestic relations proceedings necessary for the safety and well-being of a litigant and/or children under MCR 3.207.

2. Safe delivery of newborn child (NB) proceedings under MCL 712.1 *et seq.*

3. Waiver for parental consent (PW) proceedings under the Parental Rights Restoration Act, MCL 722.901, *et seq.*

4. Juvenile delinquency proceedings:

a. hearings required within 24 hours of a juvenile's apprehension or detention pursuant to MCR 3.935 and MCR 3.944

b. arraignments for in-custody designated and adult court waiver proceedings pursuant to MCR 3.951 (designated) and MCR 3.950 (waiver, circuit court arraignment).

5. Child protective proceedings:

a. hearings required within 24 hours of taking a child into protective custody pursuant to MCR 3.965 and MCR 3.974;

b. permanency planning hearings that are required pursuant to MCL 712A.19a.

6. Friend of the court arraignments on bench warrants pursuant to MCR 3.221(B). An arrested individual must be promptly arraigned if the underlying contempt hearing cannot be held within 48 hours. In addition, Friend of the Court offices should set priorities to continue the following services:

a. Courts should continue to make staff available to record child support orders in MiCSES as long as there are unrecorded orders so the SDU can send out child support payments.

b. To the extent it is safely possible, courts should continue to make staff available to implement income withholding notices so payments can be deducted and paid automatically. To the extent it is not safely possible to make staff available for this purpose, most income withholding notices should be issued automatically when there is a New Hire Directory match.

c. To the extent it is safely possible, courts should continue to make staff available to implement national medical support notices to allow health care coverage to be implemented as quickly as possible.

7. All other family court matters, including trials, must be conducted remotely using two-way interactive video technology or other remote participation tools or they must be adjourned until after April 3, 2020.

D. Other emergency motions in the discretion of the court.

II. DISTRICT COURTS

A. **Criminal Matters** — To the extent possible and consistent with MCR 6.006 and a defendant's constitutional and statutory rights, courts should conduct

the following hearings remotely using two-way interactive video technology or other remote participation tools:

1. For in-custody criminal defendants, pleas, sentencing, arraignments under MCR 6.104, bond motions under MCR 6.106 or MCR 6.108, probable cause conferences under MCR 6.108, and preliminary examinations under MCR 6.110.

2. Processing of criminal extradition matters for in-custody defendants pursuant to MCL 780.9. The issue of bail should be addressed for those eligible defendants as provided in MCL 780.14.

3. With regard to matters involving forensic evaluations of juveniles or adults for competence to stand trial, competence to waive Miranda rights, and criminal responsibility, courts shall permit the use of video technology. The evaluator shall note in the forensic opinion whether the use of video technology impeded an impartial and accurate clinical assessment, and, if so, notify the court that an in-person evaluation must be scheduled.

4. Review and determination of requests for search warrants should continue pursuant to MCL 780.651.

5. Review and issuance of arrest warrants pursuant to MCL 764.1a for crimes that present a danger to public safety.

6. All other criminal matters, including all non-emergency matters where the defendant is not in custody, shall be adjourned. All criminal jury trials shall be adjourned until after April 3, 2020.

B. Civil Matters — All matters must be conducted remotely using two-way interactive video technology or other remote participation tools or they must be adjourned until after April 3, 2020.

C. **Traffic Matters** — All civil infractions, including trials, must be conducted remotely using two-way interactive video technology or other remote participation tools or they must be adjourned until after April 3, 2020. No bench warrants shall be issued for individuals failing to appear during the state of emergency.

D. Other emergency motions in the discretion of the court.

III. PROBATE COURTS

A. Proceedings regarding involuntary mental health treatment under Chapter 4 of the Mental Health Code, including the following:

1. Pick-up / transportation orders pursuant to MCL 330.1436 and 330.1426;

2. Petitions for initial or continuing involuntary hospitalization pursuant to MCL 330.1472a.

B. Petitions for immediate funeral / burial arrangements pursuant to MCL 700.3206 and 700.3614.

C. Emergency petitions filed by Adult Protective Services under MCL 400.11b(6).

D. Emergency petitions for guardianship pursuant to MCL 700.5312.

E. Emergency conservatorships and other protective orders pursuant to MCL 700.5407 in those cases with immediate pending evictions/foreclosures/shut off notices.

F. Estates where immediate access to residence is necessary under MCL 700.5407.

G. Ex parte requests for temporary restraining orders.

H. With regard to proceedings involving mental health and guardianship matters, courts shall permit

the use of video technology unless a health and safety issue requires an in-person appearance.

I. All other probate court matters must be conducted remotely using two-way interactive video technology or other remote participation tools or they must be adjourned until after April 3, 2020.

J. Other emergency motions in the discretion of the court.

Further, the court must work with the county clerk to ensure that if in-person filing of court pleadings is limited due to the state of emergency, court pleadings will continue to be accepted for filing by other means, such as U.S. mail, e-Filing, email, or facsimile.

Further, with regard to all courts, all matters that are resolved by agreement of the parties and with approval of the court that do not involve any appearance at the court may proceed during the pendency of this order. Such agreement may be documented using technology as authorized in AO No. 2020-1, dated March 15, 2020. This authority does not extend to any matters suspended by executive action of the Governor.

This order shall remain in effect until the close of business Friday, April 3, 2020, or as provided by subsequent order.

SPECIAL ADMINISTRATIVE INQUIRY

SPECIAL ADMINISTRATIVE INQUIRY REGARDING QUESTIONS RELATING TO MENTAL HEALTH ON THE MICHIGAN BAR EXAMINATION APPLICATION

Entered March 18, 2020, effective for the February 2021 Michigan Bar Examination (File No. 2016-46)—REPORTER.

By order dated January 23, 2019, the Court solicited input on whether and in what form questions relating to an applicant's mental health history should be included on the Michigan Bar Examination application. On order of the Court, an opportunity for comment in writing having been provided, and consideration having been given to the comments received, the Court directs that the Board of Law Examiners remove current questions 54(a) and 54(b) from the application, and insert question 29 of the National Conference of Bar Examiners model questions as follows:

Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?

This revision will be effective for the February 2021 Michigan Bar Examination.

MCCORMACK, C.J. (*concurring*). In January 2019, this Court solicited public comments on whether the application for the Michigan Bar Examination should

continue to include questions regarding an applicant's mental health and treatment history.

As noted in our order, until now an applicant to the bar was required to disclose whether they had ever received or refused treatment for a mental health condition that “permanently, presently or chronically” impairs the applicant’s “ability to cope with ordinary demands of life” or to exercise the types of professional responsibilities that are common to the practice of law.¹ In asking the public whether the Court should eliminate or revise these questions, we noted a trend among state bar admission authorities nationwide of eliminating questions that ask applicants to divulge their mental health history, and instead asking applicants whether they had exhibited conduct or behavior that would negatively affect their ability to practice law in a competent, ethical, and professional manner.

Shortly after our request for comment, the Conference of Chief Justices issued a resolution urging states

¹ The personal affidavit section of the bar application includes Questions 54a and 54b, which ask:

Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life? If yes, provide the names and addresses of all involved agencies, institutions, physicians or psychologists or other health care providers and describe the underlying circumstances or the diagnosis, treatment or hospitalization.

* * *

Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?

to stop asking bar applicants about their mental health history, diagnoses, or treatment.² As an alternative to “diagnosis-based” questions, the Conference endorsed the sort of “conduct-based” approach referenced in our request for comment. The Conference’s resolution echoed a similar recommendation from the National Task Force on Lawyer Well-Being.³

These recommendations—and this Court’s changes to the Board of Law Examiners’ questions—do not “prioritize the needs of the applicant over the need to protect the public,” as our dissenting colleague contends. Rather, they reflect a growing recognition that questions concerning an applicant’s mental health are often based on unfounded generalizations about mental health diagnoses, and that admission standards that depend on the mere existence of a mental health diagnosis (and not an applicant’s conduct) would violate the Americans with Disabilities Act, 42 USC 12101 *et seq.*

Most commenters—including two of our state’s prominent law schools as well as the Michigan Attorney Grievance Commission, the body charged with investigating and prosecuting instances of attorney misconduct—favored the elimination of diagnosis-based questions altogether, as several of our sister states have done.⁴ These commenters noted the dearth

² See Conference of Chief Justices, *Resolution 5, In Regard to the Determination of Fitness to Practice Law* (February 13, 2019), available at <https://www.ctbar.org/docs/default-source/lawyer-wellbeing/resolution-5_admission-to-bar-resol-item-iv-1> (accessed February 3, 2020) [<https://perma.cc/H7DA-F33A>].

³ See National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (August 14, 2017), p 27, available at <<https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf>> (accessed February 3, 2020) [<https://perma.cc/YD8V-AQZ3>].

⁴ A recent report issued by the New York State Bar Association indicates that 10 states—Alaska, Arizona, California, Connecticut,

of evidence supporting the view that past mental health diagnoses are accurate predictors of future attorney misconduct. Instead, diagnosis-based questions were criticized for being unfocused, based on generalization and misconceptions about mental health, and lacking empirical evidence to support their use. (Indeed, the automatic association of mental health diagnoses with incapacity and disablement was a stigma that many commenters recognized regardless of their position on eliminating diagnosis-based questions altogether.) Many commenters voiced concern that diagnosis-based questions like those under consideration have the unintentional effect of deterring aspiring attorneys from seeking assistance.⁵ And a

Illinois, Iowa, Massachusetts, Mississippi, Pennsylvania and Washington—do not include any questions on their applications that ask applicants about a mental health diagnosis or impairment. See Working Group on Attorney Mental Health of the New York State Bar Association, *The Impact, Legality, Use and Utility of Mental Disability Questions on the New York State Bar Application* (November 2, 2019), pp 1-2, available at <<https://www.nysba.org/mentalhealthreport/>> (accessed February 3, 2020) [<https://perma.cc/RK4V-T7KV>].

⁵ There is research to support this view. In a 2014 survey of 3,300 law school students at 15 law schools nationwide, 45% of respondents indicated that the potential threat to bar admission was a factor that would discourage them from seeing a health professional for mental health concerns. See Organ, Jaffe & Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 *J Legal Educ* 116, 123-124, 141 (2016), available at <<https://jle.aals.org/home/vol66/iss1/13/>> (accessed February 3, 2020) [<https://perma.cc/T9CY-RT6D>].

Additionally, as several commenters noted, Questions 54a and 54b ask applicants to disclose whether they have “been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition” An applicant suffering from an undiagnosed condition and who has simply never sought treatment may honestly answer “no” to these questions, while an applicant who has been diagnosed or sought treatment must answer “yes.”

handful of commenters noted the incongruity that once an individual is admitted to practice law in Michigan, they have no continuing obligation to apprise state bar regulators of new developments in their mental health (nor, to my knowledge, has such an obligation ever been seriously proposed).

We are well aware of the troubling statistics cited by our dissenting colleague concerning the rates of substance use and mental health problems in our profession, among licensed attorneys, and law students alike. And yet the Board of Law Examiners reports that less than 2.5% of bar applicants answered Questions 54a or 54b in the affirmative, with less than 11% of those applications requiring further “extensive investigation” by the Board. Those numbers hardly support Justice ZAHRA’s view that Questions 54a and 54b are so necessary to the Board’s mandate that eliminating them will prevent the Board from effectively vetting applicants. Applicants who have exhibited behavior that calls into question their ability to practice law in a competent, ethical, and professional manner are expected to disclose that fact to the Board. And in cases where an applicant’s condition or impairment has resulted in criminal consequences, substance addiction or dependency, or licensure sanctions, such consequences must be disclosed in response to other questions on the application. By focusing the Board’s inquiry on an applicant’s *conduct*, rather than using an applicant’s status or diagnosis as a proxy for behavior, we hope aspiring attorneys will recognize that mental health issues are not professional disqualifications. After all, there is broad agreement that applicants (as well as licensed attorneys) should be encouraged to seek treatment and counseling for mental health issues. The change we make today will allow applicants to do so

without fear that their decision will subject them to increased scrutiny during the admission process.

I fully endorse this Court's decision to eliminate questions that probe the applicant's mental health and treatment history and ask the applicant to divulge that history. I favor the approach we take today, which inquires about the conduct exhibited by the applicant prior to admission. I believe this change will allow for an equally effective admission review process, prevent discrimination on the basis of an applicant's disability, and destigmatize and encourage mental health treatment in the legal profession.

BERNSTEIN, J., joins the statement of MCCORMACK, C.J.

VIVIANO, J. (*concurring in part and dissenting in part*). I agree with the Court's decision today to eliminate Questions 54a and 54b from the application for the Michigan Bar Examination. I do not agree, however, that Model Question 29 promulgated by the National Conference of Bar Examiners (NCBE) is, by itself, a sufficient replacement. Instead, I share many of the concerns raised by Justice ZAHRA regarding the Court's decision to circumscribe the Board of Law Examiners' (BLE's) ability to probe an applicant's current mental health conditions and impairments. But, rather than maintaining the status quo, as Justice ZAHRA urges, in addition to adopting NCBE Model Question 29, I would also adopt NCBE Model Questions 30 and 31.¹ Model Questions 30 and 31 inquire into conditions or impairments that an applicant cur-

¹ NCBE Model Question 29 is cited in the Court's order, while Questions 54a and 54b on the application for the Michigan Bar Examination are cited both in Justice ZAHRA's dissenting statement and in footnote 1 of Justice MCCORMACK's concurring statement. Model Questions 30 and 31 provide:

rently has, or has raised in a recent proceeding, that may affect the applicant's fitness to practice law. The NCBE adopted all three questions following a Department of Justice (DOJ) investigation into questions pertaining to an applicant's mental health status on the application for the Louisiana Bar. The report following that investigation concluded that inquiries into an applicant's prior mental health diagnosis and treatment history were "unnecessary" to ascertain an applicant's current fitness to practice law and that, instead, those inquiries "screen[ed] out" individuals with disabilities.² The report recommended the use of conduct-based questions because, as one federal court has noted, "past behavior is the best predictor of present and future mental fitness[.]"³ But the report

30. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?

31. Within the past five years, have you asserted any condition or impairment as a defense, in mitigation, or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority; or in connection with an employment disciplinary or termination procedure? [National Conference of Bar Examiners, *Character and Fitness Investigations, Character & Fitness Resources—Sample Application*, available at <<http://www.ncbex.org/dmsdocument/134>> (accessed March 12, 2020) [<https://perma.cc/7E27-LJNV>].]

² The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans With Disabilities Act (ADA), DJ No. 204-32M-60, 204-32-88, 204-32-89, available at <<https://www.ada.gov/louisiana-bar-lof.pdf>> (accessed March 12, 2020) [<https://perma.cc/5WAP-UK6F>], pp 19-23.

³ *Id.* at 22, quoting *Clark v Virginia Bd of Bar Examiners*, 880 F Supp 430, 446 (1995).

approved of certain mental health related questions that inquired into conditions or impairments that affect an applicant's current fitness to practice law or that aid a state bar in fairly evaluating proceedings in which such a condition was asserted.⁴

I concur in the Court's decision to adopt Model Question 29 for the reasons stated in the DOJ report, but I also believe it is necessary to adopt Model Questions 30 and 31. The BLE has the duty and responsibility to ensure that all attorneys are competent to practice law in this state. As the DOJ report acknowledged, it is appropriate, and indeed essential, for the BLE to inquire into the current conditions or impairments that an applicant has that may affect his or her current ability to practice law. Further, an inquiry into conditions that have been raised in past proceedings also allows the BLE to evaluate fairly any disciplinary or legal proceedings in which an applicant was involved. Those inquiries provide the BLE with the ability to evaluate an applicant's past behavior that may shed light on his or her present or future mental fitness to provide legal services. I believe that Model Questions 29, 30, and 31, when taken together, strike the right balance between the duty of the BLE to protect the public and legal profession by ascertaining an applicant's current fitness to practice law, on the one hand, and to protect the rights and needs of bar applicants to be free from unnecessary or discriminatory inquiries into prior irrelevant medical history, on the other. Therefore, while I concur in the majority's decision to adopt Model Question 29, I dissent from its decision not to also adopt Model Questions 30 and 31.

⁴ *Id.* at 22-23.

ZAHRA, J. (*dissenting*). In Michigan, you cannot become licensed to participate in certain occupations or professions, or assume certain state-sanctioned responsibilities, without disclosing the current state of your mental health. For instance, you cannot become a law enforcement officer,¹ practice medicine in many hospitals,² or pilot commercial airliners³ without answering specific questions about your mental health. Similarly, you cannot become a foster parent,⁴ adopt a child,⁵ or carry a concealed weapon⁶ without answering specific questions about your mental health. This is for good reason. We want to ensure that those with ongoing mental health concerns can competently execute these great responsibilities. It should therefore go without saying that, because law is “a licensed profession that influences all aspects of society, economy, and government, levels of impairment among attorneys are of great importance and should therefore be closely

¹ MCL 28.609(1)(d).

² A cursory view of the some of the leading hospitals within the state shows that they all impose a requirement to disclose current mental illness: see University of Michigan Hospitals and Health Centers, *Medical Staff Bylaws* <<http://www.med.umich.edu/mss/pdf/bylaws.pdf>>, p 29 (accessed January 29, 2020) [<https://perma.cc/4NK7-FUEP>]; Henry Ford Hospital, *Medical Staff Bylaws* <<https://www.henryford.com/-/media/files/henry-ford/hcp/physician-careers/hfbylaws.pdf?la=en>>, p 23 (accessed January 29, 2020) [<https://perma.cc/V9UT-HE3H>]; Beaumont Health System, *Bylaws of the Medical Staffs*, <https://providers.beaumont.org/docs/default-source/governance/download.pdf?sfvrsn=f8e136b5_4>, p 14 (accessed January 29, 2020) [<https://perma.cc/Y4B3-G6JP>].

³ 14 CFR 67.107.

⁴ MCL 722.115(3); Mich Admin Code, R 400.9206(c)(iv) (requiring a foster home applicant to provide “[a] statement regarding any past and/or current mental health treatment or counseling by any member of the household”).

⁵ MCL 710.23f(5)(c).

⁶ MCL 28.425b(1)(d).

evaluated.”⁷ But today this Court has barred the Michigan Board of Law Examiners (BLE) from inquiring specifically into the current state of an applicant’s mental health. In so doing, this Court has turned the purpose of the BLE on its head. By eliminating pertinent questions that delve into the current state of an applicant’s mental health, it has substantially impaired the ability of the BLE to accomplish its primary goal of protecting the public. Instead of being the gatekeeper that protects the public from those unfit to practice law with regard to the mental health of aspiring lawyers, the BLE has now been instructed by this Court to prioritize the needs of the applicant over the need to protect the public. I dissent from the majority’s unjustified and misguided decision to bar the BLE from inquiring into the current state of an applicant’s mental health.⁸ I would leave the current bar application as it is.

Pursuant to MCL 600.934, candidates who wish to practice law in Michigan must prove “to the satisfaction of the board of law examiners that he or she is a person of *good moral character* . . . and [possesses the] *fitness and ability* to enable him or her to practice law in the courts of record of this state”⁹ To comply with this dictate, the BLE establishes the policies and procedures for admission to the State Bar of Michigan (SBM). In addition to requiring passage of the Michigan Bar Examination, the SBM investigates on behalf

⁷ Krill, Johnson, & Albert, The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, 10 *J Addiction Med* 46, 46 (January/February 2016).

⁸ The Court has barred the BLE from inquiring into the mental health of applicants by instructing the BLE to strike Questions 54a and 54b from the application for admission to the Michigan Bar.

⁹ MCL 600.934(1) (emphasis added).

of the BLE the applicant's background through its "character and fitness" process. The BLE has recently added language to the application for admission to the Michigan Bar, explaining that the BLE "must assess whether an applicant manifests any mental health or substance abuse issue which impairs or could impair an applicant's ability to meet the essential eligibility requirements to practice law." Accordingly, applicants are asked the following questions:

Question 54a:

Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life? If yes, provide the names and addresses of all involved agencies, institutions, physicians or psychologists or other health care providers and describe the underlying circumstances or the diagnosis, treatment or hospitalization.

Question 54b:

Have you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?

The BLE prefaces these questions by expressly noting that it "supports applicants seeking mental health and/or substance abuse treatment, and views effective treatment by a licensed professional as enhancing an applicant's ability to meet the essential eligibility requirements." The BLE also limits the breadth of the inquiries by explaining that an applicant "do[es] not need to provide information that is reasonably charac-

terized as situational counseling. Examples of situational counseling include stress counseling, grief counseling, and domestic relations counseling.”¹⁰

In my view, the BLE is mandated by its duty to protect the public to ask Questions 54a and 54b. Attorneys, along with surgeons and pilots, are typically identified as being susceptible to exceptionally high levels of job-related stress.¹¹ As one might expect, airline pilots and surgeons practicing in our finest hospitals are required to disclose current mental health concerns as a requisite to practicing their occupations. Aspiring attorneys should not be exempt from this inquiry.¹²

In 2016, the Journal of Addiction Medicine published a study titled “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys.”¹³ The study “reveals a concerning amount

¹⁰ This guidance is very useful to highlight that the application inquires only about conditions that impair or distort judgment, as these would clearly affect a person’s ability to practice law.

¹¹ Business News Daily, *The Top 10 Most and Least Stressful Jobs*, <<https://www.businessnewsdaily.com/1875-stressful-careers.html>> (accessed January 29, 2020) [<https://perma.cc/Y2T5-GQKQ>].

¹² In 1995, the Journal of Law and Health published an article highlighting a “highly alarming fact”:

[A] significant percentage of practicing lawyers are experiencing a variety of significant psychological distress symptoms well beyond that expected of the general population. These symptoms are directly traceable to law study and practice. They are not exhibited when the lawyers enter law school, but emerge shortly thereafter and remain, without significant abatement, well after graduation from law school.

Beck, Sales & Benjamin, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J L & Health 1, 2 (1995–1996).

¹³ Krill, 10 J Addiction Med 46.

of behavioral health problems among attorneys in the United States.”¹⁴ The study notes that “[l]evels of depression, anxiety, and stress among attorneys were significant, with 28%, 19%, and 23% experiencing symptoms of depression, anxiety, and stress, respectively.”¹⁵ In addition, the study also concluded that younger lawyers are the segment of the profession most at risk of substance abuse and mental health problems.¹⁶ The concern over behavioral health problems does not solely relate to practicing attorneys. In fact, “[s]tress among law students is 96%, compared to 70% in med[ical] students and 43% in graduate students. Entering law school, law students have a psychological profile similar to that of the general public. After law school, 20-40% have a psychological dysfunction.”¹⁷ Clearly, there is significant research to support the basic premise that “stress is . . . a risk factor for law students and lawyers in regard to both physical and psychological illness.”¹⁸ At least one member of the majority even acknowledges these “troubling statistics,” only to dismiss mental health concerns by noting

¹⁴ *Id.* at 51.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Dave Nee Foundation, *Lawyers & Depression* <<http://www.daveneefoundation.org/scholarship/lawyers-and-depression/>> (accessed January 29, 2020) [<https://perma.cc/H2CE-CGU5>] (formatting altered).

¹⁸ *Lawyer Distress*, 10 J L & Health at 10. “Stress has a major impact upon the nervous system, its structures and functions, since stress is closely associated with its effectors, and profound connections between stress and neurodegenerative diseases as well as mental disorders exist.” Esch et al, *The Role of Stress in Neurodegenerative Diseases and Mental Disorders*, 23 *Neuroendocrinology Letters* 199, 206 (July 2002), available at (accessed January 29, 2020). “Stress plays a significant role in susceptibility, progress, and outcome of neurodegenerative diseases/mental disorders. It may cause or exacerbate such diseases

“that less than 2.5% of bar applicants answered Questions 54a or 54b in the affirmative, with less than 11% of those applications requiring further ‘extensive investigation’ by the Board.”¹⁹ Respectfully, the fact that there *are* applications worthy of in-depth review, however few, reveals that the BLE is properly able to identify a segment of the bar-applicant population whose mental health concerns require extensive investigation. To strip the BLE of its ability to investigate these serious cases leaves the public unnecessarily vulnerable.

Nonetheless, the Court has decided to eliminate Questions 54a and 54b apparently based on two primary notions. The first is noted in Justice BERNSTEIN’s concurrence to the Court’s Special Administrative Inquiry order specifically asking for public comment regarding whether “inquiring into an applicant’s mental health status [is] an effective way of assessing an applicant’s ‘fitness and ability’ to practice law[.]” He then cites research materials to provide a greater context for this question. The problem is, however, that none of the research he cites is relevant to answering Questions 54a and 54b. Read carefully, the research speaks in terms of “a *history* of mental health diagnosis,” a “*history* of previous psychiatric treatment,” “lawyers who have *had* psychiatric treatment,” “*having undergone treatment*,” “mental health *histories*,” and “mental health treatment *histories*.” But Questions 54a and 54b target only “mental, emotional, or nervous condition[s]” that “permanently, presently or chronically” exist. Questions 54a and 54b only solicit

depending on the type of stressor involved (e.g., physical, chemical, biological, mental, psychosocial etc.) and/or duration of its influence on an organism.” *Id.*

¹⁹ *Ante* at cxiii (McCORMACK, C.J., concurring).

mental health histories or diagnoses if the conditions are *currently* present. In sum, Questions 54a and 54b do not implicate the concerns raised by the Department of Justice (DOJ) in its investigation of Louisiana’s attorney licensure system pursuant to the Americans with Disabilities Act, 42 USC 12101 *et seq.*, in regard to mental health questions on bar examination applications.²⁰ The DOJ’s concerns were related to “an applicant’s ‘status’ as a person with a mental health disability” and, to a lesser extent, questions that speculate about the “future, hypothetical” effect of the mental condition rather than a current ability to practice law.²¹ Unlike the questions posed by the Louisiana Attorney Licensure System, Questions 54a and 54b inquire about neither “status” nor the hypothetical effect of the condition; rather, the questions are limited to addressing a current ability to practice law.

Further, following the DOJ investigation, the National Conference of Bar Examiners (NCBE) revised its questions to reflect that mental health inquiries must be conduct-based, rather than diagnosis-based. These revised questions satisfied the concerns raised by the DOJ. The new NCBE questions are as follows:

25. Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?

26. A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, or a

²⁰ The United States’ Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans With Disabilities Act, DJ No. 204-32M-60, 204-32-88, 204-32-89 (DOJ Investigation), available at <<https://www.ada.gov/louisiana-bar-lof.pdf>> (accessed January 30, 2020) [<https://perma.cc/HAA5-82AR>].

²¹ *Id.* at 20, 22.

mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?

B. If your answer to Question 26(A) is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?²²

Questions 54a and 54b are entirely consistent with the NCBE's model questions. And while the Court does adopt NCBE Question 25, that question is entirely lacking in context if not considered along with Question 26. Standing alone, a question that asks "have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner" is so broad and vague that it cannot be reasonably answered. Further, this question leaves it in the hands of the applicant and the applicant alone to decide whether mental health concerns should be disclosed to the BLE. Such an inquiry strips the BLE of its gatekeeping function.

The second apparent rationale for eliminating Questions 54a and 54b is that mental health questions may actually deter prospective applicants from seeking rehabilitative counseling and treatment, or detract from the effectiveness of such professional help. Perhaps this is true. But those who willfully decline needed mental health treatment out of fear that dis-

²² These questions appear as Questions 29 and 30 on the current application. The phrase "If your answer to Question 26(A) is yes" has been omitted and a note regarding the word "currently" has been added, but the language is otherwise unchanged. See National Conference of Bar Examiners, *Character and Fitness Investigations, Character & Fitness Resources—Sample Application*, available at <<http://www.ncbex.org/dmsdocument/134>> (accessed January 30, 2020) [<https://perma.cc/7E27-LJNV>].

closing such treatment may impede their ability to obtain a law license may very well lack the requisite good character needed to be a member of the legal profession. Professions exist “primarily for the advancement of the profession[,] . . . not for the advancement of the individual members.”²³

The professional serves the public interest and the best interest of the patient or client. . . . [T]he professional is not merely in a money-making trade. The professional serves others, and thereby emphasizes quality. Gaining a livelihood is incidental. A professional offers a certain service and confers the same diligence and quality of service whether paid or not.^[24]

If an applicant chooses to not seek needed treatment for a mental condition solely to avoid disclosure of that condition, the applicant has chosen to place his or her own interest in obtaining a law license over the greater good of the profession. This is precisely the reason that Questions 54a and 54b both ask whether an applicant has “refused treatment or counseling,” and the reason that the BLE expressly states in the application that it “supports applicants seeking mental health and/or substance abuse treatment, and views effective treatment by a licensed professional as enhancing an applicant’s ability to meet the essential eligibility requirements.” Stated differently, if you have the good judgment to seek treatment when you need it and the good character to disclose your treatment to the BLE, you are highly likely to receive your law license upon a showing that this condition is manageable and under control. By contrast, if an applicant places his or her professional desires and personal concerns above the greater good of

²³ Rotunda and Dzienkowski, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility* (2018), § 1.6(d), p 41.

²⁴ *Id.*

the legal profession and public, that applicant lacks the good character to enter the profession. To even suggest that the BLE should not ask mental health questions merely because such questions may deter treatment by would-be applicants is severely misguided.

In sum, I see no valid reason to preclude the BLE from asking Questions 54a and 54b on the current bar application. Every aspiring lawyer should truthfully and completely answer these questions before being granted a law license. The Court's action today materially impedes the BLE from accomplishing its duty to protect the public. Accordingly, I dissent.

MARKMAN, J., joins the statement of ZAHRA, J.

ADMINISTRATIVE ORDER
No. 2020-3

ORDER EXTENDING DEADLINE FOR
COMMENCEMENT OF ACTIONS

Entered March 23, 2020, effective immediately (File No. 2020-08); language as amended by order entered May 1, 2020; rescinded effective June 20, 2020, by Administrative Order No. 2020-18, entered June 12, 2020—REPORTER.

In light of the continuing COVID-19 pandemic and to ensure continued access to courts, the Court orders that:

For all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).

This order is intended to extend all deadlines pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters during the state of emergency declared by the Governor related to COVID-19. Nothing in this order precludes a court from ordering an expedited response to a complaint or motion in order to hear and resolve an

emergency matter requiring immediate attention. We continue to encourage courts to conduct hearings remotely using two-way interactive video technology or other remote participation tools whenever possible.

This order in no way prohibits or restricts a litigant from commencing a proceeding whenever the litigant chooses, nor does it suspend or toll any time period that must elapse before the commencement of an action or proceeding. Courts must have a system in place to allow filings without face-to-face contact to ensure that routine matters, such as filing of estates in probate court and appointment of a personal representative in a decedent's estate, may occur without unnecessary delay and be disposed via electronic or other means.

ADMINISTRATIVE ORDER
No. 2020-4

ORDER SUSPENDING FILING DEADLINES IN THE MICHIGAN
SUPREME COURT AND COURT OF APPEALS

Entered March 26, 2020, effective immediately (File No. 2020-08);
rescinded effective June 8, 2020, by Administrative Order No. 2020-16,
entered June 3, 2020—REPORTER.

The deadlines for all filings, jurisdictional and non-jurisdictional, in the Michigan Supreme Court and Court of Appeals are suspended as of March 24, 2020, the effective date of Executive Order 2020-21, and will be tolled until the expiration of EO 2020-21 or a subsequent EO that extends the period in which citizens are required to suspend activities that are not necessary to sustain or protect life. This AO gives filers the same number of days to submit their filings after the EO expires as they had before the suspension went into effect. For example, if the deadline for filing an application for leave to appeal with the Michigan Supreme Court is March 26, 2020, the filer would have three days after the EO expires to timely submit the application with the Court.

**ADMINISTRATIVE ORDER
No. 2020-5**

ORDER EXTENDING ADMINISTRATIVE ORDER NOS. 2020-1
AND 2020-2 UNTIL AT LEAST APRIL 14, 2020

Entered March 27, 2020, effective immediately (File No. 2020-08)—
REPORTER.

In light of Governor Whitmer's Executive Order No. 2020-21 that temporarily suspends activities that are not necessary to sustain or protect life until at least April 13, 2020, at 11:59 pm, the Court directs that the expiration date of April 3, 2020, in Administrative Order Nos. 2020-1 and 2020-2 is extended until April 14, 2020, or as provided by further order of the Court.

ADMINISTRATIVE ORDER
No. 2020-6

ORDER EXPANDING AUTHORITY FOR JUDICIAL OFFICERS TO
CONDUCT PROCEEDINGS REMOTELY

Entered April 7, 2020, effective immediately (File No. 2020-08)—
REPORTER.

In response to the extraordinary and unprecedented events surrounding the COVID-19 pandemic in Michigan, the Court has adopted a number of administrative orders authorizing courts to implement emergency measures to mitigate the transmission of the virus and provide the greatest protection possible to those who work and have business in our courts. During the past few weeks, Michigan’s judges, court administrators, court staff, court clerks, attorneys, law enforcement officers, probation staff and many others who support our courts have continued to serve the public with courage and conviction and have shown they are up to the challenge of both limiting foot traffic in our courts while creatively adopting new business methods and implementing new technologies to conduct the court’s business and ensure that our courts remain accessible to the public to the greatest extent possible during this crisis.

Although our highest priority during this crisis is for courts to continue to be vigilant and protect against

further spread of the coronavirus, we must also continue to ensure that our courts operate as efficiently and effectively as possible under the circumstances, continue to ensure timely hearing and disposition of essential matters, and make our best efforts to provide timely justice in all other matters. The purpose of the order is to empower our courts and judges to meet this challenge by allowing them to use innovative ways to conduct court business remotely, including best practices as identified by the State Court Administrative Office.

On order of the Court, pursuant to 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, the Court authorizes judicial officers to conduct proceedings remotely (whether physically present in the courtroom or elsewhere) using two-way interactive videoconferencing technology or other remote participation tools under the following conditions:

- any such procedures must be consistent with a party's Constitutional rights;
- the procedure must enable confidential communication between a party and the party's counsel;
- access to the proceeding must be provided to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule;
- the procedure must enable the person conducting or administering the procedure to create a recording sufficient to enable a transcript to be produced subsequent to the activity.

While this order is in effect, and consistent with its provisions, all judges in Michigan are required to make a good faith effort to conduct proceedings remotely

whenever possible. Although adjournments are permitted when necessary, courts are directed to implement measures to ensure all matters may proceed as expeditiously as possible under the circumstances, given the particular public health conditions in each locality and the technology resources and staffing situations in place at each court.¹ The Michigan Judicial Institute will continue to provide instruction and other training materials on procedures to conduct remote hearings. Courts should also consult with their regional administrators in working toward this goal.

A judge who wishes to participate from a location other than the judge's courtroom shall do so only with the written permission of the court's chief judge (email is sufficient). The chief judge shall grant such permission whenever the circumstances warrant, unless the court does not have and is not able to obtain any equipment or licenses necessary for the court to operate remotely.

Judges who conduct remote proceedings must provide notice of the time and procedure for participating in the remote hearing, and verify that all participants are able to proceed in this manner. Judges who operate under this method must comply with any standards promulgated by the State Court Administrative Office for purposes of this order. Courts may only operate remotely as long as they can do so safely and consistent with the Governor's recent executive orders relating to the COVID-19 pandemic.

This order is effective during the period of the State of Emergency declared by Governor Whitmer under Executive Order 2020-33 or as further ordered by the Court.

¹ To the extent Administrative Order No. 2020-2 may be interpreted to require the adjournment of some matters, this order replaces that directive.

**ADMINISTRATIVE ORDER
No. 2020-7**

EXTENSION OF ADMINISTRATIVE ORDER
NOS. 2020-1, 2020-2, AND 2020-6

Entered April 10, 2020, effective immediately (File No. 2020-08)—
Reporter.

On order of the Court, in light of Executive Order 2020-33, Executive Order 2020-42 and Senate Concurrent Resolution 24, the expiration dates in Administrative Order Nos. 2020-1, 2020-2, and 2020-6 are extended through April 30, 2020, or until further order of the Court.

ADMINISTRATIVE ORDER
No. 2020-8

ADDITIONAL VERIFICATION REQUIRED FOR
LANDLORD TENANT CASES

Entered April 16, 2020, effective immediately (File No. 2020-08)—
REPORTER.

The federal Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Public Law No. 116-136, imposes a moratorium, until July 25, 2020, on the filing of summary proceeding actions to recover possession of premises for nonpayment of rent that meet certain parameters.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, Sec 4, which provides for the Supreme Court’s general superintending control over all state courts, a complainant who files a summary proceeding action before July 25, 2020 under MCR 4.201 for possession of premises for nonpayment of rent also must submit verification indicating whether the property is exempt from the moratorium provided for under the CARES Act. The verification shall be made on a SCAO-approved form.

This order is effective until July 25, 2020, or as further ordered by the Court.

ADMINISTRATIVE ORDER

No. 2020-9

TEMPORARY AMENDMENTS AND EXTENSIONS RELATED TO CONTINUING WORK IN COURTS

Entered April 17, 2020, effective immediately (File No. 2020-08)—
REPORTER.

On order of the Court, except as otherwise provided by this order, and consistent with Administrative Order No. 2020-6, courts (including judicial officers and staff), attorneys, parties, and other participants in the judicial system are expected to proceed with activities related to all pending legal proceedings to the greatest extent possible.

In pursuit of that goal, the following rules are temporarily amended to enable the work of the courts to continue while also complying with the restrictions on leaving home and accessing private facilities (such as office space) and public facilities including courthouses, post offices, and other common services pursuant to EO 2020-42 and 2020-36, and other executive orders that may be issued, during the state of emergency.

Rules Temporarily Amended **During State of Emergency**

During the state of emergency established by Governor Whitmer under Executive Order 2020-33, the following rules are temporarily amended:

MCR 2.002: Courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process.

MCR 2.107(C): Because people may not be physically present to receive mail at a particular location, all service of process under this rule must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) during the effective period of this order, but should otherwise comply as much as possible with the provisions of MCR 2.107(C)(4).

MCR 2.305, 2.506, 2.621(C), 9.112(D), 9.115(I)(1), 9.212: Subpoenas issued under these rules may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

MCR 3.904: Courts may use two-way videoconferencing technology or other remote participation tools where the court orders a more restrictive placement or more restrictive treatment.

**Extension of Deadlines During
Stay Home Stay Safe Order**

Consistent with AO No. 2020-3 (excluding days in the State of Emergency in computing the deadline for case initiation filings) and AO No. 2020-4 (extending the filing deadlines in the Michigan Supreme Court and Court of Appeals for the period of the Executive Order 2020-21 and 2020-42), the following deadlines are likewise suspended as of March 24, 2020, the effective date of Executive Order 2020-21, and will be extended until the expiration of Executive Order 2020-42 or a subsequent Executive Order that extends the period in which citizens are required to suspend activities that are not necessary to sustain or protect life:

MCR 2.102(D): Expiration of summons.

MCR 2.614: A stay of proceedings to enforce judgment.

MCR 3.216(G)(3) and MCR 2.411(F)(4): Two-year period in which to complete advanced mediation training.

Postjudgment motions filed in the trial court as well as circuit court appeals and appeals of agency determinations.

This order is effective as provided herein or as otherwise provided by subsequent order of the Court.

ADMINISTRATIVE ORDER
No. 2020-10

DELAY OF JURY TRIALS

Entered April 23, 2020, effective immediately (File No. 2020-08)—
REPORTER.

On order of the Court, pursuant to 1963 Const, Art VI, § 4, which provides for the Supreme Court’s general superintending control over all state courts, all jury trials are delayed for a period of 60 days from the date of this administrative order (until June 22, 2020), or as otherwise provided for by local order, whichever date is later.

Further, the State Court Administrative Office is authorized to initiate pilot projects regarding practices related to how to conduct remote jury trials. The pilot courts will test and evaluate innovative jury procedures to allow for appropriate social distancing while also protecting the parties’ Constitutional and statutory rights. After the pilot projects are complete, the State Court Administrative Office shall provide recommendations to assist all courts in providing jury trials that promote public health and safety as well as protect people’s rights.

This order shall remain in effect through June 22, 2020, or until further order of the Court.

ADMINISTRATIVE ORDER
No. 2020-11

EXTENSION OF PERSONAL PROTECTION ORDERS THAT
EXPIRE DURING THE STATE OF EMERGENCY

Entered April 27, 2020, effective immediately (File No. 2020-08)—
REPORTER.

During the continuing COVID-19 pandemic, the Michigan Supreme Court has directed courts to work to protect public health and mitigate the transmission of the coronavirus while also ensuring continued access to the judicial system for those who need it. Although electronic access to courts has increased dramatically over the last several weeks, most courts are currently operating with limited onsite staff. As a result, many interactions that would occur by face-to-face encounter have become impossible, including those that are geared toward protecting vulnerable individuals.

For that reason, on order of the Court, pursuant to 1963 Const, Art VI, § 4, which provides for the Supreme Court's general superintending control over all state courts, any personal protection order that expires during the period from the date of entry of this administrative order through June 1, 2020, is automatically extended to July 21, 2020. A respondent who objects to the extension may file a motion to modify or terminate the personal protection order and request a hearing

under MCR 3.707. For a hearing under this order, the court shall schedule the hearing and notify the parties at least 7 days before the date of the hearing by the means most likely to provide actual notice. The extension set forth in this order does not limit in any way a judge's authority and ability to hold a hearing on respondent's motion and determine whether the extension should continue or the personal protection order should be modified or terminated.

Nothing in this order prohibits a petitioner from consenting to termination of the personal protection order.

**ADMINISTRATIVE ORDER
No. 2020-12**

EXTENSION OF ADMINISTRATIVE ORDER
NOS. 2020-1, 2020-2, 2020-6, AND 2020-9

Entered April 27, 2020, effective immediately (File No. 2020-08)—
REPORTER.

On order of the Court, pursuant to 1963 Const, Art VI, § 4, which provides for the Supreme Court's general superintending control over all state courts, the expiration dates in Administrative Order Nos. 2020-1, 2020-2, 2020-6, and 2020-9 are extended until further order of the Court.

ADMINISTRATIVE ORDER
No. 2020-13

ORDER AUTHORIZING COURTS TO
COLLECT CONTACT INFORMATION

Entered April 29, 2020, effective immediately (File No. 2020-08);
language as amended by Administrative Order No. 2020-19, entered
June 26, 2020—REPORTER.

On order of the Court, in light of Administrative Order No. 2020-2, Administrative Order No. 2020-6, and Administrative Order No. 2020-9, and under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court’s general superintending control over all state courts, a court may collect contact information, including mobile phone number(s) and email address(es), from any party or witness to a case to facilitate scheduling of and participation in remote hearings or facilitate case processing. A court may collect the contact information using a SCAO-approved form. The form used under this administrative order to collect the information shall be confidential. An email address for an attorney must be the same address as the one on file with the State Bar of Michigan.

This order is effective until further order of the Court.

**AMENDED ADMINISTRATIVE ORDER
No. 2020-3**

ORDER EXTENDING DEADLINE FOR
COMMENCEMENT OF ACTIONS

Entered May 1, 2020 effective immediately (File No. 2020-08)—
REPORTER.

On order of the Court, the following amendment of Administrative Order No. 2020-3 is adopted, effective immediately.

[Additions to the text are indicated in underlining.]

In light of the continuing COVID-19 pandemic and to ensure continued access to courts, the Court orders that:

For all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).

This order is intended to extend all deadlines pertaining to case initiation and the filing of initial re-

sponsive pleadings in civil and probate matters during the state of emergency declared by the Governor related to COVID-19. Nothing in this order precludes a court from ordering an expedited response to a complaint or motion in order to hear and resolve an emergency matter requiring immediate attention. We continue to encourage courts to conduct hearings remotely using two-way interactive video technology or other remote participation tools whenever possible.

This order in no way prohibits or restricts a litigant from commencing a proceeding whenever the litigant chooses, nor does it suspend or toll any time period that must elapse before the commencement of an action or proceeding. Courts must have a system in place to allow filings without face-to-face contact to ensure that routine matters, such as filing of estates in probate court and appointment of a personal representative in a decedent's estate, may occur without unnecessary delay and be disposed via electronic or other means.

Staff comment: The amendment of Administrative Order No. 2020-3 is intended to make the order more consistent with Executive Order 2020-58.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

ADMINISTRATIVE ORDER
No. 2020-14

CONTINUED STATUS QUO COURT OPERATIONS AND PHASED
RETURN TO FULL COURT OPERATIONS

Entered May 6, 2020 effective immediately (File No. 2020-08)—
REPORTER.

The Michigan Supreme Court has made clear that during the health crisis relating to the coronavirus pandemic, courts must continue to conduct essential functions, and are expected to use their best efforts to provide timely justice in all other matters. To achieve this goal, the Court has authorized judicial officers to conduct proceedings remotely to the greatest extent possible, and several administrative orders have been adopted to help courts and litigants navigate more efficiently and effectively.

Keeping the public and court staff safe and reducing the risk of spreading the virus will remain a critical focus of our efforts. However, nearly two months after the first case of coronavirus was identified in Michigan, we don't know how long this effort will last. Moreover, the spread of the virus presents challenges that are different in each community as case counts rise in some areas and fall in others.

There is some consensus—nationally and locally—about the best way to approach returning to more

normal work practices in a way that ensures access to necessary services while also protecting against the risk of further infection. This approach involves meeting various benchmarks based on local public health data as public facilities gradually phase in operations. Courts should consider expanding in person operations with diligent regard for health and safety practices as determined in consultation with local health officials and considering the capacity of the community's health system, and as approved by SCAO.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, Sec. 4, which provides for the Supreme Court's general superintending control over all state courts, courts must adhere to the phased return to operations as determined by policy guidelines established by the State Court Administrative Office. Such policies will include but may not be limited to:

- Continued use and expansion of remote hearings as practicable and increase of the court's capacity to conduct business online, including increased remote work by employees.
- Continued limited access to courtrooms and other spaces to no more than 10 persons, including staff.
- Imposition of social distancing practices of at least 6 feet for both employees and visitors.
- Limited in-person court activity to essential functions that cannot be conducted remotely.
- In accordance with CDC guidelines,
 - Adoption of policies that ensure appropriate cleaning and sanitation.
 - Adoption of policies that appropriately protect vulnerable individuals.
 - Adoption of policies to safely screen employees and the public for potential cases of illness.
- Courts must maintain their current level of operations until SCAO approves a court's plan to expand in-court

proceedings. Courts in each circuit may work together to submit to SCAO at each gating level a single plan wherever possible consistent with the SCAO guidelines for returning to full capacity. Conditions may also require a court to move to a previous access level, depending on local conditions.

These conditions remain in effect until further order of the Court.

ADMINISTRATIVE ORDER
No. 2020-15

REVISED FORMAT FOR JULY 2020
MICHIGAN BAR EXAMINATION

Entered May 18, 2020 effective immediately (File No. 2020-08)—
REPORTER.

In recognition of the continuing COVID-19 pandemic, in light of various current and projected pandemic-related restrictions, and pursuant to the Court's constitutional and statutory authority to supervise and regulate the practice of law, 1963 Const, Art VI, Sec 5, and MCL 600.904, and in consultation with the Board of Law Examiners (Board), the Court orders that in lieu of the two-day exam previously scheduled for July 28-29, 2020, a one-day exam will be administered on July 28, 2020. The exam will be conducted online, and will consist solely of the essay portion of the traditional exam.

The Board will inform applicants of the specific instructions for the online exam no later than July 1, 2020. Any applicant receiving accommodations under the Americans with Disabilities Act that would preclude remote testing will be allowed to test in person at a location to be determined, assuming that federal and state restrictions permit such examination. Any applicant that did not register to use a laptop for the exam

must contact the Board if the applicant is unable to take the exam on a computer.

Applicants who complete the test in person will be required to adhere to federal and state health recommendations and requirements. Such requirements will, at a minimum, likely require the applicant to answer health-related screening questions, use personal protective equipment, and comply with staggered test times to ensure social distancing mandates.

For applicants who do not wish to test in July 2020, applications to sit for the July 2020 bar examination will automatically be transferred to the next available 2021 bar exam. In addition, applicants who wish to transfer their application to the next available exam should notify the Board no later than July 1, 2020, by e-mail at BLE-Info@courts.mi.gov. Transfer fees will not be charged. Applicants who wish to withdraw from the process and notify the Board of that withdrawal no later than July 1, 2020, by e-mail, will have their exam fees refunded by the Board and their character and fitness fees refunded by the State Bar of Michigan.

Applicants have the affirmative obligation to frequently check the Board's website, where updates, instructions, and other vital information will be provided.

**ADMINISTRATIVE ORDER
No. 2020-16**

ORDER RESUMING FILING DEADLINES IN
THE MICHIGAN SUPREME COURT AND COURT OF APPEALS

Entered June 3, 2020 effective June 8, 2020 (File No. 2020-08)—
REPORTER.

Effective Monday, June 8, 2020, Administrative Order No. 2020-4 that tolled the filing deadlines in the Michigan Supreme Court and Court of Appeals is rescinded, and the periods for all filings, jurisdictional and non-jurisdictional, in those Courts shall resume. For time periods that started before AO No. 2020-4 took effect, the filers shall have the same number of days to submit their filings on June 8, 2020, as they had when the tolling went into effect. For filings with time periods that did not begin to run because of the tolling period, the filers shall have the full periods for filing beginning on June 8, 2020.

ADMINISTRATIVE ORDER
No. 2020-17

PRIORITY TREATMENT AND NEW PROCEDURE FOR
LANDLORD/TENANT CASES

Entered June 9, 2020 effective immediately (File No. 2020-08)—
REPORTER.

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for

the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1) Each Trial Court with jurisdiction over cases filed under the Summary Proceedings Act, MCL 600.5701, *et seq.*, may accept new filings and begin to schedule hearings as follows:

a. In a manner that is consistent with the Return to Full Capacity (RTFC) guidelines referenced in Administrative Order No. 2020-14,

b. In a manner that is consistent with each court's most recently-approved local administrative order regarding Return to Full Capacity.

(2) When a trial court resumes scheduling hearings for recovery of possession of premises under MCL 600.5714 and MCL 600.5775, the following operational priorities apply:

a. First priority: complaints alleging illegal activity under MCL 600.5714(1)(b) and complaints alleging

extensive and continuing physical injury to the premises under MCL 600.5714(1)(d).

b. Second priority: complaints alleging nonpayment of rent for 120 days or more.

c. Third priority: complaints alleging nonpayment of rent for 90 days or more.

d. Fourth priority: complaints alleging nonpayment of rent for 60 days or more.

e. Fifth priority: complaints alleging nonpayment of rent for 30 days or more.

f. Courts should proceed to a subsequent priority when all cases in the higher priority have been scheduled for hearing.

g. Instead of setting many cases for one hearing time as has traditionally been common, each case must be scheduled for a particular date and time (whether held in-person or remotely) to allow in-person proceedings to be held safely.

h. A filer who filed a case before April 16, 2020 (the date Administrative Order No. 2020-8 entered) must update the factual allegations in the complaint and file the verification form required by Administrative Order No. 2020-8 before a hearing will be scheduled. The court shall not require an additional filing fee.

(3) Trial Courts must schedule cases filed for an alleged termination of tenancy (as opposed to cases for nonpayment of rent) pursuant to MCL 600.5714 during or after the fifth level of priority described above or after the statutorily-required notice period has elapsed, whichever comes later.

(4) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. Administrative Order No. 2020-6 requires that the

court scheduling a remote hearing must “verify that all participants are able to proceed in this manner.” Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR 2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours is sufficient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.

(5) All local administrative orders requiring a written answer pursuant to MCL 600.5735(4) are suspended.¹ Unless otherwise provided by this order, a court must comply with MCR 4.201 with regard to summary proceedings.

(6) At the initial hearing noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial hearing the parties must be verbally informed of all of the following:

¹ The local administrative orders include: 1st District Court (Monroe County); 2a District Court (Lenawee County); 12th District Court (Jackson County); 18th District Court (City of Westland); 81st District Court (Alcona, Arenac, Iosco, and Oscoda Counties); 82nd District (Ogemaw County); and 95b District Court (Dickinson and Iron Counties).

a. Defendant has the right to counsel. MCR 4.201(F)(2).

b. The Michigan Department of Health and Human Services (MDHHS), the local Coordinated Entry Agency (CEA), or the federal Help for Homeless Veterans program may be able to assist the parties with payment of some or all of the rent due.

c. Defendants DO NOT need a judgment to receive assistance from MDHHS or the local CEA. The Summons and Complaint from the court case are sufficient.²

d. The availability of the Michigan Community Dispute Resolution Program (CDRP) and local CDRP Office as a possible source of case resolution. The court must contact the local CDRP to coordinate resources. The CDRP may be involved in the resolution of Summary Proceedings cases to the extent that the chief judge of each court determines, including conducting the pretrial hearing.

e. The possibility of a Conditional Dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such Conditional Dismissal.

(7) The pretrial required under this subsection may be conducted by the assigned judge, a visiting judge appointed by SCAO, a magistrate (as long as that magistrate is a lawyer) or a CDRP mediator.

(8) Except as provided below, all Summary Proceeding Act cases must be adjourned for seven days after the pretrial hearing is conducted. MCL 600.5732. Any party who does not appear at the adjourned date will be defaulted. Cases need not be adjourned for seven

² See State Emergency Relief Manual, Relocation Services, ERM 303, ERB 2019-005, Page 3 of 7.

days if: the plaintiff dismisses the complaint, with or without prejudice, without any conditions, or if defendant was personally served under MCR 2.105(A) and fails to appear.

(9) The court may require remote participation in the second, and any subsequent, proceedings, and the court must verify that participants are able to proceed in that manner under Administrative Order No. 2020-6. If a party cannot appear remotely, in-person proceedings must be scheduled that provide for the safety of all parties.

(10) MCR 4.201(F)(3) is temporarily suspended to the extent that a jury demand must be made in the first response. Instead, if the defendant wants a jury trial, he or she must demand it within seven days of the first response. The jury trial fee, if not waived by the court, must be paid when the demand is made.

This order is effective until further order of the Court.

ADMINISTRATIVE ORDER
No. 2020-18

ORDER RESUMING USUAL COMPUTATION OF DAYS FOR
DETERMINATION OF DEADLINES APPLICABLE TO THE
COMMENCEMENT OF CIVIL AND PROBATE ACTIONS

Entered June 12, 2020 effective June 20, 2020 (File No. 2020-08)—
REPORTER.

In Administrative Order No. 2020-3, the Supreme Court issued an order excluding any days that fall during the State of Emergency declared by the Governor related to COVID-19 for purposes of determining the deadline applicable to the commencement of all civil and probate case types under MCR 1.108(1). Effective Saturday, June 20, 2020, that administrative order is rescinded, and the computation of time for those filings shall resume. For time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020. For filings with time periods that did not begin to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020.

Staff Comment: Note that although the order regarding computation of days entered on March 23, 2020, it excluded any day that fell during the State of Emergency declared by the Governor related to COVID-19, which order was issued on March 10, 2020. Thus, the practical effect of

ADM ORDER NO. 2020-18

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Administrative Order No. 2020-3 was to enable filers to exclude days beginning March 10, 2020. This timing is consistent with the executive orders entered by the Governor regarding the tolling of statutes of limitation.

**AMENDED ADMINISTRATIVE ORDER
No. 2020-17**

AMENDMENT OF ADMINISTRATIVE ORDER NO. 2020-17

Entered June 24, 2020 effective immediately (File No. 2020-08)—
REPORTER.

On order of the Court, the following amendment of Administrative Order No. 2020-17 is adopted, effective immediately.

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

Administrative Order No. 2020-17 — Priority Treatment and New Procedure for Landlord/Tenant Cases.

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and

months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1) Each Trial Court with jurisdiction over cases filed under the Summary Proceedings Act, MCL 600.5701, *et seq.*, may accept new filings and begin to schedule hearings as follows:

a. In a manner that is consistent with the Return to Full Capacity (RTFC) guidelines referenced in Administrative Order No. 2020-14,

b. In a manner that is consistent with each court's most recently-approved local administrative order regarding Return to Full Capacity.

(2) When a trial court resumes scheduling hearings for recovery of possession of premises under MCL 600.5714 and MCL 600.5775, the following operational priorities apply:

a. First priority: complaints alleging illegal activity under MCL 600.5714(1)(b), ~~and~~ complaints alleging extensive and continuing physical injury to the premises under MCL 600.5714(1)(d), complaints alleging that the tenant or someone in the tenant's household has caused or threatened physical injury to an individual while on the leased property under MCL 600.5714(1)(e), and complaints alleging that the tenant is trespassing or squatting under MCL 600.5714(1)(f).

b. Second priority: complaints alleging nonpayment of rent for 120 days or more.

c. Third priority: complaints alleging nonpayment of rent for 90 days or more.

d. Fourth priority: complaints alleging nonpayment of rent for 60 days or more.

e. Fifth priority: complaints alleging nonpayment of rent for 30 days or more.

f. Sixth Priority: All cases described in First Priority through Fifth Priority that are filed after a court has moved to the next priority designation, and any case for recovery of possession of premises where the complaint alleges nonpayment of rent of less than 30 days. Cases filed in a lower numerical priority designation (e.g., a second priority case filed during a court's priority five period) shall be given first consideration in order of priority.

gf. Courts should proceed to a subsequent priority when all cases in the higher priority have been scheduled for hearing.

hg. Instead of setting many cases for one hearing time as has traditionally been common, each case must be scheduled for a particular date and time (whether held in-person or remotely) to allow in-person proceedings to be held safely.

ih. A filer who filed a case before April 16, 2020 (the date Administrative Order No. 2020-8 entered) must update the factual allegations in the complaint and file the verification form required by Administrative Order No. 2020-8 before a hearing will be scheduled. The form will allow a filer to indicate that the case was filed before the moratorium period began and therefore, even if a covered dwelling, is not foreclosed from proceeding. If the filer must remove any fees or costs that are prohibited under the CARES Act, the filer must file an amended complaint for any action that proceeds during the moratorium period. The court shall not require an additional filing fee.

(3) Except as otherwise provided, Trial Courts must schedule cases filed for an alleged termination of tenancy (as opposed to cases for nonpayment of rent) pursuant to MCL 600.5714 during or after the fifth level of priority described above or after the statutorily-required notice period has elapsed, whichever comes later. A court may consider a termination case before the fifth level of priority upon motion by plaintiff alleging that there is good cause to consider the case earlier for reasons of public safety or other just cause, including but not limited to matters brought under MCL 600.5775.

(4) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. Administrative Order No. 2020-6 requires that the court scheduling a remote hearing must “verify that all

participants are able to proceed in this manner.” Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing. In addition, the summons must be accompanied by any written information about the availability of counsel and housing assistance information as provided by legal aid or local funding agencies. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR 2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours after the initial hearing date is sufficient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.

(5) All local administrative orders requiring a written answer pursuant to MCL 600.5735(4) are suspended.¹ Unless otherwise provided by this order, a court must comply with MCR 4.201 with regard to summary proceedings.

(6) At the initial hearing noticed by the summons, the court must conduct a pretrial hearing consistent

¹ The local administrative orders include: 1st District Court (Monroe County); 2a District Court (Lenawee County); 12th District Court (Jackson County); 18th District Court (City of Westland); 81st District Court (Alcona, Arenac, Iosco, and Oscoda Counties); 82nd District (Ogemaw County); and 95b District Court (Dickinson and Iron Counties).

with SCAO guidance. At the pretrial hearing the parties must be verbally informed of all of the following:

a. Defendant has the right to counsel. MCR 4.201(F)(2).

b. The Michigan Department of Health and Human Services (MDHHS), the local Coordinated Entry Agency (CEA), or the federal Help for Homeless Veterans program may be able to assist the parties with payment of some or all of the rent due.

c. Defendants DO NOT need a judgment to receive assistance from MDHHS or the local CEA. The Summons and Complaint from the court case are sufficient.²

d. The availability of the Michigan Community Dispute Resolution Program (CDRP) and local CDRP Office as a possible source of case resolution. The court must contact the local CDRP to coordinate resources. The CDRP may be involved in the resolution of Summary Proceedings cases to the extent that the chief judge of each court determines, including conducting the pretrial hearing.

e. The possibility of a Conditional Dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such Conditional Dismissal.

(7) The pretrial required under this subsection may be conducted by the assigned judge, a visiting judge appointed by SCAO, a magistrate (as long as that magistrate is a lawyer) or a CDRP mediator.

² See State Emergency Relief Manual, Relocation Services, ERM 303, ERB 2019-005, Page 3 of 7.

(8) Except as provided below, all Summary Proceeding Act cases must be adjourned for seven days after the pretrial hearing is conducted. MCL 600.5732. Any party who does not appear at the adjourned date will be defaulted. Cases need not be adjourned for seven days if: the plaintiff dismisses the complaint, with or without prejudice, and without any conditions, or if defendant was personally served under MCR 2.105(A) and fails to appear, or where both plaintiff and defendant are represented by counsel and a consent judgment or conditional dismissal is filed with the court. Where plaintiff and defendant are represented by counsel, the parties may submit a conditional dismissal or consent judgment in lieu of appearing personally at the second hearing.

(9) The court may require remote participation in the second, and any subsequent, proceedings, and the court must verify that participants are able to proceed in that manner under Administrative Order No. 2020-6. If a party cannot appear remotely, in-person proceedings must be scheduled that provide for the safety of all parties.

(10) MCR 4.201(F)(3) is temporarily suspended to the extent that a jury demand must be made in the first response. Instead, if the defendant wants a jury trial, he or she must demand it within seven days of the first response. The jury trial fee, if not waived by the court, must be paid when the demand is made.

(11) A court shall discontinue compliance with this order when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and June 30, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the

regional administrator of its completion of the process and will not be required to return to the procedure even if a subsequent case is filed that alleges rent owing during the period of the eviction moratorium.

This order is effective until further order of the Court.

Staff Comment: The amendments in this order reflect the Court's consideration of feedback provided after the initial order entered and before the eviction moratorium expired. For the convenience of the reader, an updated version of the order reflecting the amendments is attached here.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

ADMINISTRATIVE ORDER
No. 2020-19

CONTINUING ORDER REGARDING COURT OPERATIONS

Entered June 26, 2020 effective immediately (File No. 2020-08)—
REPORTER.

For the last several months, courts have been operating under special rules to ensure that essential functions continue while also limiting access to physical locations as a way to limit the spread of COVID-19 for both court staff and court visitors. As courts return to full capacity it is now appropriate to revisit those early orders.

In Administrative Order No. 2020-14, the Court made it clear that all courts must adopt a phased approach to a return to full capacity of operations. Courts have been submitting their required local administrative orders and are balancing protecting public health and increasing operations. The technological tools courts used to ensure access during the closure should be maintained and indeed used more frequently to rebuild capacity.

Therefore, on order of the Court:

1. Administrative Order No. 2020-2 is rescinded, with the expectation that courts shall continue to process those cases listed as essential functions in addition to other cases as courts return to full capacity

under the terms of Administrative Order No. 2020-14. Courts that have progressed to Phase 3 under the Return to Full Capacity guidance document under Administrative Order No. 2020-14 shall begin holding jury trials using trial standards approved by the State Court Administrative Office. In addition, courts that are not yet at Phase 3 may proceed with jury trials upon approval from the State Court Administrative Office. Further, courts must continue to provide a method or methods for filers to submit pleadings other than by personal appearance at the court.

2. Courts shall continue to expand the use of remote participation technology (video or telephone) as much as possible to reduce any backlog and to dispose of new cases efficiently and safely. As articulated in Administrative Order No. 2020-1 and Administrative Order No. 2020-6, as courts expand their use of remote technology tools, courts must continue to verify that participants are able to proceed remotely, and should permit some participants to appear remotely even if all participants are not able to participate electronically. To enable the greatest participation possible for judicial officers, Administrative Order No. 2012-7 (which limits the circumstances under which judges may preside over remote proceedings) is suspended until further order of the Court.

3. Administrative Order No. 2020-9 adopted temporary amendments that promoted the use of electronic means to access the courts and enabled parties to proceed with litigation, as well as extended some filing deadlines. The amendments of MCR 2.002, MCR 2.107(C), MCR 3.904, and the issuance of subpoenas under MCR 2.305, MCR 2.506, MCR 2.621(C), MCR 9.112(D), MCR 9.115(I)(1), and MCR 9.212 continue in effect until further order of the Court. The time dead-

lines in MCR 2.102(D), MCR 2.614, MCR 3.216(G)(3), and MCR 2.411(F)(4), are extended 80 days, reflecting the period between March 24, 2020 and June 12, 2020. The time deadlines in rules regarding postjudgment motions filed in the trial court (including motions for appointment of appellate counsel) as well as circuit court appeals and appeals of agency determinations are extended for 76 days, consistent with Administrative Order No. 2020-16.

4. Administrative Order No. 2020-13 allows courts to collect certain information, including mobile phone number(s) and e-mail addresses, to facilitate scheduling of and participation in remote hearings. The order has generated some confusion about how to handle nonconfidential information. To clarify that the form for collecting information (but not the information itself if it is contained elsewhere in a public portion of the file) is nonpublic, the administrative order is amended as follows:

~~To protect privacy and address security concerns;~~
~~†The contact information form used under this administrative order to collect the information shall be confidential.~~

This order is effective until further order of the Court.

MICHIGAN RULE CHANGES

Adopted November 13, 2019, effective January 1, 2020 (File No. 2002-37 and File No. 2018-19)—REPORTER.

On order of the Court, the following amendment of Rule 3.206 of the Michigan Court Rules is adopted, effective January 1, 2020. The amendments in this order replace the separate amendments of MCR 3.206 included as part of ADM File No. 2002-37 (entered on 9/18/19) and ADM File No. 2018-19 (entered on 6/19/19).

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

RULE 3.206. INITIATING A CASE.

(A) Information in Case Initiating Document.

(1) The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E).

(2)-(6) [Unchanged.]

(B) [Unchanged.]

(C) Verified Statement and Verified Financial Information Form.

(1) Verified Statement. In an action involving a minor, or if child support or spousal support is requested, the party seeking relief must provide to the friend of the court~~attach~~ a verified statement contain-

~~ing, at a minimum, personal identifying, financial, and health care coverage information of the parties and minor children. A copy of the Verified Statement must be to the copies of the papers served on the other party and provided to the friend of the court. The Verified Statement must be completed on a form approved by the State Court Administrative Office., stating~~

~~(a) the last known telephone number, post office address, residence address, and business address of each party;~~

~~(b) the social security number and occupation of each party;~~

~~(c) the name and address of each party's employer;~~

~~(d) the estimated weekly gross income of each party;~~

~~(e) the driver's license number and physical description of each party, including eye color, hair color, height, weight, race, gender, and identifying marks;~~

~~(f) any other names by which the parties are or have been known;~~

~~(g) the name, age, birth date, social security number, and residence address of each minor involved in the action, as well as of any other minor child of either party;~~

~~(h) the name and address of any person, other than the parties, who may have custody of a minor during the pendency of the action;~~

~~(i) the kind of public assistance, if any, that has been applied for or is being received by either party or on behalf of a minor, and the AFDC and recipient identification numbers; if public assistance has not been requested or received, that fact must be stated; and~~

(j) ~~the health care coverage, if any, that is available for each minor child; the name of the policyholder; the name of the insurance company, health care organization, or health maintenance organization; and the policy, certificate, or contract number.~~

(2) Verified Financial Information Form. Unless waived in writing by the parties, or unless a settlement agreement or consent judgment of divorce or other final order disposing of the case has been signed by both parties at the time of filing, and except as set forth below, each party must serve a Verified Financial Information Form (as provided by SCAO) within 28 days following the date of service of defendant's initial responsive pleading. If a party is self-represented and his or her address is not disclosed due to domestic violence, the parties' Verified Financial Information forms will be exchanged at the first scheduled matter involving the parties or in another manner as specified by the court or stipulated to by the parties. A party who is a victim of domestic violence, sexual assault or stalking by another party to the case, may omit any information which might lead to the location of where the victim lives or works, or where a minor child may be found. Failing to provide this Verified Financial Information form may be addressed by the court or by motion consistent with MCR 2.313. The Verified Financial Information form does not preclude other discovery. A proof of service must be filed when Verified Financial Information forms are served.

(23) The information in the Verified Statement and Verified Financial Information forms is confidential, and is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order. For good cause, the addresses of a party and minors may be omitted from the copy of the

Verified Statement and Verified Financial Information forms that are served on the other party. If a party excludes his or her address for good cause, that party shall either:

(a) submit to electronic filing and electronic service under MCR 1.109(G), or

(b) provide an alternative address where mail can be received.

(3) If any of the information required to be in the Verified Statement or Verified Financial Information forms is omitted, the party seeking relief must explain the reasons for the omission in those forms a sworn affidavit, or in a separate statement, verified under MCR 1.109(D)(3)(b) to be filed with the court by the due date of the form.

(5) A party who has served a Verified Financial Information form must supplement or correct its disclosure as ordered by the court or otherwise in a timely manner if the party learns that in some material respect the Verified Financial Information form is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the action or in writing.

(6) When the action is to establish paternity or child support and the pleadings are generated from Michigan's automated child support enforcement system, the party is not required to comply with subrule (C)(1) or (C)(2). However, the party may comply with subrule (C)(1) and (C)(2) to provide the other party an opportunity to supply any omissions or correct any inaccuracies.

(D) Attorney Fees and Expenses.

(1) [Unchanged.]

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter, 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, or engaged in discovery practices in violation of these rules.

Staff Comment: This amendment of MCR 3.206 combines and harmonizes two amendments issued in separate ADM files (ADM File No. 2002-37 and ADM File No. 2018-19) amending the same rule.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted November 20, 2019, effective January 1, 2020 (File No. 2018-28)—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, the following amendment of Local Court Rule 2.119 for the Court of Claims is adopted, effective January 1, 2020.

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

RULE 2.119. MOTION PRACTICE.

(A) Form of Motions.

(1) [Unchanged.]

(2) The moving party must affirmatively state that he or she requested opposing counsel's concurrence in the relief sought on a specified date, and that opposing counsel has denied or not acquiesced in the relief sought, and therefore, that it is necessary to present the motion.

(2)-(6) [Renumbered (3)-(7) but otherwise unchanged.]

(B)-(G) [Unchanged.]

Staff comment: The amendment of LCR 2.119 for the Court of Claims requires a moving party to affirmatively state that he or she has sought concurrence in the relief sought on a specific date, and opposing counsel denied concurrence in the relief sought.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted November 20, 2019, effective January 1, 2020 (File No. 2018-31)—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, the following amendment of Rule 2 of the Rules Concerning the State Bar of Michigan is adopted, effective January 1, 2020.

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

RULE 2. MEMBERSHIP.

Those persons who are licensed to practice law in this state shall constitute the membership of the State Bar of Michigan, subject to the provisions of these

rules. Law students may become ~~law student~~ section members of the State Bar Law Student Section. None other than a member's correct name shall be entered upon the official register of attorneys of this state. Each member, upon admission to the State Bar and in the annual dues ~~notice~~statement, must provide the State Bar with the member's correct name, physical address, and email address, that can be used, among other things, for the annual dues notice and to effectuate electronic service as authorized by court rule, and such additional information as may be required. If the physical address provided is a mailing address only, the member also must provide a street or building address for the member's business or residence. No member shall practice law in this state until ~~the~~such information required in this Rule has been provided. Members shall ~~notify the State Bar~~ promptly update the State Bar ~~within writing of~~ any change of name, physical address, or email address. The State Bar shall be entitled to due notice of, and to intervene and be heard in, any proceeding by a member to alter or change the member's name. The name and address on file with the State Bar at the time shall control in any matter arising under these rules involving the sufficiency of notice to a member or the propriety of the name used by the member in the practice of law or in a judicial election or in an election for any other public office. Every active member shall annually provide a certification as to whether the member or the member's law firm has a policy to maintain interest-bearing trust accounts for deposit of client and third-party funds. The certification shall be ~~included~~placed on the face of the annual dues notice and shall require the member's signature or electronic signature.

Staff Comment: The amendment of Rule 2 of the Rules Concerning the State Bar of Michigan updates and expands the rule slightly to include reference to a member's email address.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted November 20, 2019, effective January 1, 2020 (File No. 2018-36)—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, the following amendment of Rule 3.802 of the Michigan Court Rules is adopted, effective January 1, 2020.

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

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A) Service of Documents.

(1) [Unchanged.]

(2) Notice of a petition to identify a putative father and to determine or terminate his rights, or a petition to terminate the rights of a ~~noncustodial~~ parent under MCL 710.51(6), must be served on the individual or the individual's attorney in the manner provided in:

(a)-(b) [Unchanged.]

(3)-(4) [Unchanged.]

(B) Service When Identity or Whereabouts of Father ~~are~~ Unascertainable

(1)-(2) [Unchanged.]

(C) Service When Whereabouts of ~~Noncustodial~~ Parent ~~are~~ 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 ~~that~~~~the~~ ~~noncustodial~~ parent ~~have~~~~has~~ not been ascertained after diligent inquiry, the petitioner must file proof of the efforts made to locate ~~that~~~~the~~ ~~noncustodial~~ parent in a statement verified under MCR 1.109(D)(3). If the court finds, on reviewing the statement, that service cannot be made because the whereabouts of the person ~~have~~~~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.

(D) [Unchanged.]

Staff comment: The amendment of MCR 3.802 eliminates references to the “noncustodial parent” to make the rule consistent with the statute (MCL 710.51) allowing stepparent adoption when the petitioning stepparent’s spouse has joint legal custody, rather than requiring sole legal custody.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted November 20, 2019, effective January 1, 2020 (File No. 2019-02)—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, the following amendment of Rule 9.123 of the Michigan Court Rules is adopted, effective January 1, 2020.

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

RULE 9.123. ELIGIBILITY FOR REINSTATEMENT.

(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less pursuant to disciplinary proceedings may be~~automatically~~ reinstated in accordance with this rule. The attorney may file, not sooner than 7 days before the last day of the suspension, with the board and serve on the administrator by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with all requirements~~the terms and conditions~~ of the suspension order. The affidavit must contain a statement that the attorney will continue to comply with the suspension order until the attorney is reinstated. A materially false statement contained in the affidavit is~~ground for~~ disbarment~~a basis for an action by the administrator and additional discipline. Within 7 days after the filing of the affidavit, the administrator may file with the board and serve on the attorney an objection to reinstatement based on the attorney's failure to demonstrate compliance with the suspension order. If the administrator files an objection, an order of reinstatement will be issued only if the objection is withdrawn or a hearing panel makes a determination that the attorney has complied with the suspension order. An objection which cannot be resolved without the adjudication of a disputed issue of fact shall be promptly referred to a hearing panel for decision on an expedited basis. If the administrator does not file an objection and the board is not otherwise apprised of a basis to conclude that the attorney has failed to comply with the suspension order, the board must promptly issue~~

an order of reinstatement. The order must be filed and served under MCR 9.118(F).

(B)-(D) [Unchanged.]

(E) Abatement or Modification of Conditions of Discipline or Reinstatement. When a condition has been imposed in an order of discipline or in an order of reinstatement, the attorney may request an order of abatement discharging the lawyer from the obligation to comply with the condition, or an order modifying the condition. The attorney may so request either before or with the attorney's affidavit of compliance under MCR 9.123(A) or petition for reinstatement under MCR 9.123(B). The request may be granted only if the attorney shows by clear and convincing evidence that a timely, good-faith effort has been made to meet the condition but it is impractical to fulfill the condition.

Staff Comment: The amendment of MCR 9.123 updates the attorney discipline process for reinstatement of short-term suspensions and allows for abatement or modification of a condition in certain circumstances.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted November 20, 2019, effective January 1, 2020 (File No. 2019-04)—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, the following amendment of Rule 5.117 of the Michigan Court Rules is adopted, effective January 1, 2020.

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

RULE 5.117. APPEARANCE BY ATTORNEYS.

(A) [Unchanged.]

(B) Appearance.

(1) In General. An attorney may generally appear by an act indicating that the attorney represents an interested person in the proceeding. A limited appearance may be made by an attorney for an interested person in a civil action or a proceeding as provided in MCR 2.117(B)(2)(c), except that any reference to parties of record in MCR 2.117(B)(2)(c) shall instead refer to interested persons. An appearance by an attorney for an interested person is deemed an appearance by the interested person. Unless a particular rule indicates otherwise, any act required to be performed by an interested person may be performed by the attorney representing the interested person.

(2) [Unchanged.]

(3) Appearance by Law Firm.

(a) [Unchanged.]

(b) The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court-ordered conference or trial if it is within the scope of the appearance.

(C) Duration of Appearance by Attorney.

(1)-(4) [Unchanged.]

(5) Limited Scope Appearances. Notwithstanding other provisions in this section, limited appearances under MCR 2.117(B)(2)(c) may be terminated in accordance with MCR 2.117(C)(3), except that any

reference to parties of record in MCR 2.117(B)(2)(c) shall instead refer to interested persons.

(56) [Renumbered but otherwise unchanged.]

(D) [Unchanged.]

Staff Comment: The amendment of MCR 5.117 clarifies that the rules authorizing limited scope representation are explicitly applicable to civil cases and proceedings in probate court.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted December 18, 2019, effective January 1, 2020 (File No. 2019-03)—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, the following amendment of Rule 8.110 of the Michigan Court Rules is adopted, effective January 1, 2020.

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

RULE 8.110. CHIEF JUDGE RULE.

(A) [Unchanged.]

(B) Chief Judge, Chief Judge Pro Tempore, and Presiding Judges of Divisions.

(1) The Supreme Court shall select a judge to serve as chief judge of each trial court. Any judge seeking appointment as chief judge shall complete and submit an application for chief judge on the form available on

SCAO's website. The application will describe the criteria for selection of chief judges. SCAO will also provide an opportunity for any judge or judges to provide information to the Court (which will be kept confidential) regarding the selection of a particular person as chief judge. When SCAO is considering whether to consolidate recommending appointment of a chief judge of a specific group of courts under the supervision of a single chief judge, SCAO shall inform and seek input from those courts. SCAO may seek additional information as needed from any court or judge during the appointment process, and will give respectful consideration to all applicants and to any information it receives. Any judge of a court or group of courts may submit an application or recommendation to SCAO regarding the selection of a chief judge for that court or group of courts.

(2) [Unchanged.]

(3) The chief judge, chief judge pro tempore, and any presiding judges shall serve a two-year term beginning on January 1 of each even-numbered year, provided that the chief judge serves at the pleasure of the Supreme Court and the chief judge pro tempore and any presiding judges serve at the pleasure of the chief judge. A chief judge shall attend training as required by the State Court Administrator.

(4) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(8) [Unchanged.]

(9) The delegation of such authority to a chief judge does not in any way limit the Supreme Court's authority to exercise "general superintending control over all courts" under Const 1963, art 6, § 4.

(D) Court Hours; Court Holidays; Judicial Absences.

(1)-(2) [Unchanged.]

(3) Judicial Vacation Standard. A judge ~~mayis expected to~~ take an annual vacation leave of 20 days with the approval of the chief judge to ensure docket coordination and coverage. A judge may take an additional 10 days of annual vacation leave with the approval of the chief judge. A maximum of ~~1530~~ 1530 days of annual vacation unused due to workload constraints may be carried ~~from one calendar year into the first quarter of the next calendar year and used during that quarter,~~ if approved by the chief judge. Vacation days do not include:

(a)-(e) [Unchanged.]

(4)-(6) [Unchanged.]

Staff comment: The amendments of this rule expand and clarify the chief judge selection process, modify the judicial vacation standard as it relates to the number of carryover days and when they may be used, and allow the State Court Administrator to require a chief judge to attend training.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted December 27, 2019, effective January 1, 2020 (File No. 2018-19)—REPORTER.

On order of the Court, the following amendment of Rule 3.229 of the Michigan Court Rules is adopted, effective January 1, 2020.

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

RULE 3.229. FILING CONFIDENTIAL MATERIALS.

(A) If a party or interested party files any of the following items with the court, the party shall identify the document as a confidential document and the items shall be served on the other parties in the case and maintained in a nonpublic file in accordance with subrule (B):

(1)-(8) [Unchanged.]

(B) Any item filed and identified under subrule (A) is nonpublic and must be maintained separately from the legal file. The filer waives any claim of confidentiality to any item filed under subrule (A) that is not identified by the filer as confidential. The nonpublic file must be made available for any appellate review.

Staff comment: The amendment of MCR 3.229 requires the filer to identify nonpublic documents when they are submitted to the clerk, and stipulates that the filer waives any claim of confidentiality where such documents are filed without a designation of confidentiality. These amendments update the language originally adopted by the Court as part of the civil discovery rules proposal in ADM File No. 2018-19.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted January 8, 2020, effective May 1, 2020 (File No. 2018-30)
—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, the following amendment of Rule 8.115 of the Michigan Court Rules is adopted, effective May 1, 2020.

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

RULE 8.115. COURTROOM DECORUM; POLICY REGARDING USE OF CELL PHONES OR OTHER PORTABLE ELECTRONIC COMMUNICATION DEVICES.

(A)-(B) [Unchanged.]

(C) Use of Establishment of a Policy Regarding Portable Electronic Communication Devices in a Courthouse.

(1) Purpose. This rule specifies the permitted and prohibited uses of portable electronic devices in a courthouse. A court must use reasonable means to advise courthouse visitors of the provisions of this rule. Any allowed use of a portable electronic device under this rule is subject to the authority of a judge to terminate activity that is disruptive or distracting to a court proceeding, or that is otherwise contrary to the administration of justice. This rule does not modify or supersede the guidelines for media coverage of court proceedings set forth in AO No. 1989-1. A facility that contains a courtroom may determine use of electronic equipment in nonjudicial areas of the facility.

(2) ~~The chief judge may establish a policy regarding the use of cell phones or other portable electronic communication devices within the court, except that no photographs may be taken of any jurors or witnesses, and no photographs may be taken inside any courtroom without permission of the court. The policy regarding the use of cell phones or other portable electronic communication devices shall be posted in a conspicuous location outside and inside each courtroom. Failure to comply with this section or with the policy established by the chief judge may result in a fine, including confiscation of the device, incarceration;~~

or both for contempt of court. Definitions. The following definitions apply in this rule:

(a) A “portable electronic device” is a mobile device capable of electronically storing, accessing, or transmitting information. The term encompasses, among other things, a transportable computer of any size, including a tablet, a notebook, and a laptop; a smart phone, a cell phone, or other wireless phone; a camera and other audio or video recording devices; a personal digital assistant (PDA); other devices that provide internet access; and any similar items.

(b) A “courthouse” includes all areas within the exterior walls of a court building, or if the court does not occupy the entire building, that portion of the building used for the administration and operation of the court. A “courthouse” also includes areas outside a court building where a judge conducts an event concerning a court case.

(c) A “courtroom” includes the portion of a courthouse in which the actual proceedings take place.

(3) Photography and audio or video recording, broadcasting, or live streaming. Except for requests for film or electronic media coverage of court proceedings as permitted under AO No. 1989-1, the following restrictions apply to photography, audio recording, video recording, broadcasting, or live streaming in a courthouse.

(a) In a courtroom: In a courtroom, no one may use a portable electronic device to take photographs or for audio or video recording, broadcasting, or live streaming unless that use is specifically allowed by the Judge presiding over that courtroom.

(b) Outside a courtroom: In areas of a courthouse other than courtrooms, no one may photograph, record,

broadcast, or live stream an individual without that individual's prior express consent.

(c) Jurors: No one may photograph, record, broadcast, or live stream any juror or anyone called to the court for jury service.

(d) Local orders: By local administrative order, a court may adopt further reasonable limits on photography and audio or video recording or broadcasting in a courthouse that are not inconsistent with this rule.

(4) Jurors and witnesses. The following restrictions apply to use of portable electronic devices by jurors, including prospective jurors, and by witnesses.

(a) Jurors: Jurors must turn off their portable electronic devices while present in a courtroom. A court may order jurors to turn over to the court their portable electronic devices during deliberations. If so, the court must provide jurors with a phone number where they can be reached in case of an emergency during deliberations.

(b) Witnesses: A witness must silence any portable electronic device while in a courtroom, and may use a device while testifying only with permission of a judge.

(5) Attorneys, parties, and members of the public. The following provisions apply to use of portable electronic devices in a courtroom by attorneys, parties, and members of the public.

(a) Allowed uses: Attorneys, parties, and members of the public may use a portable electronic device in a courtroom to retrieve or to store information (including notetaking), to access the Internet, and to send and receive text messages or information. Attorneys, parties, and members of the public may use a portable electronic device to reproduce public court documents in a clerk's office as long as the device leaves no mark

or impression on the document and does not unreasonably interfere with the operation of the clerk's office.

(b) Prohibited uses: Attorneys, parties, and members of the public must silence portable electronic devices while in the courtroom. A portable electronic device may not be used, without permission of the court, to make or to receive telephone calls or for any other audible function while court is in session. Portable electronic devices may not be used to communicate in any way with any courtroom participant including, but not limited to, a party, a witness, or juror at any time during any court proceedings. Additional prohibited uses related to photography, recording, and broadcasting are found in 8.115(C)(3) above.

(6) Use of a portable electronic device outside a courtroom; limitations. Except as provided in paragraphs (3), (4) and (5) of this rule, a person may use a portable electronic device in a courthouse, subject to the authority of judges, Clerks of the Court, or court administrators to limit or terminate activity that is disruptive to court operations or that compromises courthouse security.

(7) Violations of this rule. If these rules are violated, the presiding judge may confiscate the device for the remainder of the day or order that the phone be turned off and put away. Violations of this rule are punishable by appropriate sanctions up to and including contempt of court as determined in the discretion of the court.

Staff comment: The amendment of MCR 8.115, submitted by the Michigan State Planning Body, explicitly allows the use of cellular phones (as well as prohibits certain uses) in a courthouse. The rule makes cell phone and electronic device use policies consistent from one court to another, and broadens the ability of litigants to use their devices in support of their court cases when possible.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

MARKMAN, J. (*dissenting*). A better sense of priority by this Court in exercising its superintending authority over our judiciary would, in my judgment, be to accord less regard for the proposition that all persons attending our courtrooms must be allowed to remain in the possession of “smartphones” and to accord more regard for the proposition that criminal and civil trials taking place in these courtrooms must proceed in a manner ensuring that their participants—judges, jurors, litigants, witnesses, attorneys, and court staff—be accommodated as much as reasonably possible in the stressful circumstances under which each carries out responsibilities in the pursuit of justice under law. A further sense of priority would be to accord greater deference in this regard to the judgments of trial judges throughout this state who are principally charged with ensuring that such trials proceed in a fair, efficient, orderly, and serious-minded manner.

Available for this Court’s consideration have been at least the following options: (a) preserving the status quo by allowing local courts to set their own policies concerning phones, (b) requiring that local courts provide lockers or similar storage facilities for phones if their rules did not allow phones in courtrooms, (c) allowing jurors or other persons with specifically defined needs to bring phones into courtrooms, (d) establishing procedures by which persons could request special permission to bring a phone into a courtroom, (e) requiring that self-represented litigants be placed on an equal footing with attorneys in their ability to use phones in courtrooms, and (f) allowing all persons to bring phones into courtrooms. While I could support

any of the first five options, I respectfully dissent from the Court's selection of the final option. Such a rule—allowing phones in courtrooms, and during virtually all judicial proceedings—raises at least the following concerns.

First, it is not apparent that a “one-size-fits-all” approach best addresses the diverse role and character of courtrooms, and the distinctive configurations of courthouses, across this state. Allowing phones in a courtroom in a small county courthouse may pose relatively few problems, as there may only be a small number of attendees during proceedings and many may be known to the presiding judge or court staff. However, courtrooms serving significantly larger populations, which may host busy and crowded motion hearings and have limited security staffs, are likely to face significantly greater challenges in regulating permissible and impermissible uses of phones set forth in the newly amended court rule. Additionally, while allowing phones in courtrooms during a pretrial civil hearing may raise only modest concerns, allowing phones in courtrooms during a criminal trial may raise considerably greater concerns, many of which would outweigh the “convenience benefits” to individual phone users. Given that local judges are obviously most attuned to the needs and circumstances of their communities and courtrooms, and given that it ultimately falls on them to ensure the integrity of proceedings within their courtrooms, local judges should continue to possess the authority and flexibility to regulate phone usage in these venues. The Michigan Probate Judges Association and the Michigan District Judges Association have understandably raised this same point.

Second, courtrooms are home to solemn proceedings demanding the fullest attention of participants in these proceedings. Allowing individuals in courtrooms to casually browse the internet, to text, or to play games, may introduce distractions into these proceedings or compromise the necessarily formal and focused atmosphere of the courtroom. Nor should judges and court staff periodically be required to divert their attention from matters at hand in order to maintain a watchful eye for phone misuse by any one of the many spectators. Even more particularly, jurors and witnesses, who may not be altogether comfortable in their assigned roles, should not have to keep an apprehensive eye out for surreptitious or inappropriate picture-taking or out-of-court communications.

Third, aside from the inevitable and distracting beeps, buzzes, and personalized ringtones coming from unsilenced phones, allowing phones in the courtroom risks undermining the orderliness and propriety of the judicial process, the integrity of which must be of the highest priority. Doubtlessly, this risk will be of a greater or lesser character as the case may be, but in light of the gravity of what is taking place, there should be no such risk at all. Just as a courtroom in which a criminal trial is taking place, for example, is not a place for conversation, for headphones, for political paraphernalia, or for signs or messages or buttons expressing attitudes on issues being litigated, it is also not a “place” or a “time” for all other forms of conduct that might be entirely proper under different circumstances.

And for this Court in the exercise of its superintending authority, the maintenance and preservation of the sanctity of the courtroom, and the process occurring therein, ought to be of paramount consideration, not

the facilitation of access to what is a mere individual *convenience* that, in instances in which convenience rises to necessity, can be specifically and reasonably accommodated by the trial court. Simply put, however, when persons in the courtroom may use phones in the full range of their contemporary functions, there is simply no practical means by which photographs can be prevented from being taken, especially photographs unnecessarily imposing upon the privacy or security interests of witnesses and jurors. See, e.g., State of Illinois, Circuit Court of Cook County, *Cell Phone & Electronic Communication Device Ban* <<http://www.cookcountycourt.org/HOME/CellPhoneElectronicDeviceBan.aspx>> (select “Why is a ban necessary?”) (accessed January 2, 2020), quoting Cook Circuit Court Chief Judge Timothy C. Evans (“‘Of course the judges and I understand the ban presents an inconvenience for the public. I wish it were possible to just say to the people coming to court, “Please turn off your phones and devices.” The simple fact is we have tried that, and it does not work. People either ignore or refuse to comply with the judges’ directions; and the Sheriff’s staff has confirmed that their deputies cannot prevent the misuse of these devices in the courtrooms.’”) [<https://perma.cc/9XSU-SNM7>]. These photographs may then be used to gain information about witnesses and jurors in order to intimidate, compromise, or embarrass these persons, undermining in the process an entire justice system that is so dependent upon the cooperation and compliance of countless numbers of persons who would just as soon be elsewhere than in the courtroom. Indeed, the misuse of phones specifically contributed to the country’s second most-populated county—Cook County, Illinois, home to Chicago—restoring a ban on phones in courthouses where criminal matters are heard. Brobst, *The Modern Penny Dreadful: Public*

Prosecution and the Need for Litigation Privacy in a Digital Age, 96 Neb L Rev 281, 304-305 (2017).

Moreover, members of the public simply cannot as a practical matter be entirely precluded from surreptitiously *recording* judicial proceedings, and one need look no further than the public comments to recognize that some proponents specifically *intend* this result, the recording of judicial proceedings of personal concern or interest. While some of these recordings may well shed useful light upon the judicial process, they are also susceptible to distortion and manipulation, a concern also raised by the Michigan District Judges Association.

Allowing texting from within the courtroom also risks the potential compromise of trial testimony itself as reflected by the incidence of persons in courtrooms who have texted information about evidence to witnesses sequestered outside the courtroom. See *id.*; see also Sellers, *The Circus Comes to Town: The Media and High-Profile Trials*, 71 Law & Contemp Probs 181, 192 (Autumn 2008) (recounting an instance in Detroit where sequestered witness in murder trial received texts from persons in the courtroom concerning the testimony of other witnesses). In short, the sanctity and security of our courtrooms have been preserved over the years in a variety of ways, while ensuring the fullest access by the media and the public to these places. There are good and legitimate reasons for why restrictions on even “nonsmartphones” have persisted in American courtrooms, as well as for why jurors and witnesses and others should not be discomfited or made uneasy by even the risk that abuse of a phone will occur in the courtroom. To restate, it is *this* concern—ensuring the integrity and single-minded fo-

cus and orderliness of the judicial process—that ought to be understood by this Court as its dominant consideration in reflecting upon the availability of phones in the courtroom. See, e.g., *Cell Phone & Electronic Communication Device Ban*, quoting Cook Circuit Chief Judge Evans (“‘It always must be remembered that a criminal case is a serious, solemn proceeding. A defendant’s liberty, or even life, is at stake. Often victims of crimes are in court. There should be no interruption of testimony by ringing phones and no texting of testimony to witnesses waiting to testify. Most important, no juror or witness should ever be afraid because a defendant’s supporters are taking their pictures.’”). Not until we are assured that the changes we adopt can proceed without eroding our present process, and without interfering with prerogatives best belonging to trial courts, should we engage as we so casually do today with the instant experiment.

In adopting a rule that allows phones in the courtroom, this Court gives greater regard to a modest increase in personal convenience than to the traditional sanctity of the courtroom and the security of jurors and witnesses. In pursuing this course, we also give inadequate consideration and deference to the opinions and concerns of the judges of this state who will be on the front lines of confronting the problems associated with these phones and who will be held responsible for enforcing what many of them recognize to be a practically unenforceable rule. I dissent and would adopt a considerably more measured rule.

Adopted March 4, 2020, effective May 1, 2020 (File No. 2018-02)—
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, the following amendment of Rule 3.501 of the Michigan Court Rules is adopted, effective May 1, 2020.

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

RULE 3.501. CLASS ACTIONS.

(A)-(C) [Unchanged.]

(D) Judgment.

(1)-(5) [Unchanged.]

(6) Residual Funds.

(a) “Residual Funds” are funds that remain after the payment of approved class member claims, expenses, litigation costs, attorney’s fees, and other court-approved disbursements made to implement the relief granted in the judgment approving a proposed settlement of a class action.

(b) Nothing in this rule is intended to limit the parties to a class action from proposing a settlement, or the court from entering a judgment approving a settlement, that does not create Residual Funds.

(c) Any judgment approving a proposed settlement of a class action certified under this rule that may result in the existence of Residual Funds shall provide for the disbursement of any such Residual Funds upon the stipulation of the parties and subject to the approval of the court. In matters where the claims process has been exhausted and Residual Funds remain, unless the judgment provides otherwise, the Residual Funds shall be disbursed to the Michigan State Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of Michigan.

(E)-(I) [Unchanged.]

Staff Comment: The amendment of MCR 3.501 establishes procedures for residual funds by adding a definition, clarifying that a settlement need not create residual funds, that a proposed settlement order provide for the disbursement of residual funds, and requiring that all unclaimed class action funds be disbursed to the Michigan State Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of Michigan. The amendment applies the new language to situations in which the court approves a proposed settlement.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

MARKMAN, J. (*dissenting*). Today, the Court amends MCR 3.501 by adding a provision addressing the disbursement of unclaimed class action settlement funds. In short, the amendment provides that, if the parties to a class action settlement do not themselves provide for the disbursement of unclaimed funds, the trial court shall disburse the full amount of the unclaimed funds to the Michigan State Bar Foundation. Although the amendment represents a considerable improvement over the language originally published for comment by divesting trial courts of discretion

concerning how to disburse unclaimed funds, the following reasons nonetheless impel me to dissent.

First, in adjudicating class actions, courts must assume the singular supervisory role of protecting the interests of unidentified and anonymous class members who will never come before the court. See MCR 3.501(A)(2), (B)(3), and (C)(3). In this regard, class action practice has been subject to much scrutiny, with “one of the most heavily criticized class action abuses [being] the use of class action settlements to generate huge fees for lawyers and little or nothing for the allegedly injured [class members].” Beisner, Shors, & Miller, *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 *Stan L Rev* 1441, 1445 (2005). This Court must, in this regard, employ a carefully measured and disciplined approach to amending court rules governing class actions, particularly where such amendments affect the disbursement of funds that are (a) specifically intended for class members, and (b) specifically predicated upon economic losses incurred by those same class members. At the time these amendments were initially published, I raised a number of inquiries for public comment. Common threads in those inquiries included: (a) whether the judicial disbursement of funds to nonparties is a fundamentally “legislative” exercise, the judicial definition and administration of which is an inappropriate object of our state’s judicial power; and (b) whether specifically this Court’s adoption of a *cy pres* procedure in which unclaimed funds will be disbursed to a charitable organization will lend an appearance problem to the trial court’s disinterested review of a settlement likely to result in substantial amounts of unclaimed funds going to such an organization. In particular, concerning (b), even where there is no conflict of interest, or even an appearance of conflict, on the part of the trial

court, will subtle disincentives arise to identifying difficult-to-locate class members by what may be perceived as the “greater” or “higher” charitable or philanthropic interest? Similarly, will some larger business defendants come to be similarly disincentivized as a result of the perception that substantial *cy pres* payments constitute a preferable “public relations” alternative to lesser payments being paid to a larger number of difficult-to-locate class members? The purpose of the civil justice process is to resolve disputes and to provide remedies for harms suffered, not to facilitate philanthropic and public-interest financial contributions.

Second, while some may view the instant amendment as generally maintaining the status quo, I do not share this view. By establishing an explicit procedure for the disbursement of unclaimed class action funds, the present amendment formalizes, and institutionalizes, this Court’s approval of *cy pres* practice. Absent this amendment, the disbursement of such funds to nonparties was but one of four options available to trial courts. See 4 Newberg, *Class Actions* (5th ed), § 12:28, p 210 (identifying four options for disbursing unclaimed funds: reversion to the defendant; pro rata disbursement to class members who filed claims; escheat to the government, and *cy pres* awards); see also *Wilson v Southwest Airlines, Inc*, 880 F2d 807, 813 (CA 5, 1989) (concluding that the defendants themselves have a strong equitable argument for the return of unclaimed funds); *Gerken v Sherman*, 484 SW3d 95, 105 (Mo Ct App, 2015) (“When courts are faced with distributing unclaimed funds from a class action, they have four options: a pro rata distribution to the class members who have already made claims; escheat to the government; reversion to the defendant; or *cy pres* distribution.”); *In re Motorsports Merchandise Anti-*

trust Litigation, 160 F Supp 2d 1392, 1393-1394 (ND Ga, 2001) (identifying the same four options). By limiting the trial court's range of options for disbursing unclaimed funds, as this Court has now done in the exercise of an quasi-legislative exercise of power, we effectively select "winners and losers" from among a large number of possible beneficiaries of unclaimed funds. And the amendment's preclusion of the trial court's authority to order the reversion of unclaimed funds to the defendant itself is especially troubling, in particular where the class action defendant is a political subdivision of the state. In such a circumstance, unclaimed class action funds may alternatively be characterized as "taxpayer funds," more fairly returned to the taxpayers themselves than disbursed to the State Bar Foundation, regardless of how exemplary and estimable the work of the Foundation may be. Indeed, in such circumstances, it might further be presumed that a large number of such taxpayers were *also* among the class action members to whom economic harm had been done and who were thus directly *entitled* to such funds. No matter, as we specifically declined, as the city of Detroit proposed, even to exempt from the present amendment class action awards against political subdivisions.

Third, for the above reasons, how a court should disburse unclaimed funds is a matter that affects the *substantive* rights of litigants—to what are they entitled as a matter of public policy? Thus, how this judiciary should disburse unclaimed funds is a matter properly left to the Legislature and does not, in my judgment, constitute a proper aspect of the "judicial power—the power to resolve certain types of cases and controversies and the only power belonging to the judiciary under either the Michigan or the United States Constitution. See also Goodlander, *Cy Pres*

Settlements: Problems Associated with the Judiciary's Role and Suggested Solutions, 56 BC L Rev 733, 757 (2015) (“Another way to shield judges from the potential for appearances of impropriety inherent in an unstructured *cy pres* distribution framework could originate in the legislative branch.”). Legislatures in other states have enacted statutes governing the disbursement of unclaimed funds. See, e.g., Wis Stat 803.08(10) (2017); Neb Rev Stat 25-319.01 (2014); 735 Ill Comp Stat 5/2-807 (2008); SD Codified Laws 16-2-57 (2008); NC Gen Stat 1-267.10 (2005). In contrast, this Court now: (a) enacts the entirety of state public policy governing the disbursement of unclaimed funds, (b) expressly ratifies class action settlements likely to result in unclaimed funds, and (c) affirmatively and explicitly approves the disbursement of unclaimed funds. By doing these things, we discourage legislative action, and we do so at an especially inapt time. Given the national attention *cy pres* practice in the class action context has recently received, it seems a particularly poor moment at which to diminish the Legislature’s incentives to act on their own. See, e.g., *Marek v Lane*, 571 US 1003, 1006 (2013) (statement of Roberts, C.J., respecting denial of certiorari) (identifying “fundamental concerns” with *cy pres* practice and suggesting need to “clarify the limits” of the practice); see also *Frank v Gaos*, 586 US ___, ___; 139 S Ct 1041, 1047-1048 (2019) (Thomas, J., dissenting) (questioning fairness of class settlements when a majority of funds are disbursed via *cy pres* and suggesting attorney-fee awards should be decreased because *cy pres* disbursements do not provide relief to class members); *Klier v Elf Atochem North America, Inc*, 658 F3d 468, 481-482 (CA 5, 2011) (Jones, C.J., concurring) (noting perception of impropriety often attached to *cy pres* disbursements and concluding that “[o]ur adversarial system should not

effectuate transfers of funds from defendants beyond what they owe *to the parties* in judgments or settlements”). It would have been far better for this Court to have surveyed the *cy pres* experiences of other jurisdictions at this time of flux and debate.

Finally, not only are courts constitutional institutions designed principally to adjudicate cases and controversies between parties and to afford relief to aggrieved parties, but *lawyers*, as custodians of our justice system, must also carry out their responsibilities within the context of that system. In particular, they are governed by rules of ethics and professional standards of conduct to pursue cases on *behalf* of their clients, and not on behalf of charitable, philanthropic, or public-interest organizations, however admirable the purposes of such organizations may be. See MRPC 1.7(b). But settlements resulting in large *cy pres* disbursements may well transform these basic ground rules. The attorney for plaintiffs in a class action represents the class as a whole, including difficult-to-locate class members. However, once a court approves a class action settlement and the attorney’s fees have been set, there remains little incentive for attorneys on either side to expend significant additional resources and efforts reaching difficult-to-locate class members. This is particularly true where: (a) the unclaimed funds are designated for distribution to an organization—the State Bar Foundation—that most in the legal profession would view as a worthy recipient, and (b) in some situations, the attorney for the plaintiffs’ class may hope later to persuade the Foundation to distribute monies to a legal organization that represents class litigants. As a result, one must ask whether the *cy pres* process adopted here introduces a

strain, or a tension, affecting plaintiffs' attorney's ability to act with undivided loyalty on behalf of the clients' interests.

For these reasons, I respectfully dissent from this Court's adoption of the present amendments to MCR 3.501 and further encourage the Legislature to consider how, in its own judgment, these matters should best be addressed.

Adopted March 4, 2020, effective May 1, 2020 (File No. 2018-23)—
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, the following amendment of Rule 6.610 of the Michigan Court Rules is adopted, effective May 1, 2020.

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

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(D) [Unchanged.]

(E) Discovery in Misdemeanor Proceedings.

(1) The provisions of MCR 6.201, except for MCR 6.201(A), apply in all misdemeanor proceedings.

(2) MCR 6.201(A) only applies in misdemeanor proceedings, as set forth in this subrule, if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, then the defendant must also comply with MCR 6.201(A).

(E)-(H) [Relettered (F)-(I) but otherwise unchanged.]

Staff Comment: The amendment of MCR 6.610 allows discovery in misdemeanor proceedings in the district court by creating a structure similar to the federal rules (FR Crim P 16[b]) in which a defendant's duty to provide certain discovery is triggered only if defense counsel first requests discovery from the prosecution, and the prosecution complies.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

MCCORMACK, C.J. (*concurring*). The rule the Court adopts today will promote efficiency, fairness, and justice in our district courts. Until today there was no required discovery in any misdemeanor cases; whether a defendant could obtain a copy of a police report before deciding to go to trial, for example, was left to the discretion of the prosecutor. Now, discovery will be available for defendants who request it, and those who do request it will provide the same to the prosecution.

The benefits of this change are substantial. Early information helps resolve cases more efficiently, conserving the resources of both the parties and the courts.¹ I suspect this explains, at least in part, why many prosecutor's offices already provide discovery in misdemeanor cases.² Earlier resolution of cases means less court time, less attorney time, and, in many cases, less jail time and supervision time. It also will result in less uncertainty for defendants facing prosecution, an unquantifiable yet meaningful benefit. Obtaining discovery is key to determining whether to go to trial or

¹ See The Justice Project, *Expanded Discovery in Criminal Cases* (accessed January 17, 2020) [<https://perma.cc/VV85-EPWB>].

² It may also explain why prosecutors supported amending the court rules to provide discovery in misdemeanor cases. Although the Prosecuting Attorneys Association of Michigan (PAAM) did not support the rule adopted today, it did submit its own proposal, which also would have provided pretrial discovery. And when asked at the public hearing, the PAAM representative refused to express support for the status quo. I thank PAAM for their proposal and for their work on this important issue.

proceed with plea negotiations. Early disclosure of the prosecution's evidence allows a defendant to investigate, formulate a defense, and decide whether to plead guilty without delay.³ Assuming that a criminal defendant knows enough about the alleged crime to adequately investigate it without discovery from the prosecution "flies in the face of the constitutional right to a presumption of innocence."⁴ Although the misdemeanor criminal justice system has operated in Michigan for many years without a regulated discovery process, the benefits that will flow from this new rule are significant and overdue.

Moreover, based on testimony and comments from representatives from the Criminal Defense Attorneys of Michigan (CDAM) and the Prosecuting Attorneys Association of Michigan (PAAM), the system this new rule puts in place will not be a drastic change at all. Rather, it seems that many prosecutors across the state are already providing discovery to misdemeanor criminal defendants. For example, a PAAM representative commented at the public hearing that based on "what I have seen in my practice, it wouldn't really change much that we do in Genesee County." This sentiment was echoed by the CDAM representative, who said that in most places where he practiced, discovery in misdemeanor cases has been routine. "But," he explained, "I'm relying on a prosecutor's largesse. . . . In Southeast Michigan, that largesse is more routine than not. I'm told by my colleagues in many parts of the state it's not so routine."

³ This is especially important for defendants who are innocent and may have no information at all about the offense.

⁴ Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 *Fordham Urb L J* 1097, 1102 (2004).

This is the problem with the lack of any required discovery: a defendant's ability to adequately weigh the pros and cons of accepting a plea deal or proceeding to trial should not, in my view, depend on the particular practice of the prosecuting office handling their case. This rule ensures that the misdemeanor discovery process is uniform throughout Michigan, that people charged with crimes in Ann Arbor and Escanaba get the same justice. More equal justice under law is alone an argument in favor of its adoption.

I respectfully disagree with my dissenting colleagues' assessment that the costs of this rule outweigh its benefits. In my view, my colleagues undervalue the benefits and overstate the burdens this rule will impose, given that discovery will not be required in every misdemeanor prosecution. The Court considered a proposal that would have made disclosure mandatory, whether the defendant wanted it or not. We declined to adopt that rule in light of opposition from both sides of the bar. Instead, the new rule only triggers the disclosure requirements upon request from the defense.

My dissenting colleagues believe that this rule will be costly in terms of the time and resources to prosecutors. But for the reasons outlined above, I question the direction the costs will go. And as most evidence—for example, the police report—can be produced electronically and can therefore be e-mailed to the opposing party, disclosure can be accomplished with minimal time and effort. It is true that this new rule will require defense attorneys to spend more time advising their clients whether to request discovery. And when the defendant decides that discovery is necessary, I do not doubt that more resources will be spent analyzing the

disclosed evidence. But that information will allow defense counsel to advocate for their clients more efficiently and effectively.⁵

I do not agree that this rule will lead to a “more contentious criminal justice process.” In many cases the opposite will be true: early information will lead to early resolution. For the subset of cases for which there is more process, I see no reason why more information will lead to contentiousness or more process will lead to contentiousness. The Michigan Bar is a collegial body, even when involved in the adversary system.

The criminal justice system, like all of the justice system, was designed to be adversarial because an adversarial system produces better justice. When a defendant is armed with the tools to decide whether to plead or face trial and require the prosecution’s case “to survive the crucible of meaningful adversarial testing,” *United States v Cronin*, 466 US 648, 656 (1984), we can be more confident that the outcome is truly just. I see no reason to expect or accept less justice in misdemeanor prosecutions than felonies. Misdemeanor convictions can expose people to fines, jail time, and serious collateral consequences—some that last a lifetime.

I am puzzled that this modest rule change triggers my dissenting colleagues’ concern about the slippery slope of providing more process. All this rule does is give people accused of a crime the right to basic information possessed by the government so they can

⁵ As CDAM explained in its comment, “discovery in the modern age oftentimes is just as important in misdemeanor cases as it is in felony cases, where the trial frequency is similar.” I agree with CDAM that the rule as adopted “strikes the proper balance between cases where the defense may not need discovery, and it is not requested, and where the defense believes discovery is important, and agrees to provide it reciprocally under the court rule.”

make informed decisions about how to proceed. This is especially important today in light of the fact that our criminal justice system has evolved from one based on trials to one based on pleas in the name of efficiency. See Neily, *Our Broken Criminal Justice System*, 41 *Cato Pol Rep* 7, 8 (May/June 2019), available at <<https://www.cato.org/sites/cato.org/files/serials/files/policy-report/2019/6/cpr-v41n3-1.pdf>> (accessed February 6, 2020) [<https://perma.cc/L88Q-CXU8>] (“[P]lea bargaining arose in response to the need to process a rapidly increasing number of criminal defendants through a system that was consciously designed to promote fairness and transparency rather than mere efficiency.”) If the Founders beamed into any criminal courtroom in America, they would not recognize the criminal justice system; the least we can do is make that system of pleas one that is slightly more fair.

Criminal procedure is not just a balance of dollars and cents. After all, it would be more efficient to do away with pleas and trials too, and instead send all accused persons straight to sentencing. Due process, fairness, and, maybe most of all, public confidence in the criminal justice system are difficult to quantify. But they are worth a whole lot.

VIVIANO, J., joins the statement of MCCORMACK, C.J.

MARKMAN, J. (*dissenting*). The majority here adopts an amendment to our court rules that grants a right to discovery to misdemeanor defendants equivalent to that of felony defendants (although with fewer obligations on the part of the former). This amendment will affect an estimated 490,000 criminal defendants in Michigan each year. While I have no quarrel with the good intentions of my colleagues in the majority, I do respectfully take issue with the Court’s assessment of

the costs and benefits of this proposal, an assessment that necessarily lies at the heart of all prudent public decision-making.

Concerning its costs, the following seem quite certain: the proposal will be costly both in terms of private legal expenses and public spending; it will lead to a lengthier and more contentious criminal justice process; it will produce more procedural disputes and hence more appeals; it will impose greater obligations upon defense counsel and lead to more claims of ineffective assistance of counsel; it will result in growing burdens upon the state judiciary and thus a need for greater judicial resources; it will produce countless additional numbers of pleadings and hearings and motions and reconsiderations; and it will divert prosecutorial resources and effort from criminal cases of the highest priority. Yet concerning its benefits, these seem considerably more vague: no compelling case has been made for why this change, described as “drastic” by the state prosecutor association, should be adopted today after 180 years of experience in Michigan with a more informal and relaxed misdemeanor discovery process; no compelling case has been made for why the present case-by-case treatment of misdemeanors—in which accommodations are readily and routinely made by prosecutors, trial courts, and defense counsel—has not sufficed to ensure due process and fairness for defendants; and no testimony or public comments have identified an instance or illustration in which a real prosecutor or a real judge has refused to provide a real misdemeanor defendant information necessary for trial.

In other words, the costs of the present proposal are clear and straightforward—there will be “more” of a great many things as to which “more” is hurtful to the justice system—while the benefits of the proposal are

nebulous and uncertain, in particular concerning the single “more” proposition most compelling in its support: will it secure “more” fairness and justice under law? While good intentions certainly commend this proposal, an estimation of its real-world impact, as well as its practical dislocations, does not. It is a “drastic” and unsettling solution in search of a problem. It is the replacement in our state of a customary and traditional process by which generations of persons of good will and professionalism have labored, successfully, to secure justice for generations of misdemeanor defendants, many of them unrepresented, with a panoply of new rules, procedures, rights, entitlements, and formalisms, which, if ever equivalently successful, will have done so at a considerably greater expense. Ours is an exercise in which the judgments of all past generations of bench and bar in Michigan, none any less committed to fair treatment for misdemeanor defendants, will have been supplanted.

In response to the concurring statement, I offer the following:

(1) My colleagues assert that I am “overstat[ing] the burdens this rule will impose”—that “[a]ll this rule does is give people accused of a crime the right to basic information” However, I remain comfortable in the conclusion that establishing new rights and entitlements and procedures for as many as half a million criminal cases each year in Michigan will affect substantially the budgets and resources of prosecutors, law enforcement agencies, legal services providers, court clerks, and the judiciary itself, throughout our state. Indeed, even before final enactment, the State Bar has “urge[d] additional funding to help prosecutors meet their new responsibilities,” and the Criminal Defense Attorneys of Michigan have asserted that an

increased financial burden is “inescapable.” All of which alone suggest why the new rule would be far better considered by the legislative branch, which might be inclined and equipped to give greater consideration to *both* the benefits *and* the burdens of the new rule.

(2) My colleagues, while asserting that I “undervalue the benefits” of the new rule, state further that it “will not be a drastic change at all,” that “many prosecutors across the state are already providing [such] discovery,” that the system of pleas will become “slightly more fair,” and that, in the words of one prosecutor, “it wouldn’t really change much that we do” If all this is so, why doesn’t this Court simply maintain the status quo of the past 180 years and spare the taxpayers the additional financial burdens, the prosecutors the dilution of their resources, the criminal justice system the delays and dislocations, and the judiciary the transformation of their dockets?

(3) My colleagues invoke “due process” as a justification for imposing these new burdens upon the criminal justice system. But this is a formless and rhetorical “due process,” lacking any context in the historical or traditional judicial practices of our state. There is no end to such a notion of “due process,” for it is always possible to impose additional rights and entitlements and procedures upon the criminal justice system. And there is no end to the argument that “due process” requires something “more,” particularly when “due process” is removed from the realm of “costs and benefits” and the need to balance competing considerations. While my colleagues are correct in the assertion that criminal procedure cannot be dictated entirely on the “balance of dollars and cents,” it also cannot be dictated entirely on the basis of “due process,” for there is never any stopping point, and never any relevant standards, for when

more process is “due” when this principle is fashioned out of whole cloth. There is always “more” process that can be given, and “more” procedure that can be attached, yet neither offers “more” guarantee of justice under law.

(4) And finally, just to make clear if it is not already, the Prosecuting Attorneys Association of Michigan does *not* support this proposal and has testified against it in the administrative processes of this Court.

I respectfully dissent.

ZAHRA, J., joins the statement of MARKMAN, J.

Adopted March 11, 2020, effective May 1, 2020 (File No. 2014-46)—
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, the following amendment of Rule 6.508 of the Michigan Court Rules is adopted, effective May 1, 2020.

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

RULE 6.508. PROCEDURE; EVIDENTIARY HEARING; DETERMINATION.

(A)-(C) [Unchanged.]

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) [Unchanged.]

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding

under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision; for purposes of this provision, a court is not precluded from considering previously decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or if the previously decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence;

(3) [Unchanged.]

(E) [Unchanged.]

Staff Comment: The amendment of MCR 6.508 allows a court to consider previously decided claims in the context of a new claim for relief, consistent with footnote 17 in *People v Johnson*, 502 Mich 541 (2018) or where such previously decided claims (in conjunction with a new claim) create a significant possibility of actual innocence.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 11, 2020, effective May 1, 2020 (File No. 2018-24)—
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, the following amendment of Rule 8.301 of the Michigan Court Rules is adopted, effective May 1, 2020.

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

RULE 8.301. POWERS OF REGISTER OF PROBATE, DEPUTY REGISTERS, AND CLERKS.

(A) [Unchanged.]

(B) Entry of Order Specifying Authority.

(1) To the extent authorized by the chief judge of a probate court by a general order, the probate register; and the deputy probate register; ~~the clerks of the probate court, and other court employees designated in the order;~~ have the authority, until the further order of the court, to do all acts required of the probate judge except judicial acts in a contested matter and acts forbidden by law to be performed by the probate register.

(2) [Unchanged.]

(C) [Unchanged.]

Staff comment: The amendment of MCR 8.301 makes the rule consistent with the statute (MCL 600.834) allowing only the probate registers and deputy probate registers to perform certain administrative tasks that would otherwise be performed by the probate judge.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 11, 2020, effective May 1, 2020 (File No. 2018-34)—
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, the following amendment of Rule 6.425 of the Michigan Court Rules is adopted, effective May 1, 2020.

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

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(F) [Unchanged.]

(G) Appointment of Lawyer and Preparation of Transcript; Scope of Appellate Lawyer’s Responsibilities.

(1) Appointment of Lawyer and Preparation of Transcript.

(a)-(c) [Unchanged.]

(d) Within 7 days after receiving a proposed order from MAACS, the trial court must rule on the request for a lawyer. If the defendant is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is filed within 42 days after entry of the judgment of sentence or, if applicable, within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal. An order denying a request for the appointment of appellate counsel~~A denial of counsel~~ must include a statement of reasons and must inform the defendant that the order denying the request may be appealed by filing an application for leave to appeal in the Court of Appeals in accordance with MCR 7.205.

(e)-(g) [Unchanged.]

(2) [Unchanged.]

Staff Comment: The amendment of MCR 6.425 clarifies that criminal defendants whose request for counsel due to indigency are denied are entitled to appeal that denial.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 11, 2020, effective May 1, 2020 (File No. 2018-35)—
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, the follow-

ing amendment of Rule 8.108 of the Michigan Court Rules is adopted, effective May 1, 2020.

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

RULE 8.108. COURT REPORTERS AND RECORDERS.

(A)-(D) [Unchanged.]

(E) ~~Preparing~~Furnishing Transcript. The court reporter or recorder shall ~~prepare~~furnish without delay, in legible English, a transcript of the records taken by him or her (or any part thereof):

(1) to any party on request. The reporter or recorder is entitled to receive the compensation prescribed in the statute on fees from the person who makes the request.

(2) on order of the trial court. The court may order the transcript prepared without expense to either party. Except when otherwise provided by contract, the court reporter or recorder shall receive from the appropriate governmental unit the compensation specified in the statute on fees for a transcript ordered by a court.

(F) Filing Transcript.

(1) After preparing a transcript upon request of a party or interested person to a case or ~~On~~ order of the trial court, the court reporter or recorder shall ~~promptly file themake and file in the clerk's office a~~ transcript of the proceedings~~his or her records~~, in legible English, of any civil or criminal case (or any part thereof) ~~without expense to either party; the transcript is a part of the records in the case.~~

(2) After an official transcript is filed, copies shall be made only from the official transcript filed with the court~~Except when otherwise provided by contract, the~~

~~court reporter or recorder shall receive from the appropriate governmental unit the compensation specified in the statute on fees for a transcript ordered by a court.~~

(G) [Unchanged.]

Staff comment: The amendment of MCR 8.108 clarifies the rule regarding preparation and filing of transcripts including that a court reporter or court recorder shall file their transcripts with a court when produced for a party or for the court.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 11, 2020, effective immediately (File No. 2019-12)—
REPORTER.

By order dated September 11, 2019, this Court amended Rules 1.109, 3.206, 3.931, and 3.961 of the Michigan Court Rules, effective immediately. At the same time, the Court stated that it would consider at a future public hearing whether to retain the amendments. Notice and an opportunity for comment having been provided, these amendments are retained with the following additional amendments.

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

RULE 3.206. INITIATING A CASE.

(A) Information in Case Initiating Document.

(1)-(2) [Unchanged.]

(3) When any pending or resolved family division or tribal court case exists that involves family members of the person(s) named in the case initiation document filed under subrule (2), the filing party must complete and file a case inventory listing those cases, if known. The case inventory is confidential, not subject

to service requirements in MCR 3.203, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court. The case inventory must be on a form approved by the State Court Administrative Office. This does not apply to outgoing requests to other states and incoming registration actions filed under the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq.* and the Uniform Interstate Family Support Act, MCL 552.2101 *et seq.*

(4)-(6) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 3.931. INITIATING DELINQUENCY PROCEEDINGS.

(A) Commencement of Proceeding. Any request for court action against a juvenile must be by written petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E). When any pending or resolved family division or tribal court case exists that involves family members of the person(s) named in the petition filed under subrule (B), the petitioner must complete and file a case inventory listing those cases, if known. The case inventory is confidential, not subject to service requirements in MCR 3.203, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court. The case inventory must be on a form approved by the State Court Administrative Office.

(B)-(D) [Unchanged.]

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A) Form. Absent exigent circumstances, a request for court action to protect a child must be in the form of a petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E).

When any pending or resolved family division or tribal court case exists that involves family members of the person(s) named in the petition filed under subrule (B), the petitioner must complete and file a case inventory listing those cases, if known. The case inventory is confidential, not subject to service requirements in MCR 3.203, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court. The case inventory must be on a form approved by the State Court Administrative Office.

(B)-(C) [Unchanged.]

Staff Comment: The amendments of MCR 3.206, 3.931, and 3.961 previously adopted by order dated September 11, 2019, are retained; further amendments are included in this order to also add tribal cases to the description of other cases that must be listed on the inventory form, if known.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 19, 2020, effective immediately (File No. 2015-21)—
REPORTER.

On order of the Court, the following amendments of Rules 3.971, 3.972, 3.973, and 3.974 of the Michigan Court Rules are adopted, effective immediately.

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

RULE 3.971. PLEAS OF ADMISSION OR NO CONTEST.

(A) [Unchanged.]

(B) **Advice of Rights and Possible Disposition.** Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

(1)-(5) [Unchanged.]

(6) that appellate review is available to challenge any errors in the adjudicatory process, which may be challenged in an appeal from the court's initial order of disposition~~a court's initial order of disposition following adjudication, and such a challenge can include any issues leading to the disposition, including any errors in the adjudicatory process;~~

(7) that an indigent respondent is entitled to appointment of an attorney to represent the respondent on any appeal as of right~~of the initial dispositional order~~ and to preparation of ~~relevant~~ transcripts; and

(8) [Unchanged.]

(C) ~~Right to Appellate Review. The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the respondent's parental rights are terminated at the initial dispositional hearing pursuant to MCR 3.977(E). In addition, t~~The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the court fails to properly advise the respondent of their right to appeal pursuant to subrule (B)(6)-(8).

(D) [Unchanged.]

RULE 3.972. TRIAL.

(A)-(E) [Unchanged.]

(F) ~~Respondent's Rights Following Trial and Possible Disposition.~~ If the trial results in a verdict that one or more statutory grounds for jurisdiction has been proven, the court shall advise the respondent orally or in writing that:

(1) appellate review is available to challenge any errors in the adjudicatory process, which may be chal-

~~lenged in an appeal from the court's~~ a court's assumption of jurisdiction in an appeal of the initial order of disposition,

(2) that an indigent respondent is entitled to appointment of an attorney to represent the respondent on any appeal as of right and to preparation of relevant transcripts, and

(3) [Unchanged.]

(G) Right to Appellate Review. ~~The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the respondent's parental rights are terminated at the initial dispositional hearing pursuant to MCR 3.977(E). In addition, t~~The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the court fails to properly advise the respondent of their right to appeal pursuant to subrule (F)(1)-(3).

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(F) [Unchanged.]

(G) Respondent's Rights Upon Entry of Dispositional Order. When the court enters an initial order of disposition following adjudication the court shall advise the respondent orally or in writing:

(1) that at any time while the court retains jurisdiction over the minor, the respondent may challenge the continuing exercise of that jurisdiction by filing a motion for rehearing; under MCL 712A.21 ~~or MCR 3.992~~; or by filing an application for leave to appeal with the Michigan Court of Appeals,

(2) that appellate review is available to challenge ~~the court's both an~~ initial order of disposition following adjudication ~~and any order removing a child from a parent's care and custody,~~

(3) that an indigent respondent is entitled to appointment of an attorney to represent the respondent on any appeal as of right and to preparation of ~~relevant~~ transcripts, and

(4) [Unchanged.]

(H)-(J) [Unchanged.]

RULE 3.974. PROCEDURES FOR CHILD AT HOME; PETITION AUTHORIZED.

(A)-(C) [Unchanged.]

(D) Procedure Following Postadjudication Out-of-Home Placement. If the child is in placement under subrule (B)(2) or (C)(3)(b), the court shall proceed as follows:

(1)-(2) [Unchanged.]

(3) The court shall advise the parent, guardian, or legal custodian of the right to appeal the order removing the child from a parent's care or custody.

Staff Comment: The amendments of MCR 3.971, 3.972, 3.973, and 3.974 make various clarifying changes to rules the Court adopted in June 2019.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted June 10, 2020, effective immediately (File No. 2020-14)—
REPORTER.

On order of the Court, this is to advise that the amendment of Rule 4.202 of the Michigan Court Rules is adopted, effectively immediately, during the public comment period. Concurrently, individuals are invited to comment on the form or the merits of the amendment. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigan-supremecourt/rules/pages/default.aspx>].

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

RULE 4.202. SUMMARY PROCEEDINGS: LAND CONTRACT FORFEITURE.

(A)-(G) [Unchanged.]

(H) Answer; Default.

(1) [Unchanged.]

(2) Default.

(a) If the defendant fails to appear, the court, on the plaintiff's motion, may enter a default and may hear the plaintiff's proofs in support of judgment. If satisfied that the complaint is accurate, the court must enter a default judgment under MCL 600.5741, and in accord with subrule (J). The ~~plaintiff must mail the default judgment~~ must be mailed to the defendant ~~and file a~~

~~proof of service with the court. by the court clerk~~
~~and~~The default judgment must inform the defendant that (if applicable)

(i)-(ii) [Unchanged.]

(b)-(c) [Unchanged.]

(3) [Unchanged.]

(I)-(L) [Unchanged.]

Staff comment: The amendment of MCR 4.202(H) makes the rule consistent with the requirements of MCR 4.201(F)(4) by requiring the court clerk to mail defendant notice of entry of a default judgment. The rule was amended previously to require plaintiff to mail a default judgment to the defendant, unlike MCR 4.201(F)(4), which was not amended. Having two different procedures for matters that are both summary proceedings has caused confusion for courts. This amendment returns the language to its previous status and makes MCR 4.201 and MCR 4.202 consistent again.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-14. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

SUPREME COURT CASES

MANIACI v DIROFF

Docket No. 158005. Argued on application for leave to appeal October 16, 2019. Decided November 21, 2019.

In 2014, Jeffrey S. Maniaci filed an action in the Gladwin Circuit Court against Thomas and Mandy Diroff, asserting that he had the right to use a piece of property (Parcel B) that separated Vonda Lane from the Tittabawassee River, also known at that location as Secord Lake; defendants counterclaimed, arguing that they owned Parcel B. In June 2015, plaintiff and defendants entered into a consent judgment in which defendants conveyed to plaintiff and others an easement to traverse Parcel B; specifically, defendants conveyed the right of ingress and egress access to and from the water's edge of the Tittabawassee River across Parcel B to Vonda Lane. The easement expressly allowed the temporary mooring and launching of watercraft, including by boat trailer, but prohibited use of the easement for nontemporary mooring, docks, and/or wharfs. In April 2016, plaintiff moved to hold defendants in contempt for not complying with the consent judgment, asserting that defendants had failed to remove certain barriers on Parcel B; plaintiff also requested to regrade the easement to allow a trailer to launch a boat from the parcel. After a hearing on the issue, the court, Thomas R. Evans, J., denied the motion. Plaintiff sought leave to appeal the postjudgment order in the Court of Appeals, and in an unpublished order entered November 23, 2016 (Docket No. 333952), the Court denied the application. In the interim, defendants had conveyed Parcel B to Kenneth G. Siler and Tonya L. Siler, and in July 2016, the Silers conveyed Parcel B to the Kenneth G. Siler and Tonya L. Siler Revocable Trust dated April 3, 2013. Plaintiff filed an application for leave to appeal in the Supreme Court, and the Court remanded the case to the Court of Appeals for consideration as on leave granted. 500 Mich 1057 (2017). On remand, the Court of Appeals, METER, P.J., and GADOLA and TUKEL, JJ., affirmed the circuit court order in an unpublished per curiam opinion issued May 15, 2018 (Docket No. 333952), reasoning that just because it was not feasible to back a boat trailer fully to the water's edge did not prevent the easement from being used to launch boats, including with the use of a boat trailer.

Plaintiff appealed, and the Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other action. 503 Mich 1024 (2019).

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal, *held*:

An easement holder cannot make improvements to the servient estate if the improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement. Relatedly, the conveyance of an easement gives to the grantee all the rights that are incident or necessary to the reasonable and proper enjoyment of the easement. In this case, the easement expressly included the right to bring a boat trailer onto Parcel B and to use it to launch watercraft into the water. Given the dictionary definition of the word “launch”—that is, to set (a boat or ship) in the water—the scope of the easement necessarily included the ability to bring a boat trailer at least to the water’s edge; in other words, the easement had to include that ability because in order to set a watercraft in the water, including by boat trailer, one had to be able to bring the trailer at least to the water’s edge. In addition, because plaintiff had an easement to launch boats, including by boat trailer, and the ability to perform that action was necessary to the reasonable and proper enjoyment of the easement, he had the right to regrade the shoreline of Parcel B for easier access to the water.

Court of Appeals judgment reversed, circuit court order denying plaintiff’s request to adjust the slope of Parcel B vacated in part, and case remanded to the circuit court.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for Jeffrey S. Maniaci.

Bommarito Law Offices, PLLC (by *Alexander D. Bommarito*) for the Kenneth G. Siler and Tonya L. Siler Revocable Trust dated April 3, 2013.

PER CURIAM. This case involves the scope of an easement to traverse a piece of property (Parcel B) that separates a road (Vonda Lane) from the Tittabawassee River, also known at this location as Secord Lake. Pursuant to a June 18, 2015 consent judgment, the

defendants¹ conveyed an easement across Parcel B for ingress and egress access to and from the Tittabawassee River to the plaintiff, Jeffrey S. Maniaci, and others. The consent judgment specified that the easement “may also be used for the temporary mooring and launching of watercraft, including by boat trailer, but may not be used for non-temporary mooring, docks, and/or wharfs.”

To decide this case, we must answer two questions. First, does the scope of the easement include backing a boat trailer all the way to the water’s edge? Second, is it necessary for effective use of the easement to regrade the shoreline to allow such access by boat trailer?

We answer both of those questions yes. Accordingly, we reverse the judgment of the Court of Appeals, vacate in part the July 11, 2016 order of the Gladwin Circuit Court, and remand this case to the Gladwin Circuit Court for further proceedings consistent with this opinion.

Michigan law on easements is well established. In *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 41; 700 NW2d 364 (2005), quoting *Little v Kin*, 468 Mich 699, 701; 664 NW2d 749 (2003), this Court reaffirmed “[a] fundamental principle of easement law”: the easement holder cannot “make improvements to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement.” (Quotation marks omitted.) The Court also quoted

¹ In June 2016, the defendants-appellees Thomas and Mandy Diroff conveyed Parcel B to Kenneth G. Siler and Tonya L. Siler. In July 2016, the Silers then conveyed Parcel B by quitclaim deed to appellee, the Kenneth G. Siler and Tonya L. Siler Revocable Trust dated April 3, 2013. This opinion uses “the defendants” to refer to the Diroffs and “the appellee” to refer to the Siler Trust.

Unverzagt v Miller, 306 Mich 260, 265; 10 NW2d 849 (1943), for the related proposition that “the conveyance of an easement gives to the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement.” (Quotation marks and citation omitted.)

Applying these legal principles, we have little trouble concluding that the unambiguous terms of the easement provide an express right to back a boat trailer to the water’s edge. The consent judgment defines the easement as extending from the end of Vonda Road *to the water’s edge* and states that the easement may be used for the “launching of watercraft, including by boat trailer . . .” See ¶ 1 of the consent judgment (defining Parcel B, in part, as “to the water’s edge of the Tittabawassee River”); see also ¶ 2 (granting the plaintiff “an appurtenant non-recreational easement for ingress and egress access to and from the Tittabawassee River (a/k/a Secord Lake) *across Parcel B to and from Vonda Lane*”) (emphasis added). Thus, the easement expressly includes the right to bring a boat trailer onto the property and to use the trailer to “launch” watercraft into the water. A lay dictionary includes as its first definition of the word “launch” “to set (a boat or ship) in the water.” *Random House Webster’s College Dictionary* (2003); see also *Merriam-Webster’s Collegiate Dictionary* (11th ed) (defining “launch” as “to set (a boat or ship) afloat”). Because in order to “set a watercraft in the water, including by boat trailer,” one must be able to bring a boat trailer at least to the water’s edge, the scope of the easement must include the ability to do so.² We therefore dis-

² The Court of Appeals erred by going beyond the language of the consent judgment to determine the scope of the easement. The Court concluded that regrading the shoreline was outside the scope of the

agree with the Court of Appeals' contrary conclusion that "just because it is not feasible to back a boat trailer all the way to the water's edge does not prevent the easement from being used to launch boats, including with the use of a boat trailer." *Maniaci v Diroff*, unpublished per curiam opinion of the Court of Appeals, issued May 15, 2018 (Docket No. 333952), p 5.

We similarly have little difficulty concluding that the plaintiff's request to regrade the shoreline of Parcel B is "necessary to the reasonable and proper enjoyment of the easement."³ *Unverzagt*, 306 Mich at 265 (quotation marks and citation omitted). The appellee's counsel conceded at oral argument that it is currently not possible to set a boat in the water by boat trailer on Parcel B. The current slope of Parcel B therefore both prevents a boat trailer from being backed to the water's edge, a permitted use within the scope of the easement, and generally inhibits water access by making it difficult to get boats of any kind into the water.

The plaintiff has an easement to launch boats, including by boat trailer, on Parcel B. He seeks to do just that by improving the land to facilitate easy access to the water by regrading the shoreline.⁴ This the law

easement, in part, because of evidence that the shoreline remained unchanged from the commencement of this litigation and evidence demonstrating that the issue of regrading the shoreline did not arise until long after entry of the consent judgment. Reference to extrinsic evidence is not appropriate because the language of the easement is unambiguous. *Little*, 468 Mich at 700 & n 2.

³ The appellee makes nothing more than a conclusory statement that the regrading of the shoreline will unreasonably burden its estate. We consider a challenge under that part of the *Blackhawk* test to be abandoned because the appellee failed to present any supporting argument.

⁴ We reject the appellee's contention that regrading the shoreline amounts to "damage to the surface of the Easement," thereby implicating ¶ 4 of the consent judgment (placing responsibility "for restoring the

gives him the right to do. We reverse the judgment of the Court of Appeals, vacate the portion of the Gladwin Circuit Court's July 11, 2016 order denying the plaintiff's request to adjust the grade or slope of Parcel B, and remand to that court for further proceedings consistent with this opinion.⁵

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred.

Easement to its pre-damaged state" on those who created such damage). Rather, we agree with the Court of Appeals that "[g]rading the parcel to alter the slope sufficiently to launch a boat from a boat trailer" is an improvement. *Maniaci*, unpub op at 4.

⁵ We decide only that the plaintiff is entitled to make some alteration to the shoreline to facilitate the launching of boats by boat trailer and leave it for the trial court to address any additional issues on remand that are beyond the scope of that narrow holding.

PEOPLE v RAJPUT

Docket No. 158866. Decided January 24, 2020. Reconsideration granted and opinion amended by order entered at 505 Mich 1112 (2020). Nadeem Y. Rajput was convicted in the Wayne Circuit Court, Qiana D. Lillard, J., of second-degree murder, MCL 750.317. Defendant was driving his vehicle with another man, known only as Haus, as a passenger. The victim was driving a red Malibu with her boyfriend, Dewayne Clay, as a passenger. When the Malibu approached defendant's vehicle, two individuals in the Malibu fired gunshots at defendant and Haus. No one was injured. Defendant and Haus returned to defendant's house but soon after went in search of the Malibu. When they found the Malibu, the victim was the sole occupant. Defendant and Haus chased the Malibu, eventually trapping it, and then approached the Malibu on foot. An argument ensued, and multiple gunshots were fired, resulting in the victim's death. Defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant argued that Haus had shot the victim but that Haus had done so in self-defense when the victim reached for a gun in her vehicle. Defendant requested that a self-defense instruction be read to the jury, but the court denied the request, citing *People v Droste*, 160 Mich 66 (1910), for the proposition that a defendant who claims that another person committed the homicide is not entitled to a self-defense instruction. Defendant also tried to admit testimony from Pierre Carr, the brother of Clay, to support his self-defense theory. Carr testified at an investigative-subpoena hearing that Clay had arrived at his house on the day of the shooting and called the victim on the phone as she was being chased. According to Carr, Clay told the victim to "shoot, shoot." The trial court refused to admit the testimony, finding it irrelevant. The jury acquitted defendant of first-degree murder and felony-firearm but convicted defendant of second-degree murder. At sentencing, the court noted defendant's guidelines minimum sentence range of 225 to 375 months' imprisonment but departed upward, sentencing defendant to 46 to 95 years' imprisonment. Defendant appealed. In an unpublished per curiam opinion issued on October 25, 2018

(Docket No. 339117), the Court of Appeals, MURRAY, C.J., and BORRELLO and RONAYNE KRAUSE, JJ., affirmed the trial court's ruling on the self-defense instruction and Carr's testimony. However, the Court of Appeals disagreed with the trial court's reasoning on the self-defense instruction, holding that defendant was not entitled to the instruction because defendant and Haus were the initial aggressors and could have fled. Defendant sought leave to appeal in the Supreme Court.

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

1. Jury instructions cannot exclude a defendant's theory of self-defense if evidence exists to support it. In this case, the trial court committed legal error when it denied defendant's requested self-defense instruction on the basis of the proposition that a defendant who claims that another person committed the homicide is not entitled to a self-defense instruction. The opinion in *Droste* was inapposite because the defendant in that case did not claim that the principal acted in self-defense. Furthermore, the Court of Appeals engaged in improper fact-finding when it held that defendant and Haus were the initial aggressors and could have fled. Defendant argued that he did not seek out the victim to harm her but rather to question her regarding the identity of the shooter and the reason for the shooting. According to defendant, people in a red Malibu had previously shot at a vacant home next to his home. Additionally, the Court of Appeals failed to identify any evidence supporting its theory that defendant could have fled at the time he and Haus confronted the victim. Defendant argued that the victim had a gun, and the police did find a gun in the front seat of the victim's car. Regardless of the merits of this defense, whether defendant and Haus were the initial aggressors or could have fled were issues for the jury to decide because defendant presented sufficient evidence to satisfy his burden of proof on self-defense. Accordingly, the Court of Appeals erred by affirming the denial of defendant's requested self-defense instruction.

2. MRE 401 provides that relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 402 provides that all relevant evidence is generally admissible. In this case, the Court of Appeals erred by finding Carr's testimony irrelevant. Carr's testimony was relevant because it addressed a material issue—the issue of self-defense. In particular, it addressed whether the victim had reached for the gun found in her car as defendant

and Haus approached her. And Carr's testimony had probative value because it had some tendency to make it more likely that the victim reached for a gun when instructed by Clay to "shoot, shoot" and that Haus responded in self-defense. Finally, because the Court of Appeals made an improper factual finding that defendant and Haus were the initial aggressors and could have fled, it also erred by finding Carr's testimony irrelevant for this reason.

Reversed and remanded to the Court of Appeals.

Nadeem Rajput *in propria persona*.

PER CURIAM. We consider whether defendant, Nadeem Yousaf Rajput, was entitled to his requested self-defense instruction and whether the trial court erred by refusing to admit testimony related to defendant's theory of self-defense.

On May 7, 2016, defendant was driving his vehicle with another man known only as Haus. At the same time, the victim, Lakeisha Henry, was driving a red Malibu with her boyfriend, Dewayne Clay, as a passenger. The Malibu approached defendant's vehicle, and two individuals in the Malibu fired gunshots at defendant and Haus. No one was injured. Rather than immediately confront the Malibu after it drove off, defendant and Haus first returned to defendant's home. Soon after, however, they left and went in search of the Malibu. By the time they found it, the victim was the sole occupant. Defendant and Haus chased the Malibu, eventually trapping it, and then approached the Malibu on foot. An argument ensued, and multiple gunshots were fired, resulting in the victim's death.

At trial, defendant argued that Haus had shot the victim but that Haus had done so in self-defense when the victim reached for a gun in her vehicle. Defendant requested that a self-defense instruction be read to the jury, but the trial court denied his request, citing *People v Droste*, 160 Mich 66; 125 NW 87 (1910), for the

proposition that a defendant who claims that another person committed the homicide is not entitled to a self-defense instruction. Defendant also tried to admit testimony from Pierre Carr, the brother of Clay, to support his self-defense theory. Carr testified at an investigative-subpoena hearing that Clay had arrived at his house on the day of the shooting and called the victim on the phone as she was being chased. According to Carr, Clay told the victim to “shoot, shoot.” The trial court refused to admit the testimony, finding it irrelevant. The jury convicted defendant of second-degree murder, MCL 750.317, and the trial court sentenced him to 46 to 95 years in prison.

The Court of Appeals affirmed the trial court’s rulings on the self-defense instruction and Carr’s testimony. Although it disagreed with the trial court’s reasoning, the Court held that defendant was not entitled to a self-defense instruction because he and Haus were the initial aggressors and could have fled. *People v Rajput*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2018 (Docket No. 339117), p 5. The Court of Appeals also held that Carr’s testimony was irrelevant. *Id.* at 5-6.

We reverse the Court of Appeals’ holding that defendant was not entitled to his requested self-defense instruction and that Carr’s testimony was irrelevant, and we remand this case to the Court of Appeals for further consideration in light of this opinion.

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The first issue is whether defendant was entitled to his requested self-defense instruction. “If supported by the evidence, defendant’s theory of the case must be given.” *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978), citing *People v Reed*, 393 Mich 342,

350; 224 NW2d 867 (1975). And “[o]nce a defendant satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of disproving the affirmative defense of self-defense beyond a reasonable doubt.” *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010). The sufficiency of the evidence of a defendant’s self-defense theory is “for the jury to decide under proper instructions . . .” *Hoskins*, 403 Mich at 100. Those instructions cannot exclude the theory of self-defense “if there is evidence to support [it].” *Reed*, 393 Mich at 350. We review the trial court’s determination that the jury instruction was inapplicable for an abuse of discretion. *Dupree*, 486 Mich at 702. “A trial court necessarily abuses its discretion when it makes an error of law.” *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

We agree with the Court of Appeals that the trial court’s reason for denying defendant’s requested self-defense instruction was wrong. According to the trial court, defendant’s claim that Haus shot the victim precluded an instruction on self-defense. But an aider and abettor is relieved of liability if the principal acted in self-defense. See *People v Pearce*, 369 Mich 692, 695; 120 NW2d 838 (1963). Our opinion in *Droste* is inapposite because in that case the defendant did not claim that the principal acted in self-defense. *Droste*, 160 Mich at 80 (holding that no self-defense instruction was warranted when the defendant claimed that someone else had committed the homicide and the defendant had not requested a self-defense instruction). Therefore, the trial court made a legal error that amounted to an abuse of discretion.

But we also hold that the Court of Appeals engaged in improper fact-finding when it held that defendant and Haus were the initial aggressors and could have fled instead of responding with deadly force when the victim allegedly reached for a weapon. First, “an initial aggressor (i.e., one who is the first to use deadly force against the other) . . . is generally not entitled to use deadly force in self-defense.” *People v Riddle*, 467 Mich 116, 120 n 8; 649 NW2d 30 (2002). Though the Court of Appeals determined that defendant was an initial aggressor, defendant argued that he did not seek out the victim to harm her. Instead, he testified that he pursued the victim only to find out who was shooting at him and why. According to defendant, he also wanted to find out who was shooting at him because people in a red Malibu had previously shot at a vacant home next to his home—a story confirmed by his father at trial. Second, “[o]ne who is involved in a physical altercation in which he is a willing participant . . . is *required* to take advantage of any reasonable and safe avenue of retreat before using deadly force against his adversary, should the altercation escalate into a deadly encounter.” *Id.* at 120. The Court of Appeals determined that defendant could have fled at the time he and Haus confronted the victim. But the Court failed to point to any evidence supporting this theory. Defendant, on the other hand, testified that the victim had reached for a gun in the car and that Haus reacted to this in self-defense; the police did find a gun in the front passenger seat of the victim’s car, which could lend support to defendant’s version of events. Regardless of the merits of this defense, whether defendant and Haus were the initial aggressors or could have fled were issues “for the jury to decide” because defendant presented sufficient evidence to satisfy his burden of proof on self-defense. *Hoskins*, 403 Mich at 100. There-

fore, the Court of Appeals erred by affirming the denial of defendant's requested self-defense instruction.

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The second issue is whether Carr's testimony was relevant to defendant's theory of self-defense. Under MRE 401, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable" is relevant. Accordingly, evidence is relevant if it is material and has probative value. See *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). "Materiality is the requirement that the proffered evidence be related to 'any fact that is of consequence' to the action." *Id.*, quoting MRE 401. And evidence has probative value when it "tends 'to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" *Crawford*, 458 Mich at 389-390, quoting MRE 401. This "threshold is minimal: 'any' tendency is sufficient probative force." *Crawford*, 458 Mich at 390, quoting MRE 401. Finally, all relevant evidence is generally admissible. MRE 402. We review evidentiary decisions under MRE 401 for an abuse of discretion. See *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017).

The Court of Appeals affirmed the trial court, finding the evidence irrelevant.¹ It found that "even if Clay told [the victim] to shoot at defendant, that does not make it any more or less likely that [the victim] actually shot at defendant." *Rajput*, unpub op at 6. The

¹ The Court of Appeals suggested that Carr's testimony was inadmissible hearsay but then decided the case on relevance grounds instead of hearsay. *Rajput*, unpub op at 5-6. Because the Court of Appeals has yet to decide this issue, we do not address it here.

Court also found Carr’s testimony irrelevant “because defendant and Haus were the initial aggressors in pursuing [the victim]” and, as a result, “defendant was not justified in responding with deadly force even if we assume that [the victim] actually fired a gun at defendant at some point during the incident.” *Id.* We disagree with the Court of Appeals’ conclusion. Carr’s testimony was relevant because it addressed a material issue—the issue of self-defense. In particular, it addressed whether the victim had reached for the gun found in her car as defendant and Haus approached her. And Carr’s testimony has probative value because it has some tendency—however minimal—to make it more likely that the victim reached for a gun when instructed by Clay to “shoot, shoot” and that Haus responded in self-defense. Finally, as discussed earlier, because the Court of Appeals made an improper factual finding that defendant and Haus were initial aggressors and could have fled—and thus were not entitled to a self-defense instruction—it also erred by finding Carr’s testimony irrelevant for this reason.

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We reverse the Court of Appeals’ holdings that defendant was not entitled to his requested self-defense instruction and that Carr’s testimony was irrelevant. We remand this case to the Court of Appeals to address whether the trial court’s erroneous denial of defendant’s requested self-defense instruction was harmless beyond a reasonable doubt. See *People v Anderson (After Remand)*, 446 Mich 392 (1994); *People v Carines*, 460 Mich 750 (1999). The Court of Appeals shall also address whether Carr’s investigative-subpoena testimony was admissible under MRE 804(b)(1) and whether Clay’s statement to

the victim was admissible either as an excited utterance under MRE 803(2) or because it was not hearsay under MRE 801(c). If the panel concludes that the evidence was admissible, it shall consider whether exclusion of Carr’s testimony was harmless or whether it is more probable than not that the error was outcome-determinative. See *Lukity*, 460 Mich at 496.

Finally, although he was charged with first-degree murder, the jury acquitted defendant of that charge. At sentencing, the trial court noted defendant’s guidelines minimum sentence range of 225 to 375 months but departed upward. In doing so, the trial court remarked that defendant appeared to be guilty of first-degree murder, not second, and suggested that the jury verdict might have been a compromise. If the Court of Appeals affirms defendant’s conviction, it shall reconsider the trial court’s sentence in light of *People v Beck*, 504 Mich 605, 609; 939 NW2d 213 (2019) (“Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime.”).²

We do not retain jurisdiction.

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred.

² Because defendant’s sentence must first be reconsidered in light of *Beck*, we decline to address defendant’s argument that his sentence is unreasonable or disproportionate.

PEOPLE v FURLINE
PEOPLE v JENKINS

Docket Nos. 158296 and 158298. Argued on application for leave to appeal October 3, 2019. Decided March 12, 2020.

Terrance A. Furline and Alvin B. Jenkins, Sr., were convicted, after a joint jury trial in the Saginaw Circuit Court, of criminal enterprise, arson, retail fraud, and related crimes under an aiding-and-abetting theory in connection with a fire and subsequent attempted theft at a home-improvement store in Saginaw. Furline moved to be tried separately from Jenkins, arguing that a joint trial would prejudice his substantial rights because Jenkins had stated, in a videotaped interview with detectives from the Saginaw County Sheriff's Department, that Furline had told Jenkins he planned to set the fire and encouraged Jenkins to steal items during the ensuing commotion. Furline further argued that, because he planned to defend against the charges on the grounds that he was presumed innocent and that Jenkins had acted alone in setting the fire and attempting to commit retail fraud, their defenses were antagonistic and mutually exclusive and Furline would be denied his right to cross-examine Jenkins about his statements in the interview. The court, James T. Borchard, J., denied the motion for severance, and, after defendants were tried jointly and convicted, they appealed their convictions. The Court of Appeals, O'BRIEN, P.J., and CAVANAGH and STEPHENS, JJ., consolidated the appeals and held that the trial court had abused its discretion by denying the motion for severance. Accordingly, the Court of Appeals vacated defendants' convictions and sentences and remanded the cases for new trials. *People v Furline*, unpublished per curiam opinion of the Court of Appeals, issued July 3, 2018 (Docket No. 335906). The prosecution sought leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 503 Mich 942 (2019).

In a per curiam opinion signed by Chief Justice McCORMACK and Justices MARKMAN, ZAHRA, VIVIANO, and CLEMENT, in lieu of granting leave to appeal, the Supreme Court *held*:

The Court of Appeals erred by vacating defendants' convictions and sentences and remanding for a new trial. Severance is mandated only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that the defendant's substantial rights will be prejudiced by a joint trial and that severance is the necessary means of rectifying the potential prejudice. The trial court correctly ruled that Furline failed to show that he was entitled to severance in his motion and supporting affidavit, and this decision must be upheld because there was no significant indication on appeal that the requisite prejudice actually occurred at trial.

1. MCR 6.121(C) requires a trial court to sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to a defendant's substantial rights. Under *People v Hana*, 447 Mich 325 (1994), severance is mandated only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that the defendant's substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to show that the requisite prejudice to substantial rights in fact occurred at trial precludes the reversal of a joinder decision. While severance may be warranted when defendants' mutually exclusive or antagonistic defenses create a serious risk of prejudice, the defenses must be irreconcilable and create such great tension that a jury would have to believe one defendant at the expense of the other. Prejudice requiring reversal occurs only when the competing defenses are so antagonistic at their cores that both cannot be believed. Incidental spillover prejudice, which is almost inevitable in a multidefendant trial, does not suffice for reversal.

2. The trial court correctly ruled that Furline failed to show that he was entitled to severance in his motion and supporting affidavit. Furline offered two theories of prejudice. First, Furline anticipated that the prosecutor would offer into evidence a video in which Jenkins denied setting the fire in the Saginaw store and stated that Furline admitted setting that fire. Furline argued that he would be prejudiced by the inability to confront and to cross-examine Jenkins about these statements. Second, believing that Jenkins would claim that Furline acted alone, Furline argued that he would be prejudiced by the need to defend not only against the prosecutor's case but also against Jenkins's defense theory. But at the hearing on Furline's motion, the prosecutor expressed his intent not to offer the video into evidence. The allegations in Furline's affidavit did not demonstrate that his substantial rights

would be prejudiced at trial without severance because these allegations were either irrelevant, involved legal conclusions rather than facts, or involved the contents of the video that the prosecutor agreed not to offer into evidence.

3. The trial court's decision must be upheld because there was not a significant indication on appeal that the requisite prejudice actually occurred at trial. Furline feared that he would have to defend against Jenkins's theory that Furline set the fire and that, in light of Jenkins's theory, he would struggle to show that Jenkins acted alone. Neither fear came to pass because Jenkins offered no evidence that Furline started the fire at the Saginaw store and Furline offered no evidence that Jenkins acted alone. The record did not support the proposition that either defendant sought to convict the other or that either had to defend in turn against the other's antagonistic defense. Each defendant experienced, at most, incidental spillover prejudice rather than the degree of prejudice required to reverse the trial court's joinder decision.

Court of Appeals judgment reversed; defendants' convictions and sentences reinstated; Furline's cross-application for leave to appeal denied.

Justice CAVANAGH, joined by Justice BERNSTEIN, concurred but wrote separately to avoid possible misinterpretations. She stated that review of the trial court's decision to deny pretrial severance is accomplished by reference to the pretrial motion and affidavit, while review of prejudice that might have occurred at trial is a separate inquiry. Review of the trial court's pretrial decision to deny severance in this case was simple, given that the only pretrial prejudice theory advanced by either defendant was addressed when the prosecution agreed to forgo the use of Jenkins's recorded statement. With respect to whether there was any significant indication on appeal that the requisite prejudice in fact occurred at trial, she noted that the defenses actually presented at trial were neither mutually exclusive nor irreconcilable; rather, each defendant argued that the prosecution had not met its burden against either of them. Justice CAVANAGH further stated that she did not understand the Court's opinion to hold that the prosecution can avoid severance simply by charging codefendants under an aiding-and-abetting theory because the relevant inquiry is not the prosecution's theory but the defenses offered by the defendants.

CRIMINAL LAW — JOINT TRIALS — SEVERANCE — AIDING AND ABETTING.

MCR 6.121(C) requires a trial court to sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to a defendant's substantial rights; severance is

mandated only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that the defendant's substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice; for severance to be warranted when defendants' mutually exclusive or antagonistic defenses create a serious risk of prejudice, the defenses must be irreconcilable and create such great tension that a jury would have to believe one defendant at the expense of the other.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, and *Melissa J. Hoover*, Assistant Prosecuting Attorney, for the people.

Ronald D. Ambrose for Terrance A. Furline.

Jonathan B. D. Simon for Alvin B. Jenkins, Sr.

Amicus Curiae:

D. J. Hilson, *Kym L. Worthy*, *Jason W. Williams*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

PER CURIAM. In October 2015, a fire broke out at the Home Depot in Flint Township and, in the ensuing commotion, merchandise was stolen. The next day, a fire broke out at the Home Depot in Saginaw, but an attentive employee, tipped off that morning by the Flint store's loss-prevention staff, foiled a theft attempt by grabbing a cart full of big-ticket items before a man, who turned out to be Alvin Jenkins, could make off with it. After a police investigation, Jenkins and Terrance Furline were arrested and charged in Saginaw County with criminal enterprise, arson, retail fraud, and related crimes, under an aiding-and-abetting theory. Furline moved to be tried separately

from Jenkins. The trial court denied Furline’s motion. After a joint trial, a jury convicted each defendant on all charges. Furline appealed the severance issue in the Court of Appeals, which vacated and remanded for proceedings “with some device of severance.” The prosecutor then sought this Court’s leave to appeal.¹ Rather than grant leave, we reverse the Court of Appeals’ judgment and reinstate defendants’ convictions and sentences.

The decision to try two defendants jointly or separately lies within the discretion of the trial court, and that decision will not be overturned absent an abuse of that discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994); see also MCL 768.5.

Under MCR 6.121(C), the trial court “must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.” According to *Hana*, 447 Mich at 346, “[s]everance is mandated . . . only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice.” The affidavit or offer of proof must state “facts on which the court might determine whether . . . a joint trial might result in prejudice.” *Id.* at 339 (cleaned up). A court can reject statements that are “conclusory” or that “lack[] sufficient specificity to enable the trial court to accurately determine what the [joined defendants’] defenses would be, how the defenses would affect each other, and whether the defendants’ respec-

¹ Furline cross-applied for leave to appeal. We deny his cross-application because we are not persuaded that the questions he presented should be reviewed by this Court.

tive positions were indeed mutually exclusive or merely inconsistent.” *Id.* at 355. A defendant’s claim of prejudice must be “substantiated” through “concrete facts.” *Id.* We stressed in *Hana* that the failure to show prejudice to substantial rights, “absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.” *Id.* at 347.

As *Hana* acknowledged, severance may be warranted when defendants’ “mutually exclusive” or “antagonistic” defenses create a “serious risk” of prejudice. *Id.* at 344-346 (cleaned up). But we explained that the defenses must be “irreconcilable” and create such great tension “that a jury would have to believe one defendant at the expense of the other.” *Id.* at 349 (cleaned up). “Defenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant.” *Id.* at 350 (cleaned up). Prejudice requiring reversal occurs “only when the competing defenses are so antagonistic at their cores that both cannot be believed.” *Id.* at 349-350 (cleaned up). But “incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.” *Id.* at 349 (cleaned up). When the prosecutor relies on aiding-and-abetting liability, finger-pointing—each defendant’s proceeding on a theory that “the other guy did it”—“does not create mutually exclusive antagonistic defenses.” *Id.* at 361. Both defendants may be found “similarly liable without any prejudice or inconsistency because one found guilty of aiding and abetting can also be held liable as a principal.” *Id.*

In his trial motion and supporting affidavit, Furline offered two theories of prejudice. First, he anticipated

that the prosecutor would offer into evidence a video in which Jenkins denied setting the fire in the Saginaw store, accused Furline of setting that fire, and stated that Furline admitted setting that fire; Furline argued that he would be prejudiced by the inability to confront and to cross-examine Jenkins about these statements. Cf. *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). Second, believing that Jenkins would claim that Furline acted alone, Furline argued that he would be prejudiced by the need to defend not only against the prosecutor’s case but also against Jenkins’s defense theory. In a hearing on Furline’s motion, Furline’s counsel focused on the Jenkins video as a source of prejudice, and the prosecutor expressed his intent not to offer the video into evidence. In a written opinion, the trial court denied relief on the basis that Furline had shown “merely antagonistic,” but not “irreconcilable,” “claims as to who was responsible for setting the fire.”

We agree with the trial court that Furline failed to show that he was entitled to severance in his motion and affidavit. Furline’s affidavit offered the following allegations:

1. I am charged, along with co-defendant, Alvin Bernard Jenkins, Sr., with Criminal Enterprise, Conspiracy, Arson and Retail Fraud as a result of an incident on October 29, 2015, at Home Depot in Kochville Township, Saginaw County, MI.
2. That co-defendant Jenkins has given taped statements in which he claimed that I started the fire at Home Depot, and that I admitted this to him.
3. That I deny setting the fire at Home Depot, and deny ever admitting this to anyone and Jenkins is lying about this.
4. That should this case proceed to Trial with two defendants, it is anticipated that a [*Bruton v United*

States] situation will arise where Defendant Furline may be denied his right to confront the witness against him, in the event the videotaped statement of Jenkins is played before the jury.

5. That the defenses of defendant Furline and co-defendant Jenkins are antagonistic and mutually exclusive and require severance under [*People v Hana*].

6. That unless the trials of Furline and Jenkins are separated, my substantial rights will be prejudiced and that severance is necessary to rectify the possible prejudice. [Cleaned up.]

These allegations don't demonstrate that Furline's substantial rights would be prejudiced at trial without severance. Paragraph 1 is contextual and not relevant to the severance analysis. Paragraphs 2 and 4 relate directly to prejudice caused by the Jenkins video and so are obviated by the prosecutor's agreement not to offer that video into evidence. While Paragraph 3 doesn't mention the video, its denials correspond to Jenkins's accusations in the video (i.e., the "taped statements" described in Paragraph 2); so, like Paragraphs 2 and 4, this paragraph is obviated by the prosecutor's agreement. Paragraphs 5 and 6 contain legal conclusions rather than facts and so don't contribute to Furline's burden. It is clear to us, in light of the prosecutor's agreement, that Furline's affidavit lacks the "concrete facts" to "fully demonstrate" his claim of prejudice. *Hana*, 447 Mich at 355.

In light of the failure of Furline's affidavit to articulate a prejudice theory that materialized at trial, we reject the Court of Appeals' belief that the trial court "was fully apprised of the specifics of the codefendants' mutually exclusive defenses and the potential prejudice from one defendant being pitted against another in order to prove each's innocence." *People v Furline*, unpublished per curiam opinion of the Court of Appeals,

issued July 3, 2018 (Docket Nos. 335906 and 336203), p 7. Even if Furline’s motion “fully apprised” the trial court of his defense—he said in his motion that he intended “to defend this matter by relying on his presumption of innocence and requiring the People to meet their burden of proof”—the prosecution met its burden of demonstrating each individual defendant’s guilt without either defendant’s help.

For these reasons, we see no error in the trial court’s denial of Furline’s motion.

The trial court’s decision must be upheld absent a “significant indication on appeal that the requisite prejudice” actually occurred at trial. *Hana*, 447 Mich at 347. We believe that no such prejudice actually occurred. Furline feared that he would have to defend against Jenkins’s theory that Furline set the fire and that, in light of Jenkins’s theory, he would struggle to show that Jenkins acted alone. Neither fear came to pass since Jenkins offered no evidence that Furline started the fire at the Saginaw store and Furline offered no evidence that Jenkins acted alone.

The Court of Appeals exaggerated the extent to which each defendant contributed to proving the other’s culpability. Furline averred in his motion that his and Jenkins’s defenses would require Furline to “seek to convict the other, and defend in turn against the other’s antagonistic defense, while also defending against the prosecution’s case.” The Court of Appeals believed that defendants were prejudiced at trial because each had “to prove the other’s culpability through each witness’s testimony.” *Furline*, unpub op at 8. But, as explained below, the record doesn’t support the proposition that either defendant “sought to convict the other” or that either had to “defend in turn against the other’s antagonistic defense.”

The Court of Appeals started with whether joinder prejudiced Jenkins—even though Jenkins never moved for a separate trial and did not raise the severance issue on appeal. The Court of Appeals cited the testimony of Doris Walker-Furline, a witness called by the prosecutor. Walker-Furline, Furline’s mother and an accomplice in the Flint incident, testified that Furline had known Jenkins only for a week, that Jenkins had set the Flint fire, that Furline was present for (but did not participate in) the Flint incident, and that Jenkins wished to repeat the scheme at the Saginaw store. As the Court put it, “Without Furline having to testify himself, his mother’s testimony was evidence that promoted his defense that it was Jenkins [sic] idea to commit arsons and thefts at home improvement stores and he had nothing to do with Jenkins’ plan.” *Id.* But Walker-Furline lacked direct knowledge of the Saginaw incident, and her testimony placed Furline at the Flint store—hardly exonerating. Nothing in the Court of Appeals’ characterization of Walker-Furline’s testimony suggested that Furline “sought to convict” Jenkins. Nor did it cause Jenkins to have to “defend against [Furline’s] antagonistic defense.”

As to the prejudice to Furline, the Court of Appeals identified Jenkins’s counsel’s cross-examinations of Walker-Furline and of Joy Royal, another witness called by the prosecutor. Jenkins’s counsel tried and failed to elicit Walker-Furline’s acknowledgment that Furline was involved in the Flint incident. From Royal, he got testimony that Furline had been involved in a “no receipt” return at a Lowe’s store. While Jenkins’s counsel perhaps wished to highlight Furline’s involvement, that involvement already had been shown by the prosecutor.

The Court of Appeals characterized “[t]his situation” as creating “a subtle effect of joining defendants who have asserted mutually exclusive defenses.” *Furline*, unpub op at 8. It then offered this curious quotation, from *United States v Tootick*, 952 F2d 1078, 1083 (CA 9, 1991): “‘All evidence having the effect of exonerating one defendant implicitly indicts the other. The defendant must not only contend with the effects of the government’s case against him, but he must also confront the negative effects of the codefendant’s case.’” *Furline*, unpub op at 8. But contrary to the Court of Appeals’ implication, defendants here weren’t forced into a zero-sum contest. And, as we’ve noted, neither defendant contributed meaningfully to the prosecutor’s case. Even if the circumstances of this case created a “subtle effect” of joining defendants, that effect was dwarfed by the palpable effect of the prosecutor’s joining defendants—intentionally and appropriately—under an aiding-and-abetting theory. Cf. *People v Pipes*, 475 Mich 267, 280; 715 NW2d 290 (2006) (“The Court of Appeals failed to give sufficient weight to the evidence that was properly admitted against each defendant.”); *Zafiro v United States*, 506 US 534, 543; 113 S Ct 933; 122 L Ed 2d 317 (1993) (Stevens, J., concurring in the judgment) (“[Where mutually exclusive defenses transform a trial into a contest between the defendants], joinder may well be highly prejudicial, particularly when the prosecutor’s own case in chief is marginal and the decisive evidence of guilt is left to be provided by a codefendant.”).

While the Court of Appeals characterized this case as asking the jury to choose “which of the two was guilty,” *Furline*, unpub op at 8, we emphasize that the prosecutor’s case gave the jury a third option: “both.” See *Hana*, 447 Mich at 361 (“[The] jury could have found both defendants similarly liable without any

prejudice or inconsistency because one found guilty of aiding and abetting can also be held liable as a principal.”).

Since Furline failed to articulate a prejudice theory that materialized at trial, we reject the Court of Appeals’ belief that the trial court “was fully apprised of the specifics of the codefendants’ mutually exclusive defenses and the potential prejudice from one defendant being pitted against another in order to prove each’s innocence.” *Furline*, unpub op at 7. As explained above, Furline’s motion did not “fully demonstrate” potential prejudice. And any prejudice arguably conveyed by the motion and affidavit did not occur at trial. Each defendant experienced, at most, “incidental spillover prejudice” rather than the degree of prejudice required to reverse the trial court’s joinder decision. *Hana*, 447 Mich at 347, 349. For these reasons, we conclude that the Court of Appeals erred. We reverse.

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO, and CLEMENT, JJ., concurred.

CAVANAGH, J. (*concurring*). I concur with the majority opinion but write separately to avoid possible misinterpretations. Review of the trial court’s decision to deny pretrial severance is accomplished by reference to the pretrial motion and affidavit, while review of prejudice that might have occurred at trial is a separate inquiry.

Review of the trial court’s pretrial decision to deny severance here is simple. As the majority notes, the only pretrial prejudice theory advanced by either defendant was contained in Paragraphs 2 through 4 of the affidavit attached to defendant Furline’s motion for severance. That concern was addressed when the pros-

ecution agreed to forgo use of defendant Jenkins's recorded statement. That issue resolved, there was no offer of proof before the court as to how joinder would result in prejudice to either defendant. See *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994) ("Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice."). On that basis alone, the trial court's pretrial decision to deny severance should be affirmed.

However, there is also a second inquiry: whether there is "any significant indication on appeal that the requisite prejudice in fact occurred at trial . . ." *Id.* at 347. To answer that question, we ask whether the defenses which were actually presented at trial were " 'mutually exclusive' " or " 'irreconcilable.' " *Id.* at 349 (citations omitted). That happens when the " 'tension between defenses [was] so great that a jury would have to believe one defendant at the expense of the other.' " *Id.*, quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). Said another way, " 'defenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant.' " *Hana*, 447 Mich at 350, quoting *State v Kinkade*, 140 Ariz 91, 93; 680 P2d 801 (1984). That was not the case here.

This is best illustrated by reference to defense counsels' closing arguments, where defendants' defenses were summarized. Defendant Furline's defense was not that defendant Jenkins committed the crimes

in question alone, but simply that the prosecution had generally not proven its case beyond a reasonable doubt. For example, defendant Furline's counsel did not specifically argue that defendant Jenkins set the fire, but that "100 other people perhaps" were in the store also. Similarly, defendant Jenkins's counsel did not argue that defendant Furline set the fire, but to the contrary said "[t]here is nothing that says that Mr. Furline was going back to set a fire. There is no evidence of that as [defendant Furline's counsel] pointed out." Rather than presenting the "mutually exclusive" or "irreconcilable" defenses that the other defendant did everything, each defendant argued the prosecution had not met its burden against either of them.

Also, I do not understand the Court's opinion to hold that the prosecution can avoid severance simply by charging codefendants under an aiding-and-abetting theory. As described above and in *Hana*, the relevant inquiry is not the prosecution's theory but the defenses offered by the defendants. We did say in *Hana* that "[f]inger pointing by the defendants when such a prosecution theory is pursued does not create mutually exclusive antagonistic defenses." *Hana*, 447 Mich at 360-361. However, that was in relation to the companion cases of *People v Rode* and *People v Gallina*. In those cases, the defendants took turns firing a gun at an occupied car, each with the apparent encouragement of the other. *Id.* at 335-336. At one point, Rode reloaded the gun with bullets supplied by Gallina. *Id.* at 335. A fatal shot was fired at the second car after the collaborative reload. *Id.* at 336. Each defendant testified, and the core of their defenses was that "each claimed that the other defendant fired the gun." *Id.* (citation omitted). In that context, it made no difference who fired the gun. But other defense theories in

other aiding-and-abetting cases may be antagonistic enough to require severance.

Because neither defendant made a pretrial offer of proof alerting the trial court that defendants would present mutually exclusive defenses, and because no prejudice occurred at trial, I concur.

BERNSTEIN, J., concurred with CAVANAGH, J.

PEOPLE v SAMMONS

Docket No. 156189. Argued on application for leave to appeal October 2, 2019. Decided March 16, 2020.

Travis T. Sammons was convicted after a jury trial in the Saginaw Circuit Court of conspiracy to commit murder, MCL 750.157a, in connection with the shooting death of Humberto Casas. DyJuan Jones and Rosei Watkins witnessed the shooting, which occurred on a street around 1 p.m. Jones was riding in the backseat of a car being driven by his mother when he heard the shots, and Watkins was driving with her grandson in her own car. Jones saw a light gray Jeep, its driver, and another man who was wielding a gun. Jones described both men as black and wearing white shirts. Jones described the driver as weighing about 320 pounds with a long beard, and the gunman as being bald and wearing black pants. Watkins thought the driver was of average build. Jones saw the gunman shoot a Hispanic man, later identified as Casas. Jones did not see the gunman get into the Jeep, but he saw the Jeep leave going 60 to 70 miles per hour. About 10 to 20 minutes later, the police pulled over defendant and Dominique Ramsey in a silver Jeep. Both men wore white shirts. Ramsey weighed about 150 pounds at the time, and had facial hair that one police officer characterized as short stubble. Although defendant had a short hairstyle, he was not bald. Both men were taken to the Saginaw Police Department, where they were detained. A photo of the Jeep was taken and shown to Watkins, who identified it as the Jeep from the shooting. Several hours later, Jones and his mother went to the police station, where Michigan State Police Detective Sergeant David Rivard organized a showup identification of defendant and Ramsey. According to Jones, he could identify neither man as having been involved in the shooting, while Rivard claimed that Jones identified defendant as the shooter but did not identify Ramsey. No one witnessed the conversation between Jones and Rivard, the conversation was not recorded in any way, and Jones did not sign any kind of statement or report indicating that he had made an identification. At the preliminary examination, Jones repeatedly denied having identified the shooter. Defendant objected to Rivard's testimony about the showup identification and filed a motion to suppress this evi-

dence. The circuit court, Darnell Jackson, J., denied the motion to suppress and, after a trial, the jury found both men guilty of conspiracy. Both men filed motions for a directed verdict or a new trial. The circuit court denied defendant's motion but granted Ramsey's, ruling that there was insufficient evidence to sustain his conviction. Defendant appealed. The Court of Appeals, TALBOT, C.J., and BECKERING and M. J. KELLY, JJ., affirmed defendant's conviction in an unpublished per curiam opinion issued July 6, 2017 (Docket No. 332190), and he sought leave to appeal. The Supreme Court ordered and heard oral argument on the application, directing the parties to file supplemental briefs addressing whether the showup was impermissibly suggestive; if so, whether the identification was nonetheless reliable; and whether, if improperly admitted, any error was harmless. 503 Mich 910 (2018).

In an opinion by Justice CAVANAGH, joined by Chief Justice MCCORMACK and Justices VIVIANO, BERNSTEIN, and CLEMENT, in lieu of granting leave to appeal, the Supreme Court *held*:

The showup identification procedure employed in this case was suggestive because it indicated to the witness that the police suspected defendant. The suggestiveness was unnecessary because there was no reason, except perhaps police convenience, to use a suggestive procedure, and the showup was not reliable under *Neil v Biggers*, 409 US 188 (1972). This error was not harmless because the prosecution's case was significantly less persuasive without the showup. Accordingly, the Court of Appeals judgment was reversed.

1. Due process protects criminal defendants against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures. Exclusion of evidence of an identification is required when the identification procedure was suggestive, the suggestive nature of the procedure was unnecessary, and the identification was unreliable. The inherently suggestive nature of showups has long been beyond debate, particularly when the showup is conducted in a police stationhouse, and the use of showups continues to receive critical treatment from courts and commentators.

2. The showup procedure in this case was suggestive because defendant was shown singly to the witness. Although the prosecution argues that Rivard did not suggest that either of the men was involved in a criminal investigation, Jones could plainly see that defendant and Ramsey were involved in a criminal investigation, given that they were the subjects of a showup. Further, Jones testified that he understood he was taken to see defendant for the purpose of making an identification. Also, neither the procedural

safeguards recommended by the Prosecuting Attorneys Association of Michigan nor those recommended by the United States Department of Justice for conducting showups were used.

3. The showup in this case was not necessary. Defendant and Ramsey were arrested minutes after the shooting, and Jones did not arrive at the police station until 4 to 5 hours later. Further, there was nothing in the record to indicate that the police could not have taken more time if necessary to set up a corporeal or photographic lineup since defendant and Ramsey were in custody. The crime had been long over by the time the showup was conducted, and there was no ongoing danger that police were better able to address by dispensing with a reliable identification procedure.

4. The evidence produced by an unnecessarily suggestive identification procedure is not automatically excluded unless the improper police conduct created a substantial likelihood of misidentification. To determine whether an unnecessarily suggestive identification is nevertheless reliable, a court considers the nonexclusive list of factors set out in *Biggers*: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. In this case, Jones's opportunity to view the criminal at the time of the crime was poor. Although Jones's attention was drawn to the shooting, he testified that he was not paying attention to the physical features of the person he was asked to identify. While the description Jones gave before viewing defendant and Ramsey matched them in a general sense, the most specific corroborating details he gave did not match: neither man was heavy, neither man was bald, and neither man had a long beard. Further, the partial license plate number that Jones remembered did not match that of the Jeep defendant and Ramsey were driving. Jones's level of certainty at the confrontation was difficult to evaluate because not only was it not documented, Jones denied even having made an identification. While the relatively short time between the crime and confrontation did provide some indicia of reliability, considering all the *Biggers* factors and other evidence relied on by the trial court, the prosecution did not meet its burden to show that the indicia of reliability were strong enough to outweigh the corrupting effect of the suggestive circumstances.

5. The error of admitting the evidence from the unnecessarily suggestive and unreliable showup was not harmless beyond a reasonable doubt. When evaluating whether erroneously admit-

ted testimony was harmless beyond a reasonable doubt, a court must determine the probable effect of that testimony on the minds of an average jury. Reversal is required if the average jury would have found the prosecution's case significantly less persuasive without the erroneously admitted testimony. In this case, without the showup, the prosecution's only evidence was a compilation of security camera videos and Watkins's identification of the Jeep, both of which were far from conclusive. Accordingly, the prosecution's case was significantly less persuasive without the showup identification evidence.

Court of Appeals judgment reversed; showup evidence suppressed; case remanded to the Saginaw Circuit Court for a new trial.

Justice ZAHRA, joined by Justice MARKMAN, dissenting, agreed that the identification procedure employed at the police station was suggestive and unnecessary but did not believe that the procedure was so unduly suggestive as to lead to a substantial likelihood of misidentification, noting that defendant and Ramsey appeared before Jones in separate interview rooms and in street clothes, unrestrained and unaccompanied by any law enforcement officers, with nothing to suggest to Jones or any objective observer that Ramsey and defendant were suspects in any crime. An application of the *Biggers* factors indicated that Jones had an ample opportunity to view the defendant given that Jones had an unobstructed view of the shooting, which occurred about 20 to 25 feet away on a clear, sunny afternoon; Jones paid detailed attention to the incident and remained calm throughout it; Jones accurately described defendant's general physical characteristics and clothing; and Jones's identification of defendant occurred while the incident was fresh in Jones's mind. Viewed under the totality of the circumstances and weighed against the corrupting effect of the suggestiveness of this procedure, and considering the more recent caselaw applying the *Biggers* factors, Jones's identification of defendant retained strong indicia of reliability, and therefore the trial court did not clearly err by admitting the evidence that Jones had identified defendant as the shooter. Justice ZAHRA would have affirmed the trial court and the Court of Appeals.

1. EVIDENCE — PRETRIAL IDENTIFICATIONS — DUE PROCESS.

Due process protects criminal defendants against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures; exclusion of evidence of an identification is required when the identification

procedure was suggestive, the suggestive nature of the procedure was unnecessary, and the identification was unreliable.

2. EVIDENCE — PRETRIAL IDENTIFICATIONS — SHOWUPS — SUGGESTIVENESS.

The procedure in which the police show a criminal suspect singly to a witness for purposes of identification, known as a “showup,” is inherently suggestive for purposes of determining whether the introduction of evidence of a pretrial identification violated a defendant’s right to due process.

3. EVIDENCE — PRETRIAL IDENTIFICATIONS — EXCLUSION OF EVIDENCE — RELIABILITY OF IDENTIFICATION.

The evidence produced by an unnecessarily suggestive identification procedure with respect to a criminal defendant is not automatically excluded unless the improper police conduct created a substantial likelihood of misidentification; to determine whether an unnecessarily suggestive identification was nevertheless reliable, a court considers the nonexclusive list of factors set out in *Neil v Biggers*, 409 US 188 (1972): (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, and *Carmen R. Fillmore*, Assistant Prosecuting Attorney, for the people.

Travis T. Sammons *in propria persona*, and Warner Norcross and Judd LLP (by *Gaëtan Gerville-Réache*, *Ashley G. Chrysler*, and *Kelsey M. Dame*) for defendant.

Amici Curiae:

David A. Moran, *Imran J. Syed*, and *Megan Richardson* for Kenneth Wyniemko and the Innocence Project.

CAVANAGH, J. Defendant, Travis T. Sammons, was convicted by a jury of conspiracy to commit open murder following a trial in which the jury was told that

a witness identified defendant as the shooter during a “showup”¹ identification conducted by the police following the shooting. Defendant has appealed, arguing that the showup identification violated his constitutional right to due process, that the evidence of the showup should have been suppressed, and that he is entitled to a new trial. We agree. The questions necessary to resolve this appeal include: whether the identification procedure conducted by police was suggestive, whether any suggestiveness was necessary, whether the witness’s identification was nonetheless reliable, and whether any error was harmless. We hold that the showup identification procedure was suggestive because it indicated to the witness that police suspected defendant; the suggestiveness was unnecessary because there was no reason, except perhaps police convenience, to use a suggestive procedure; and the showup was not reliable under *Neil v Biggers*, 409 US 188, 201; 93 S Ct 375; 34 L Ed 2d 401 (1972). Finally, the error was not harmless because the prosecution’s case was significantly less persuasive without the showup. Accordingly, we reverse the Court of Appeals judgment, suppress any evidence from the showup, and remand to the Saginaw Circuit Court for a new trial. In light of this resolution, we decline to address defendant’s remaining issues.

I. FACTS AND PROCEDURAL HISTORY

Humberto Casas was shot on the street in Saginaw on June 21, 2015, at approximately 1:00 p.m. Sixteen-year-old DyJuan Jones witnessed the shooting, as did Rosei Watkins. Jones was riding in the backseat of a car being driven by his mother when he heard the

¹ A showup is “[a] police procedure in which a suspect is shown singly to a witness for identification . . .” *Black’s Law Dictionary* (11th ed).

shots, and Watkins was driving with her grandson in her own car. Jones saw a light gray Jeep, its driver, and another man who was wielding a gun. Jones did not note the model of the Jeep and “wasn’t paying attention” to the gunman. Jones described both men as black and wearing white shirts. Jones described the driver as weighing about 320 pounds with a long beard, and the gunman as being bald and wearing black pants. Watkins, on the other hand, thought the driver was of average build. Jones saw the gunman shoot a Hispanic man—Casas. The gunman fired three shots, and then paused as his gun seemed to jam. He then fired more shots. Jones did not see the gunman get into the Jeep, but he saw the Jeep leave going 60 to 70 miles per hour. Jones told the police that the Jeep’s license plate number contained either “CE” or “GE.” Jones and his mother, a nurse, initially left but then returned to the scene for her to render aid. Casas died from his injuries.

About 10 to 20 minutes later, the police pulled over defendant Travis Sammons and Dominique Ramsey in a silver Jeep Commander that had the license plate number DFQ 9593. Both men wore white shirts. Ramsey weighed about 150 pounds at the time, and had facial hair that one police officer characterized as “short stubble.” Although defendant had a short hairstyle, he was not bald. The officer ordered Ramsey out of the Jeep, searched him, handcuffed him, and put him into the back of the patrol car. The officer then ordered defendant out of the Jeep and searched him. During the search, the officer noticed that defendant’s hands were sweaty, which the officer found “pretty odd.” With Ramsey’s permission, the officer searched the Jeep. Nothing of interest was found in the searches of the men or the Jeep. Both men were taken to the Saginaw Police Department, where they were de-

tained. A photo of the Jeep was taken and shown to Watkins, who identified it as the Jeep from the shooting.

Jones and his mother went to the police station early that evening. Michigan State Police Detective Sergeant David Rivard met them and organized a showup identification of defendant and Ramsey. At the preliminary examination, Detective Sergeant Rivard explained, “it’s common that what we can do is call a show up, is to show the possible suspects to—excuse me—show the possible witnesses’ [sic] the possible suspects to see if in fact we are doing our investigation in the right direction.” He further explained that the showup was conducted because suspects had been identified relatively quickly.

The station has three interview rooms, and the detective sergeant put defendant in one interview room and Ramsey in another. The men were alone in their respective rooms, wore their street clothes, and were unrestrained. The detective sergeant took Jones to the rooms for the purpose of making an identification. The detective sergeant testified there was nothing out of the ordinary about conducting a showup this way. Jones and the detective sergeant would later disagree about what happened next.

Jones would say that he could identify neither man as having been involved in the shooting, while the detective sergeant would say that Jones identified defendant as the shooter but did not identify Ramsey. No one witnessed the conversation between Jones and the detective sergeant, and the conversation was not recorded in any way. Jones did not sign any kind of statement or report indicating that he had made an identification.

Later, the police collected videos from nine security cameras near the crime scene, each showing a Jeep Commander. The police then edited the security videos together with the dashboard camera view of the traffic stop into one video compilation. One clip showed a Jeep Commander arriving near the crime scene. Another clip showed a Jeep Commander stopping at a house for several minutes, at least one person getting out of the Jeep and going into the house, then at least one person getting back into the Jeep, and it leaving. Each clip in the compilation showed a Jeep Commander, but none of the clips showed the shooting or the license plates of the vehicles they depicted.

Defendant and Ramsey were both charged with open murder, MCL 750.316; conspiracy to commit murder, MCL 750.157a; being a felon in possession of a firearm, MCL 750.224f; and having a firearm during the commission of a felony, MCL 750.227b(1). Jones was repeatedly questioned about making an identification at the preliminary examination, and every time he denied making an identification. Specifically, Jones said, “I seen the gun, I can’t identify the person who was really [sic].” Defendant objected to Detective Sergeant Rivard’s testimony about the showup identification and filed a motion to suppress. The circuit court issued a written opinion that implicitly acknowledged that the showup was unnecessarily suggestive, but the court nonetheless concluded that the identification was reliable:

[T]he identification occurred within hours of the homicide, while the details of the crime were still fresh in the witness’ mind. Rivard explained that the show-up procedure was used as an investigative tool to determine if their investigation was headed in the right direction. Although Defendants were singled out because they were presented alone, there is no evidence that Jones was pressured to

identify either man nor was he told that the police had arrested the suspects. The fact that Jones identified Sammons as the gunman, but did not identify Ramsey, indicates that he was relying on his memory of the crime and was not influenced by the suggestiveness of the procedure. Based on the totality of the circumstances, the Court finds that the out-of-court identification was reliable and did not violate due process.

The circuit court thus denied the motion to suppress.

At trial, the prosecution offered the video compilation, as well as the testimony of Jones and Watkins. Jones acknowledged that he had taken part in the showup procedure, but he once again denied having made any identification. Detective Sergeant Rivard testified that Jones had identified defendant at the showup. Watkins testified that she saw the offenders flee in a “[g]ray, silver Jeep, whatever you call those things.” She specifically denied being able to estimate the age of the vehicle she saw: “I don’t know the difference, new, old. I know it looked like a Jeep.” She also identified a photo of the Jeep that Ramsey and defendant were stopped in as the Jeep from the scene. However, she did not identify any distinguishing features other than the color and make. She said only, “It was a box.” A jury found both men guilty of the conspiracy count and acquitted them on the remaining counts.

Both men filed motions for a directed verdict or a new trial. The circuit court denied defendant’s motion but granted Ramsey’s, ruling that there was insufficient evidence to sustain his conviction. The Court of Appeals affirmed defendant’s conviction, and he sought leave to appeal here. We ordered oral argument on the application, directing the parties to file supplemental briefs addressing whether the showup was impermissibly suggestive; if so, whether the identification was nonetheless

reliable; and whether, if improperly admitted, any error was harmless. *People v Sammons*, 503 Mich 910, 910 (2018).

II. STANDARD OF REVIEW

We review a trial court’s findings of fact in a suppression hearing for clear error. *People v Hammerlund*, 504 Mich 442, 450; 939 NW2d 129 (2019). The application of law to those facts is a constitutional matter that this Court reviews de novo. *People v Smith*, 498 Mich 466, 475; 870 NW2d 299 (2015).

III. ANALYSIS

Due process protects criminal defendants against “the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.” *Moore v Illinois*, 434 US 220, 227; 98 S Ct 458; 54 L Ed 2d 424 (1977). Exclusion of evidence of an identification is required when (1) the identification procedure was suggestive, (2) the suggestive nature of the procedure was unnecessary, and (3) the identification was unreliable. *Perry v New Hampshire*, 565 US 228, 238-239; 132 S Ct 716; 181 L Ed 2d 694 (2012). See also *People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993) (opinion by GRIFFIN, J.); *id.* at 318 (BOYLE, J., concurring in part).²

A. SUGGESTIVENESS

The inherently suggestive nature of showups has long been beyond debate. Showups have been called

² In *Kurylczyk*, almost 20 years before *Perry*, the defendant argued that a photographic lineup and a corporeal lineup each violated his due-process rights. In an opinion by Justice GRIFFIN, joined in relevant parts by Justice BOYLE, we agreed that the photographic lineup was

“the most grossly suggestive identification procedure now or ever used by the police.” Wall, *Eye-Witness Identification in Criminal Cases* (New York: Charles C Thomas, 1965), p 28. More than 50 years ago, the United States Supreme Court observed that “[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.” *Stovall v Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967), abrogated in part on other grounds by *Griffith v Kentucky*, 479 US 314 (1987). Almost 80 years ago, Professor John Henry Wigmore opined that an identification produced by a showup is “next to worthless” and that “there is no excuse for jeopardizing the fate of innocent men by such clumsy, antiquated methods” 4 Wigmore, *Evidence* (3d ed), § 1130, p 214 n 2.

The procedure continues to receive critical treatment.³ The nature of the suggestion is apparent: “when

suggestive, *Kurylczyk*, 443 Mich at 306 (opinion by GRIFFIN, J.) (“[W]e do not question his contention that his photograph stood out from the others in a suggestive fashion.”), and we described the remaining inquiry as whether “under the totality of the circumstances there [was] a substantial likelihood of misidentification,” *id.* at 306; see also *id.* at 318 (BOYLE, J., concurring in part). To answer that question, we considered the factors discussed in *Biggers*, 409 US at 201. *Kurylczyk*, 443 Mich at 306-308, 310-311 (opinion by GRIFFIN, J.). Although we did not separately address necessity, it does not appear to have been at issue. With respect to the corporeal lineup, we held that it was not impermissibly suggestive. *Id.* at 313-314. Consequently, there was no reason to inquire into reliability under the *Biggers* factors. Our analysis in *Kurylczyk* was not substantively different from the three-step analysis of *Perry* that we apply today. If the demarcation of the steps was less clear then than now, that could be a product of the evolution of the relevant federal caselaw. Although we think *Kurylczyk* is entirely consistent with *Perry*, obviously we would be bound to follow *Perry* to the extent these cases might be inconsistent.

³ See *Young v State*, 374 P3d 395, 421 (Alas, 2016) (“Alaska courts have long restricted the use of showups as an identification procedure to where it is necessary under the circumstances.”); *Commonwealth v*

the witness is shown only one person . . . , [the witness] is tempted to presume that he is the person [the police suspect].” *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998) (quotation marks and citation omitted). Said another way, “a one-man showup conveys a clear message that the police suspect *this* man.” *Ex parte Frazier*, 729 So 2d 253, 255 (Ala, 1998) (quotation marks and citation omitted).⁴

Additionally, if a witness makes an incorrect identification from among several choices in a lineup, errors will often be spread to “fillers,”⁵ creating a harmless

Figueroa, 468 Mass 204, 217; 9 NE3d 812 (2014) (“A showup identification is disfavored because it is inherently suggestive, but it violates due process only where the defendant proves by a preponderance of the evidence that it is *unnecessarily* suggestive”) (quotation marks and citation omitted); Cicchini & Easton, *Reforming the Law on Show-up Identifications*, 100 J Crim L & Criminology 381, 389 (2010) (“[T]he way in which show-ups are necessarily conducted makes them incredibly suggestive.”); Lee, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-exigent Show-ups*, 36 Colum Hum Rts L Rev 755, 759 (2005) (“[T]he suggestiveness of the [showup] procedure outweighs its reliability when conducted under non-exigent circumstances.”); *People v Brisco*, 99 NY2d 596, 613; 788 NE2d 611; 758 NYS2d 262 (2003) (Smith, J., dissenting) (“[A] showup . . . is inherently suggestive and for that reason strongly disfavored. That showup identifications are inherently suggestive means that they are likely to result in the identification of an innocent person as the perpetrator of a crime. Despite their inherent suggestiveness, showup identifications are permissible if exigent circumstances require immediate identification or if the suspects are captured at or near the crime scene and can be viewed by the witness immediately.”) (quotation marks and citations omitted).

⁴ See *State v Lawson*, 352 Or 724, 783; 291 P3d 673 (2012) (“[T]he witness is always aware of who police officers have targeted as a suspect.”); *United States v Brown*, 471 F3d 802, 804 (CA 7, 2006) (“[T]he single photo or one-person showup implies that the police have their man and suggests that the witness give assent.”); *United States v Funches*, 84 F3d 249, 254 (CA 7, 1996) (“[P]resumably the police would not bring in someone that they did not suspect had committed the crime.”).

⁵ Fillers, also known as “foils,” are innocent people used in police lineups.

“known error.” Wells, *Police Lineups: Data, Theory, and Policy*, 7 Psychol Pub Pol’y & L 791, 794 (2001). But in a showup, any mistaken identification will fall on the suspect. Given this, the empirical finding that innocent suspects are more often identified in showups than lineups is unsurprising. Steblay et al, *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 Law & Hum Behav 523, 533 (2003).

The suggestiveness of a showup is aggravated when it is conducted in a police stationhouse. In holding stationhouse showups inadmissible as a matter of law, New York’s highest court acknowledged this added layer of suggestion: “Unreliability of the most extreme kind infects showup identifications of arrested persons held at police stations” *People v Riley*, 70 NY2d 523, 529; 517 NE2d 520 (1987). See also *State v Gordon*, 185 Conn 402, 414; 441 A2d 119 (1981) (“The circumstances of the station house show-up unnecessarily suggested to the victim that she should positively identify the defendant.”), overruled on other grounds by *State v Artis*, 314 Conn 131 (2014).

In this case, all we need to observe in order to conclude that the procedure was suggestive is that defendant was shown singly to the witness.⁶ The prosecution argues that the showup was not suggestive because defendant was wearing his street clothes and was not handcuffed or restrained. To be sure, the

⁶ The prosecution argues defendant was not shown “singly” to Jones because Ramsey was present in the next room. The prosecution’s attempt to characterize what happened as a two-person lineup is belied by the circumstances—police were looking for two men and they showed Jones two men. Rather than suggesting police were looking for *this man*, the circumstances suggested police were looking for *these men*. The suggestion is still clear. Even the detective sergeant who administered the procedure characterized it as a showup. This was a showup.

showup would have been more suggestive if defendant had been shackled in a striped jumpsuit, but noting other ways the showup could have been more suggestive does not help us determine whether this showup was suggestive.⁷

The prosecution argues that Detective Sergeant Rivard did not suggest either of the men was involved in a criminal investigation, but that is inaccurate. Taking the detective sergeant at his word that he did not make any sort of announcement about his suspicions, Jones could plainly see for himself that defendant and Ramsey were involved in a criminal investigation—being the subject of a showup *is* involvement in a criminal investigation. Further, Jones testified that he understood he was taken to see defendant for the purpose of making an identification. The procedure the police used was certainly suggestive.⁸

⁷ The dissent similarly lists things the detective sergeant did or did not do during the showup in furtherance of the proposition that the procedure was not so suggestive as to require reversal. The main problem with this line of reasoning is that we do not know what the detective sergeant did or did not do because the detective sergeant failed to record the procedure.

⁸ After acknowledging this showup was suggestive, the dissent goes on to argue that “it could appear to Jones that Ramsey and defendant were also present at the police station for innocent reasons.” We do not need to imagine what Jones might have thought was going on when the detective sergeant walked him down the hall, because Jones told us what he was thinking. Jones testified that he believed he was being asked to make an identification:

Q: During the course of the time that you were at the City of Saginaw Police Department, were you walked down a hallway?

A: Yes sir.

Q: Purpose of identifying anybody?

A: Yes sir.

Given that Jones understood he was being asked to identify defendant and Ramsey as participants in the shooting, it could not have appeared

Fair and reliable identification procedures are not something that should be controversial in Michigan's law enforcement community. Putting aside that showups were considered "antiquated" in 1940 and have been "widely condemned" since at least the 1960s, in 2015 the Prosecuting Attorneys Association of Michigan (PAAM) published best practices that advised agencies to provide clear written policies on conducting identifications and to provide training to officers on minimizing contamination. Prosecuting Attorneys Association of Michigan, *Best Practices Recommendation: Eyewitness Identification and Procedures*, available at <https://www.michiganprosecutor.org/files/PAAM_Best_Practices_Eyewitness_Identification.pdf> (accessed February 14, 2020) [<https://perma.cc/5LM4-BJLQ>]. Although PAAM discussed photo arrays and lineups, it did not advise agencies to conduct showups. *Id.* PAAM recommended that identifications be conducted by an officer who is not aware of who the suspect is to avoid unintentional contamination.⁹ *Id.* PAAM further recommended giving standardized instructions to witnesses and documenting the entire procedure, including the witness's level of confidence in the identification. *Id.* These best practices were not employed in this case.

to Jones that defendant and Ramsey were at the police station for innocent reasons unless Jones thought the detective sergeant was asking him to identify random people at the station as participants in the crime. Jones never testified to that, and we decline to entertain that possibility.

⁹ Blind administration of identification procedures avoids subtle and even unintentional suggestion through "tone of voice, pauses, demeanor, facial expressions, and body language," which may be "difficult to detect and prevent." *Lawson*, 352 Or at 779, citing *Haw & Fisher, Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J Applied Psychol 1106, 1110 (2004). The administrator cannot unintentionally suggest whom police suspect if he or she does not know. Of course, blind administration of a showup is of little value as the procedure itself leaves no doubt whom the police suspect.

Even earlier, in 1999, the United States Department of Justice (DOJ) offered similar advice. United States Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement*, available at <<https://www.ncjrs.gov/pdffiles1/nij/178240.pdf>> (accessed February 14, 2020) [<https://perma.cc/8EUR-L28V>]. The DOJ advised that because there was “inherent suggestiveness” in a showup, the procedure should only be used “[w]hen circumstances require,” and in that event the suggestiveness should be minimized with the use of procedural safeguards. *Id.* at 27. Like the PAAM best practices, the DOJ-suggested safeguards were not used here. The showup was suggestive, without any procedures used to mitigate its suggestiveness.

B. NECESSITY

None of this is to say that the police may never conduct a showup, despite its suggestiveness. Having concluded that the identification procedure was suggestive, we next ask whether the suggestiveness of the procedure was necessary.¹⁰ There are instances in

¹⁰ The trial court declined to address suggestiveness or necessity and moved straight to the reliability portion of the analysis. The Court of Appeals conflated the ideas of suggestiveness and necessity, failing to really grapple with either. *People v Sammons*, unpublished per curiam opinion of the Court of Appeals, issued July 6, 2017 (Docket No. 332190), p 3. The Court of Appeals acknowledged that defendant was shown singly to Jones, although it ignored the setting of the showup in the police stationhouse. *Id.* Then, after noting ways in which the procedure was not suggestive, the Court of Appeals concluded, “[T]o the extent that defendant’s appearing in a room alone was suggestive, there is no indication that comments or actions by the police rendered the identification procedure unnecessarily suggestive.” *Id.* at 3-4. With regard to suggestiveness, as explained earlier, noting ways in which a procedure could have been more suggestive does not address the ways it was suggestive. With regard to necessity, the Court of Appeals did not engage in any analysis.

which a fair and nonsuggestive procedure simply is not possible. For example, in *Stovall* the only witness to a murder had been stabbed 11 times and was in the hospital awaiting a major surgery needed to save her life. *Stovall*, 388 US at 295. The police brought their suspect to the hospital where he was shown singly to the witness. *Id.* However, she was the only witness who could confirm or deny the suspect’s involvement and “[n]o one knew how long [the witness] might live.” *Id.* at 302 (quotation marks and citation omitted). The circumstances of that case made the showup necessary, and those circumstances certainly do not present the only situation in which a showup might be necessary.

But we do not need to explore the boundaries of what amounts to necessity or adopt any specific rule to see that the showup here was *not* necessary. The prosecution argues that the showup was necessary because it occurred relatively soon after the crime, the investigation was moving quickly, and police were trying to determine whether the investigation was headed “in the right direction.” We disagree. Defendant and Ramsey were arrested minutes after the shooting, and Jones did not arrive at the police station until 4 to 5 hours later. Further, there is nothing in the record to indicate that the police could not have taken more time if necessary to set up a corporeal or photographic lineup since defendant and Ramsey were in custody. The crime had been long over by the time the showup was conducted, and there was no ongoing danger that the police were better able to address by dispensing with a reliable identification procedure. There was no necessity justifying the showup procedure here.¹¹

¹¹ The procedures and safeguards discussed by PAAM and the DOJ are, in those organizations’ opinions, the best practices for obtaining the most accurate and reliable evidence from eyewitnesses. The introductory message to the DOJ’s guide explains: “[I]t is absolutely essential that

C. RELIABILITY

Even though the identification procedure was unnecessarily suggestive, the evidence it produced could still be admissible unless the improper police conduct created a “substantial likelihood of misidentification.”¹² *Biggers*, 409 US at 201; *Perry*, 565 US at 239 (quoting *Biggers*); *People v Thomas*, 501 Mich 913, 913 (2017). A per se rule of automatic exclusion of unnecessarily suggestive identification procedures was rejected by the United States Supreme Court in favor of a “totality of the circumstances” approach aimed at balancing three factors: preventing unreliable eyewitness testimony from getting to a jury, deterring the police from conducting unnecessarily suggestive procedures, and

eyewitness evidence be accurate and reliable. One way of ensuring we, as investigators, obtain the most accurate and reliable evidence from eyewitnesses is to follow sound protocols in our investigations.” *Eye-witness Evidence: A Guide for Law Enforcement*, at iii. Indeed, as one commentator has astutely pointed out, unnecessarily suggestive identification procedures “do not further any valid law enforcement interest.” Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal*, 79 Ky L J 259, 291 (1990). Rather, “an unnecessarily suggestive identification procedure simply creates unreliable evidence where reliable evidence could have been gathered. It is not a case where good ends justify bad means—the end result of an unnecessarily suggestive procedure is worthless precisely because of the means used.” *Id.* In his haste, the detective sergeant did not just jeopardize the fate of a potentially innocent man, he also might have compromised his investigation and tainted the testimony that could have proved to be the prosecution’s best evidence. Not only was conducting a showup unnecessary, it was counterproductive to efforts to obtain the most accurate and reliable evidence.

¹² The dissent acknowledges that the showup was suggestive and unnecessary, but concludes that the showup should be admissible nonetheless because it retains strong indicia of reliability under the *Biggers* factors as weighed against the extent of its suggestiveness. We not only disagree about the extent of the suggestiveness of the showup, we also disagree with the dissent’s application of the *Biggers* factors.

the effect on the administration of justice. *Manson v Brathwaite*, 432 US 98, 112-113; 97 S Ct 2243; 53 L Ed 2d 140 (1977).¹³

We apply the nonexclusive list of factors set out in *Biggers* to determine whether an unnecessarily suggestive identification is reliable. *Kurylczyk*, 443 Mich at 306 (opinion by GRIFFIN, J.); *id.* at 318 (BOYLE, J., concurring in part). The factors are (1) “the opportu-

¹³ The Court observed that a per se rule would go too far in the first regard by excluding testimony that is reliable notwithstanding its having been obtained through an unnecessarily suggestive procedure. *Manson*, 432 US at 112. While the police would surely be deterred by a per se rule of exclusion, the Court opined that “[t]he police will guard against unnecessarily suggestive procedures under the totality rule, as well as the *per se* one, for fear that their actions will lead to the exclusion of identifications as unreliable.” *Id.* The Court was most concerned with the administration of justice in that if the trier of fact was denied “reliable evidence” by a per se rule of exclusion, then “it may result, on occasion, in the guilty going free.” *Id.* Conversely, if these incentives do not operate on actors in the criminal justice system as the *Manson* Court predicted, the result may be conviction of the innocent. Other states have interpreted their state protections differently than the federal protection in this regard. See *State v Harris*, 330 Conn 91, 115; 191 A3d 119 (2018) (holding that the *Biggers* factors do not provide a sufficient measure for reliability and that state due-process protections require a different reliability analysis); *Young*, 374 P3d at 426-427 (holding that the *Biggers* factors do not provide a sufficient measure for reliability and that state due-process protections require a different reliability analysis); *Lawson*, 352 Or at 739-751 (refining an existing parallel state reliability analysis based on scientific and legal developments); *State v Henderson*, 208 NJ 208, 285; 27 A3d 872 (2011) (holding that the *Biggers* factors do not provide a sufficient measure for reliability, do not deter improper police conduct, and overstate the jury’s innate ability to evaluate eyewitness testimony and that state due-process protections require a different reliability analysis); *People v Adams*, 53 NY2d 241, 250-252; 423 NE2d 379 (2005) (holding that the state’s due-process requirements require per se exclusion of unnecessarily suggestive showups); *Commonwealth v Johnson*, 420 Mass 458, 465; 650 NE2d 1257 (1995) (holding that the state’s due process requirements require per se exclusion of unnecessarily suggestive showups). We have not been asked to reach that question in this case.

nity of the witness to view the criminal at the time of the crime,” (2) “the witness’ degree of attention,” (3) “the accuracy of his prior description of the criminal,” (4) “the level of certainty demonstrated at the confrontation,” and (5) “the time between the crime and the confrontation.” *Manson*, 432 US at 114 (applying the *Biggers* factors to determine reliability of a witness identification). In *Perry*, the Court framed the inquiry as follows:

An identification infected by improper police influence . . . is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is “a very substantial likelihood of irreparable misidentification,” the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.^[14]

Starting with the first *Biggers* factor, Jones’s opportunity to view the criminal at the time of the crime was,

¹⁴ *Perry*, 565 US at 232, quoting *Simmons*, 390 US at 384. With respect to the burden of proof, in *Kurylezyk*, we held that “In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.” *Id.* at 302 (opinion by GRIFFIN, J.), citing *Biggers*, 409 US at 196. However, while “[t]he defendant has the initial burden of proving that the identification procedure was unnecessarily suggestive,” when addressing the *Biggers* factors, the prosecutor bears the burden of proof. *State v Perri*, 164 NH 400, 404; 58 A3d 627 (2012). See also *English v Cody*, 241 F3d 1279, 1282-1283 (CA 10, 2001) (“It is only after the defendant meets this burden [of showing that an identification procedure is unnecessarily suggestive] that the burden shifts to the government to prove that the identification was reliable independent of the suggestive procedure.”). This makes sense given that, as noted, “the trial judge must screen the evidence for reliability pretrial” in order to determine whether “the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances . . .” *Perry*, 565 US at 232.

on balance, poor. While the circumstances of *Biggers* are not a threshold or litmus test for weighing this factor in favor of a finding of reliability, they are a useful reference point for comparison purposes. In *Biggers*, the witness was the victim of a violent sexual assault. *Biggers*, 409 US at 193-194. There, in addition to viewing the defendant in adequate lighting, the witness was forced to face the defendant “directly and intimately” and was “no casual observer.” *Id.* at 200. She was with her assailant for between 15 and 30 minutes. *Id.* at 194. By contrast, Jones was in the backseat of a moving vehicle and the shooting took place across the street on the opposite side of the car, some 20 to 25 feet away. Jones’s mother sped away upon hearing the shots, only to return when the suspects were gone. Jones had less than a minute to view the scene and only a glancing viewing opportunity. Although the crime occurred in daylight, Jones testified, “I couldn’t get a good look.” Unlike the victim in *Biggers*, Jones did not view the defendant “directly and intimately” for an extended period of time. *Id.* at 200. Instead, he was a “casual observer.” *Id.* Jones’s limited opportunity to view the defendant at the time of the crime does not provide strong indicia of reliability.¹⁵

Regarding the second *Biggers* factor, Jones’s attention was drawn to the shooting, but Jones does not appear to have focused on the physical features of the

¹⁵ The dissent argues that Jones had adequate opportunity to view the crime based on events he was able to recount and his agreement that he “had a pretty good . . . view of what was going on.” We agree Jones seemed to be able to see the events of the shooting *generally*, and the dissent’s discussion demonstrates that much. But Jones was not able to correctly list distinguishing features of the shooter or driver, and by Jones’s own account with regard to identifying the perpetrators, he “couldn’t get a good look.” Jones’s view of the assailant is the pertinent inquiry, and that view was poor.

shooter. In *Biggers*, the witness faced her assailant “directly and intimately” and was a “victim of one of the most personally humiliating of all crimes.” *Id.* In this case, to the extent that Jones was focused on the scene, his testimony indicates that he was looking at the Jeep, the driver of the Jeep, and the gun rather than at the shooter. Jones testified his attention was drawn by the gun: “I seen the gun, I can’t identify the person who was really.” Given that the witness himself testified he “wasn’t paying attention” to the physical features of the person he was asked to identify, we do not believe that his degree of attention provides strong indicia of reliability.¹⁶

The description Jones gave before viewing defendant and Ramsey matched them in a general sense. In *Biggers*, the witness’s description included specific details of “approximate age, height, weight, complexion, skin texture, build, and voice . . .” *Id.* Here, Jones described the pair as black men wearing white shirts driving a Jeep, and those generalities matched defendant and Ramsey. But the most specific corroborating details he gave did not match. Both defendant and Ramsey were the correct build to match the 150-pound estimation Jones gave of both offenders, but neither matched the description of the 320-pound driver given by Jones. Neither defendant nor Ramsey was bald as Jones described, and neither man had a “long beard” as Jones described the driver. Jones also remembered a partial license plate number as including “CE” or “GE,”

¹⁶ The dissent acknowledges Jones’s own claims of inattention but would leave the matter to the jury. This approach fails to account for the fact that the reliability of an identification is a threshold determination to submitting the identification to a jury. See *Moore*, 434 US at 227; *Perry*, 565 US at 239. When the question that the *Biggers* analysis is meant to answer is whether an identification can go to a jury, it seems less than helpful to leave that analysis to the jury.

but the Jeep defendant and Ramsey were driving had the license plate number “DFQ 9593.” Jones offered no other specifics. A general characteristic such as gender or skin tone will, by definition, match many people. So too with general characteristics of automobiles. Jones’s description was wrong about the most specific details of the suspects, and therefore this factor does not provide strong indicia of reliability.¹⁷

The level of certainty of the witness at the confrontation is difficult to evaluate because it was not documented. In *Biggers*, the witness testified, “when I first laid eyes on him, I knew that it was the individual, because his face—well, there was just something that I don’t think I could ever forget.” *Id.* at 195-196. In this case, Jones denies even making an identification. The detective sergeant testified that Jones identified defendant, but the detective sergeant provided no information about Jones’s level of certainty at the confrontation. Since Jones denies even making the identification and, at any rate, the prosecutor does not even claim Jones had a high level of certainty, it is hard to see how this could be a strong, or for that matter any, indication of reliability.¹⁸

¹⁷ The dissent criticizes our analysis of the accuracy of Jones’s description for focusing too heavily on the aspects of the description Jones got wrong. However, our analysis does not focus on wrong over right, but on specific over general. The third *Biggers* factor “helps the court determine if and when the witness developed and expressed a concrete and specific impression of the individual’s characteristics firm enough to remain reliable despite the vagaries of time and the pressures of any undue suggestiveness.” *United States ex rel Kosik v Napoli*, 814 F2d 1151, 1159 (CA 7, 1987). The more specific the characteristic, the more relevance it has as to the accuracy of the description. We acknowledge the most general aspects of Jones’s description matched defendant. But that general description might have also matched hundreds or thousands of others. The specific characteristics offered by Jones tell us whether his description was accurate, and those did not match.

¹⁸ The dissent is incorrect that there is “no evidence” which with to evaluate the fourth *Biggers* factor. It is true that the detective sergeant

The time between the crime and confrontation, here 4 or 5 hours, is clearly much shorter than the span of 7 months in *Biggers*. *Id.* at 201. This is the sole *Biggers* factor relied on by the trial court: “the details of the crime were still fresh in the witness’ mind.” This factor provides some indicia of reliability.

Lastly, the trial court reasoned, “[t]he fact that Jones identified [defendant] as the gunman, but did not identify Ramsey, indicates that he was relying on his memory of the crime and was not influenced by the suggestiveness of the procedure.” We disagree. That the defendant did not identify both suspects does not necessarily mean that he was not influenced by the procedure. And that he only identified one of the two men whom the police believed were involved in the crime could equally support the opposite conclusion, i.e., that he did not have a good vantage point and was not paying close attention. Thus, absent some indication that Jones got a better look at the gunman’s face, his inability to identify the driver does not make his identification of defendant as the gunman more reliable. We do not believe that Jones’s failure to identify Ramsey provides strong indicia of reliability.

Having reviewed the *Biggers* factors and other evidence relied on by the trial court, we do not believe that the prosecution has met its burden to show that the indicia of reliability in this case “are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances . . .” *Perry*, 565 US at 232.

did not make a specific claim regarding Jones’s level of certainty. But Jones was also present, and he denies making an identification at all. Jones’s account is relevant evidence that the dissent does not address. Instead, the dissent alludes to a police report that the prosecution attempted to use to refresh Jones’s recollection. The dissent also argues that this report is documentation of the identification procedure. However, the trial transcript gives us no clue as to what the report says, and the report itself was not entered into evidence.

D. HARMLESSNESS

Finally, having concluded that the showup was unnecessarily suggestive and unreliable, we must determine whether the error of its admission was harmless. As noted, introduction of a tainted identification violates the constitutional guarantee of due process. *Moore*, 434 US at 227. The error was preserved with the objection to Detective Sergeant Rivard's testimony. This Court reviews preserved constitutional errors to determine whether the beneficiary of the error has established that the error was harmless beyond a reasonable doubt. *Kurylczyk*, 443 Mich at 315-316 (opinion by GRIFFIN, J.); *id.* at 318 (BOYLE, J., concurring in part); *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994); *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). When evaluating whether erroneously admitted evidence was harmless beyond a reasonable doubt, we must "determine the probable effect of that testimony on the minds of an average jury." *Kurylczyk*, 443 Mich at 315 (opinion by GRIFFIN, J.) (quotation marks and citations omitted); see also *id.* at 318 (BOYLE, J., concurring in part). Reversal is required if the average jury "would have found the prosecution's case significantly less persuasive without the erroneously admitted testimony." *Id.* (quotation marks and citation omitted). The prosecution cannot show that the error in this case was harmless beyond a reasonable doubt.

The prosecution argues that the admission of the showup was harmless because the identification's unreliability was exposed to the jury through cross-examination and because the jury was instructed to evaluate the reliability of the identification. Said another way, the showup had so little value it could not have affected the jury's verdict. When an appellate

court is considering harmlessness, it will always be the case that the identification was unreliable. Further, it should always be the case that defense counsel explored reliability through cross-examination and the jury was instructed to evaluate the reliability of the identification. The prosecutor's position sweeps too broadly—it would render every error of this kind harmless.

Courts have widely acknowledged that juries place disproportionate weight on eyewitness identifications, even if they lack indicia of reliability.¹⁹ While the showup had little actual probative value, the “probable effect of that testimony on the minds of an average jury,” *Kurylczyk*, 443 Mich at 315 (opinion by GRIFFIN, J.) (quotation marks and citations omitted); *id.* at 318 (BOYLE, J., concurring in part), was almost certainly disproportionately large. If we were to consider only the weight of the showup as the prosecution suggests, we would find it harmful.²⁰

¹⁹ See *Garner v People*, 436 P3d 1107, 1107; 2019 CO 19 (Colo, 2019) (“Precisely because identification testimony is so persuasive, a mistaken identification can lead to a wrongful conviction.”); *State v Jackson*, 248 So 3d 1279, 1283; 2016-1100 (La 5/1/18) (“Scholars and judges alike have commented that the inherent risk of misidentification is generally exacerbated by the compelling nature of eyewitness testimony”); *State v Artis*, 314 Conn 131, 155; 101 A3d 915 (2014) (“We acknowledge the powerful effect that eyewitness identification testimony has on juries and recognize that the improper admission of that evidence will constitute harmful error in many instances, particularly when there is no other such eyewitness identification testimony.”); *State v Delgado*, 188 NJ 48, 60; 902 A2d 888 (2006) (“Eyewitness identification can be the most powerful evidence presented at trial, but it can be the most dangerous too.”).

²⁰ The dissent criticizes us for lacking faith in our jury system and notes that in *Manson* the United States Supreme Court was “content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill.” *Manson*, 432 US at 116. The dissent seems to have failed to consider the sentence preceding that quotation: “Surely, we cannot say that under all the circumstances of this case there is a very substantial

But, as with *Kurylczyk*, we must determine whether the prosecution’s case was “significantly less persuasive” without the showup. This requires us to consider the remainder of the prosecution’s case. Without the showup, the prosecution’s only evidence was the security camera compilation and Watkins’s identification of the Jeep.

The compilation is far from conclusive. While a Jeep passes by in each clip, there are no identifiable distinguishing features. The compilation might depict the same Jeep in each of the clips, or it might not. The compilation might depict the Jeep from the crime, or it might not. The last clip depicts the traffic stop of the Jeep defendant and Ramsey were traveling in, but earlier clips might or might not. There simply is no way to know. Even if the compilation did trace one vehicle from the crime to the traffic stop, it also shows that, after the shooting, at least one person got out, and at least one person got in. There is no way to determine whether the person or people who got out of the Jeep are the same as the one or ones who got in. Watkins’s identification of the Jeep via a photograph is also far from conclusive. The color and make were the only features of the Jeep she seemed aware of. She failed to identify any other aspect about the Jeep that was familiar to her: “I don’t know the difference, new, old. I know it looked like a Jeep. . . . It was a box.” And it is worth again noting that the license plate on the Jeep

likelihood of irreparable misidentification.” *Id.* (quotation marks and citation omitted). We agree that when an identification is sufficiently reliable, its weight is to be assessed by a jury. For reasons discussed at length here, we continue to think unreliable identifications should not be presented to juries. See *Moore*, 434 US at 227 (“[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.”).

defendant was in when he was arrested did not contain any of the letter combinations that Jones reported to police. Without the showup, this is the sum of the prosecution's case. We have little trouble concluding that it is "significantly less persuasive" without the showup.

Our conclusion is buttressed by the fact that the trial court also found the prosecution's case "significantly less persuasive" without the showup. As noted earlier, the trial court denied a directed verdict to defendant, but it granted a directed verdict to Ramsey.²¹ In denying the directed verdict to defendant, the court reasoned that "[t]he out-of-court identification testimony of Sergeant Rivard by itself, and together with the other circumstantial evidence presented," was sufficient to sustain the verdict. But the only difference between the evidence against defendant and Ramsey was the showup. We believe the prosecution's case was "significantly less persuasive" without the showup identification evidence.

IV. CONCLUSION

We conclude that the showup conducted by the police was unnecessarily suggestive and unreliable. Further, the error was not harmless. Accordingly, we reverse the Court of Appeals judgment, suppress any evidence from the showup, and remand to the Saginaw Circuit Court for a new trial.

²¹ That decision was reversed in the Court of Appeals; Ramsey's application for leave to appeal the Court of Appeals decision is still pending. See *People v Ramsey (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued July 2, 2019 (Docket No. 334614), application for leave to appeal pending. But the resolution of the legal issues in that case does not affect our observation that at least for the trial court, which observed the prosecution's case in person, the decision to grant or deny a directed verdict turned on the showup identification.

MCCORMACK, C.J., and VIVIANO, BERNSTEIN, and CLEMENT, JJ., concurred with CAVANAGH, J.

ZAHRA, J. (*dissenting*). I respectfully dissent. On a sunny June afternoon, 16-year-old Dyjuan Jones witnessed the murder of Humberto Casas from approximately 20 to 25 feet away while riding in the back of his mother's vehicle. Specifically, Jones observed a passenger exit a light gray Jeep and fire multiple shots at Casas. Jones did not have a clear view of the driver, who remained in the Jeep throughout the incident. But Jones had a clear, unobstructed view of the shooter. At the scene, Jones provided police with a description of the driver, the passenger-shooter, and the vehicle in which they fled after the shooting. This information proved invaluable. Shortly after the shooting, police stopped a vehicle matching the description provided by Jones. The vehicle had two occupants: Dominique Ramsey, the driver, and defendant, the front seat passenger. The description of the shooter provided by Jones matched defendant. Defendant and Ramsey were taken to the Saginaw Police Department. Approximately four or five hours after the murder, Jones went to the Saginaw Police Department to be interviewed regarding the crime. During a break in the interview, Michigan State Police Detective Sergeant David Rivard asked Jones to walk down a hallway and look into two interview rooms located at the end of the hall. Detective Sergeant Rivard asked Jones to determine whether he knew anyone seated in either room, and if so, how he knew them. Jones did just that and upon returning identified defendant, who was seated in one of the rooms, as the shooter. Jones did not identify Ramsey, who was seated in the other interview room. At the preliminary examination and later at trial, however, Jones testified that he never identified

defendant as being involved in the crime. The identification of defendant by Jones was nonetheless admitted into evidence through the testimony of Detective Sergeant Rivard pursuant to MRE 801(d)(1)(C) (prior statement of identification). The jury, tasked with the duty of determining the veracity and credibility of both Jones and Detective Sergeant Rivard as well as assessing the reliability, if any, of the identification of defendant allegedly made by Jones, found defendant guilty of conspiracy to commit open murder.

I do not take issue with the majority opinion's conclusion that the identification procedure employed at the police station was suggestive and unnecessary. Nonetheless, I do not believe this procedure was so unduly suggestive as to lead to a substantial likelihood of misidentification. Viewed under the totality of the circumstances and weighed against the corrupting effect of the suggestiveness of this procedure, I conclude that the identification of defendant by Jones retained strong indicia of reliability. I therefore see no clear error in the trial court's decision to admit evidence that Jones identified defendant as the shooter. I would affirm the trial court and the Court of Appeals.

I. STANDARD OF REVIEW

A "trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous."¹ "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made."²

¹ *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (opinion by GRIFFIN, J.). Justice GRIFFIN's opinion was joined, in all the parts relevant to this case, by Justice BOYLE. See *id.* at 318 (BOYLE, J., concurring in part). For ease of reading, citations to this concurrence are not included, but may be assumed throughout this opinion.

² *Id.* at 303 (opinion by GRIFFIN, J.).

II. LEGAL BACKGROUND

The majority opinion has condemned the pretrial identification procedure used in this case as an impermissible showup.³ I do not contest that identifications made by way of a showup are disfavored.⁴ Nonetheless, the Supreme Court of the United States has made it clear that suppression of evidence is not required merely because the identification of an alleged assailant was obtained through a showup.⁵ The Supreme Court has stated that a rule requiring the automatic exclusion of showups “would ‘go too far,’ for it would ‘keep evidence from the jury that is reliable and relevant,’ and ‘may result, on occasion, in the guilty going free.’”⁶ Indeed, it is well established that suppression of an eyewitness identification is a high bar to attain, requiring a defendant to show that “the pretrial

³ A “showup” is defined as “[a] police procedure in which a suspect is shown singly to a witness for identification . . .” *Black’s Law Dictionary* (11th ed). There are volumes of cases that expound on the suggestiveness of showups. The procedure implemented by Detective Sergeant Rivard was indeed suggestive. But suggestiveness alone does not require suppression. In the end, “‘each case must be considered on its own facts . . .’” *Neil v Biggers*, 409 US 188, 196; 93 S Ct 375; 34 L Ed 2d 401 (1972), quoting *Simmons v United States*, 390 US 377, 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968).

⁴ *Stovall v Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967) (explaining that showups have been “widely condemned”); see also *United States v Brownlee*, 454 F3d 131, 138 (CA 3, 2006) (“[A] show-up procedure is inherently suggestive because, by its very nature, it suggests that the police think they have caught the perpetrator of the crime.”).

⁵ *Perry v New Hampshire*, 565 US 228, 239; 132 S Ct 716; 181 L Ed 2d 694 (2012) (“Even when the police use [an unnecessarily suggestive identification] procedure, . . . suppression of the resulting identification is not the inevitable consequence.”).

⁶ *Id.*, quoting *Manson v Brathwaite*, 432 US 98, 112; 97 S Ct 2243; 53 L Ed 2d 140 (1977) (brackets omitted).

identification procedure was *so* suggestive in light of the totality of the circumstances that it led to a *substantial* likelihood of misidentification.”⁷

“[A]n unnecessarily suggestive identification may be admitted if it is sufficiently reliable.”⁸ Reliability of an eyewitness identification has been characterized as the “linchpin” in determining whether the identification is admissible.⁹ In *Neil v Biggers*, the Supreme Court of the United States provided a nonexhaustive list of factors to be considered in determining whether the identification was reliable, including:

the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.¹⁰

In *Perry v New Hampshire*, the Supreme Court summarized the standard for excluding an eyewitness identification due to the lack of reliability:

⁷ *Kurylczyk*, 443 Mich at 302 (opinion by GRIFFIN, J.) (emphasis added), citing *Biggers*, 409 US at 196; see also *Perry*, 565 US at 261-262 (Sotomayor, J., dissenting) (“It bears reminding . . . that we set a high bar for suppression. The vast majority of eyewitnesses proceed to testify before a jury.”).

⁸ *People v Thomas*, 501 Mich 913, 913 (2017), citing *Perry*, 565 US at 238-239 (opinion of the Court); see also *Manson*, 432 US at 106 (“The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.”).

⁹ *Perry*, 565 US at 239, quoting *Manson*, 432 US at 114; see also *Biggers*, 409 US at 199 (“[T]he central question [is] whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.”) (quotation marks omitted), and *Thomas*, 501 Mich at 913 (“[R]eliability is the ultimate touchstone for admissibility of an identification.”).

¹⁰ *Biggers*, 409 US at 199-200.

An identification infected by improper police influence . . . is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is “a very substantial likelihood of irreparable misidentification,” the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.¹¹

Thus, the ultimate determination of whether an eyewitness identification is admissible is a two-step interconnected inquiry.¹² That is, courts must weigh the factors inherent to reliability, i.e., the *Biggers* factors, against “the corrupting effect of the suggestive identification itself.”¹³

III. DISCUSSION

A. THE SHOWUP WAS NOT UNDULY SUGGESTIVE

I do not take issue with the majority opinion’s conclusion that the police station showup conducted in this case was suggestive and unnecessary. But the inquiry does not end there. The identification should

¹¹ *Perry*, 565 US at 232, quoting *Simmons*, 390 US at 384; see also *People v Gray*, 457 Mich 107, 122 n 18; 577 NW2d 92 (1998) (“[A] defendant is denied due process only when the identification evidence is so unreliable that its introduction renders a trial unfair. As long as there is not a substantial likelihood of misidentification, it is the function of the jury to determine the ultimate weight to be given the identification.”), quoting *United States v Causey*, 834 F2d 1277, 1285 (CA 6, 1987).

¹² *Howard v Bouchard*, 405 F3d 459, 469 (CA 6, 2005) (“We thus first assess whether the identification was unnecessarily suggestive, then assess whether the identification was nonetheless reliable. If an identification is reliable, it will be admissible even if the confrontation was suggestive.”), citing *Manson*, 432 US at 114.

¹³ *Manson*, 432 US at 114.

not be suppressed unless the showup was so *unduly* suggestive that it led to a substantial likelihood of misidentification.¹⁴ To this end, I conclude the majority opinion fails to weigh each of the *Biggers* factors under the circumstances presented in this case and against “the corrupting effect of the suggestive identification itself.”¹⁵ For instance, defendant and Ramsey appeared before Jones in separate interview rooms and in street clothes. Both Ramsey and defendant sat unrestrained and unaccompanied by any law enforcement officers.¹⁶ For all intents and purposes, there was nothing to suggest to Jones or any objective observer that Ramsey and defendant were suspects in any crime, let alone the crime Jones was at the police station to discuss. Jones was present at the police station to aid law enforcement. From the objective facts, it could appear to Jones that Ramsey and defendant were also present at the police station for innocent reasons.¹⁷

¹⁴ See *Kuryleczyk*, 443 Mich at 306 (opinion by GRIFFIN, J.) (“[A] suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification. The relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification.”) (citation omitted).

¹⁵ *Manson*, 432 US at 113, citing *Biggers*, 409 US at 199-200.

¹⁶ But see *Brownlee*, 454 F3d at 138 (finding the showup to be unnecessarily suggestive, but still sufficiently reliable, where the defendant was shown to witnesses handcuffed, in the back of a police cruiser, with police officers nearby, at the scene of the accident where one witness observed the defendant wreck the stolen vehicle, and while “all four eyewitnesses were allowed to make identifications while exposed to the suggestive influences of others”).

¹⁷ The majority opinion states that at the preliminary examination, “Jones testified that he understood he was taken to see defendant for the purpose of making an identification.” *Ante* at 45. But Jones did not say that he walked to the interview rooms “for the purpose of making an identification.” He merely agreed *at the preliminary examination* with the prosecutor, likely in retrospect, that this was the prosecutor’s

Further, Detective Sergeant Rivard did not tell Jones that defendant and Ramsey were suspects in the shooting, nor did Detective Sergeant Rivard ask Jones leading questions in an attempt to have Jones identify defendant and Ramsey as the assailants.¹⁸ Detective Sergeant Rivard simply asked Jones whether he knew either of the two men seated in the two separate interview rooms. Detective Sergeant Rivard did not pressure or coerce Jones to make an identification, nor did he in any way suggest to Jones that an identification was at all required.¹⁹ In fact, Detective Sergeant

purpose at the time of the police station showup. Further, the identification is not tainted because Detective Sergeant Rivard did not record the identification procedure. Both Jones and Detective Sergeant Rivard testified in detail regarding the facts leading to the identification of defendant by Jones. Specifically, Jones testified that Detective Sergeant Rivard “[t]old me to walk down the hallway, look left and right, it was two rooms, two males was [sic] sitting in a room, one was kind of like really clean balled [sic] and then the other one he had braids.” Then in response to the question “did that Officer tell you [to] identify anybody,” Jones flatly testified that “[h]e told me go down the hallway look left and right and see if I see anyone in the room.” Detective Sergeant Rivard testified that he asked Jones “if he’d walk down the hallway and look into both rooms and then return back to [inform Rivard whether Jones had] . . . identified any of [the] individuals in the room, [and] if he could explain how he . . . knew them.” Given the corroboration of their testimony, it is clear that Jones was not escorted to the interview rooms by police, nor was he surrounded by police when he observed defendant.

¹⁸ See, e.g., *Thomas*, 501 Mich at 913 (“[T]he police officer’s presentation of a single photograph to the victim accompanied by the question ‘was this the guy who shot you?’ was highly suggestive”); *Gray*, 457 Mich at 111-112 (finding the pretrial identification procedure to be highly suggestive where the “defendant was singled out by showing only one photo to the victim, and then the victim was *reassured* that defendant was her assailant because of the *statement by a police officer* that this was the man the police believed was her assailant”) (emphasis added); *Howard*, 405 F3d at 470 (“[T]here is no evidence that law enforcement officers said anything to suggest to [the witness] that [the defendant] was the killer.”).

¹⁹ See *Manson*, 432 US at 116 (finding that there was little pressure or urgency placed on the witness to make an identification, thus demonstrating that the “identification was made in circumstances allowing care and reflection”).

Rivard did nothing to suggest that the suspects from the shooting were apprehended and that an immediate identification was needed from Jones. The identification occurred during a break in the interview of Jones at the police station, not before the interview was conducted, demonstrating that an identification was not at all urgent. Moreover, that Jones identified defendant, but not Ramsey, demonstrates that Jones relied on his memory rather than any potential corrupting effect of the showup.

The majority opinion dismisses these facts altogether, stating that “noting other ways the showup could have been more suggestive does not help us determine whether this showup was suggestive.”²⁰ The majority opinion misses the point, failing to acknowledge that these are facts properly considered under the “totality of the circumstances” analysis; facts that are pertinent to the ultimate inquiry of whether the identification by Jones was sufficiently reliable to overcome its overall suggestiveness.²¹

B. THE IDENTIFICATION OF DEFENDANT BY JONES WAS RELIABLE

Next we must determine whether the identification of defendant by Jones was sufficiently reliable to

²⁰ *Ante* at 45.

²¹ This is not a case where the showup was so suggestive that it “made it all but inevitable that [the witness] would identify [the defendant] whether or not he was in fact ‘the man.’” *Foster v California*, 394 US 440, 443; 89 S Ct 1127; 22 L Ed 2d 402 (1969). In *Foster*, the witness failed to identify the defendant despite a suggestive three-man lineup where the defendant was the tallest person by 6 inches and was the only one wearing a leather jacket similar to the one worn by the robbery suspect. *Id.* at 441. Police then arranged a one-on-one showup, where the witness still could only make a tentative identification. *Id.* Finally, in a five-man lineup a week later, the witness affirmatively identified the defendant, who was the only person to appear in both lineups. *Id.* at 441-442. The Supreme Court found that this “procedure so undermined the reliability of the eyewitness identification as to violate due process.” *Id.* at 443.

outweigh the suggestiveness of the showup.²² This inquiry is resolved by looking to *Biggers* and its progeny. As an initial matter, the majority opinion fails to account for or consider the many cases decided since *Biggers*. While *Biggers* is the watershed case discussing the reliability of out-of-court identifications, there have been many cases since *Biggers* was decided in 1972 that have found identifications sufficiently reliable under circumstances that are seemingly less reliable than the circumstances present in *Biggers*.²³ The majority opinion relies too heavily on a factual comparison of this case to *Biggers* rather than an exhaustive application of the *Biggers* factors in the context of the caselaw that has developed over the past 48 years.

1. THE OPPORTUNITY FOR THE WITNESS
TO VIEW THE ASSAILANT AT THE TIME OF THE CRIME

Regarding the first *Biggers* factor, Jones had ample opportunity to view defendant at the time of the crime.

²² *Manson*, 432 US at 114, citing *Biggers*, 409 US at 199-200; *Causey*, 834 F2d at 1284-1285 (“In sum, the essential question is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.”) (quotation marks and citations omitted).

²³ See, e.g., *Gray*, 457 Mich at 124 (explaining that while the eyewitness “could not be one hundred percent positive at the lineup, she was sufficiently certain to be able to pick out the defendant,” and “any evidence of the victim’s lack of certainty would be relevant to the weight that the evidence should be given, but not to its admissibility”); *Brownlee*, 454 F3d at 140 (finding the eyewitness identifications sufficiently reliable despite the witnesses’ short opportunity to view the suspect, the witnesses’ misidentification of the suspect’s clothing and age, and the fact that “none of the witnesses could describe the suspect’s facial features or provide the police with more than a relatively general description of him”); *Howard*, 405 F3d at 474 (discussing cases where eyewitness identifications were sufficiently reliable and thus admissible despite poor opportunities to view the perpetrators and errors in the witnesses’ description of the perpetrators).

The shooting occurred on a clear, sunny afternoon in June, and Jones had an unobstructed view of the shooting from about 20 to 25 feet away while in the back of his mother's car. When asked at trial whether he "had a pretty good . . . view of what was going on," Jones answered in the affirmative. The majority opinion concludes, with no objective support, that Jones was a mere casual observer whose opportunity to view the crime was poor. But Jones was not required to be an active participant in the events he observed in order to have a good opportunity to observe defendant.²⁴ In fact, the conclusion that Jones was unable to adequately view the crime as a mere casual observer is belied by the detail with which Jones was able to describe the crime. At the preliminary examination, Jones stated that the shooting occurred in "[n]o less than a minute,"²⁵ during which time Jones observed a Hispanic male (Casas) walk out of a store when an African-American man got out of a Jeep and fired three gunshots at Casas. The shooter's gun jammed, but after approximately five seconds, the shooter relieved the jam and fired more shots at Casas while Casas tried to flee. The driver remained in the Jeep. Jones described the shooter as an African-American male with a shaved head wearing a white t-shirt and black cargo pants.²⁶ At trial, Jones conceded that the events

²⁴ *Haliym v Mitchell*, 492 F3d 680, 705 (CA 6, 2007) (stating only that courts are "more likely to find an identification reliable where a witness 'was able to view the assailant with a heightened degree of attention, as compared with disinterested bystanders or casual observers' "), quoting *Howard*, 405 F3d at 473 (quotation marks and citation omitted).

²⁵ I do note that at two other times during his testimony, Jones agreed with questions asking whether the shooting occurred in "less than a minute."

²⁶ Comparatively, at trial, Jones described the incident as follows:

As we were crossing the tracks on Cumberland, we were passing a little auto body shop or whatever. And as we passed the

happened in quick succession and that he did not see the shooter get back into the Jeep because Jones and his mother fled the scene to avoid the gunfire. But the facts and details provided by Jones strongly suggest that Jones had sufficient opportunity to have a clear, unobstructed view of the shooter while only a short distance away.²⁷ Thus, the opportunity Jones had to view defendant during the crime was more than adequate.

2. THE DEGREE OF ATTENTION PAID BY THE WITNESS

As to the second *Biggers* factor, the degree of attention that Jones paid to the shooting is more difficult to

tracks, I heard what I thought was firecrackers. And then, I didn't pay no mind to it.

But then, I heard them again, so I turned around, and I see an African-American male shooting a Hispanic male. And when the firecracker—well, when the gunshots stopped, I see the Hispanic male, like, rolling in the—from the sidewalk into the street, trying to get away from it. And, as the gun unjammed when I thought it jammed, he started shooting again. And the Hispanic male just kept rolling and rolling until he just didn't roll any more.

Further, Jones testified at trial that the shooter was an African-American male with a bald head wearing a white t-shirt and “probably” black cargo pants.

²⁷ See *Brisco v Ercole*, 565 F3d 80, 93 (CA 2, 2009) (explaining that “fifteen to fifty feet is hardly a great distance”); *Brownlee*, 454 F3d at 139-140 (holding that even though the entire carjacking only lasted approximately 30 seconds while the witness (the victim) was focused primarily on the weapon, not the defendant, the witness still viewed the perpetrator “at fairly close range, and in broad daylight”); *Howard*, 405 F3d at 472 (finding that the witness had “a good opportunity” to observe the defendant where the witness saw him once for a “glance” from three to six feet away, once for “a split-second” from 10 to 15 feet away, and once for approximately a minute and a half from 30 to 40 feet away); *Causey*, 834 F2d at 1285 (“The record indicates that the vehicle in which [the defendant] was allegedly sitting was 20 to 30 feet from the window, and [the witness’s] view was unobstructed looking inside the car.”). But

discern than the majority opinion suggests. Viewing the testimony of Jones as a whole, two divergent paths emerge regarding the degree of attention he paid to the crime. The majority opinion cites the testimony of Jones at the preliminary examination to conclude that Jones was more focused on the Jeep, the driver, and the gun rather than the shooter. The majority opinion chooses this path to conclude that Jones did not pay a high degree of attention to the crime. An alternative path that emerges from the testimony of Jones, the one the jury chose, suggests that Jones was paying attention to the incident as a whole, not everything except the shooter. This is evidenced by the way Jones recounted the crime and his description of the shooter. This path provides sufficient indicia of reliability under the second *Biggers* factor. Where the testimony of a witness presents different, plausible versions of what the witness observed, this Court should defer to the jury to choose which version to believe.²⁸

Further, while not an enumerated *Biggers* factor, the testimony of Jones reveals that he was relatively calm

see *Thomas*, 501 Mich at 913 (holding that the victim’s opportunity to view the assailant was inadequate where “the victim viewed the assailant’s partially obscured face for no more than seven seconds on a dark city street with no streetlights while a gun was pointed at him”); *United States v Greene*, 704 F3d 298, 310 (CA 4, 2013) (holding that the witness “had a limited opportunity to view the robber, given the robber’s disguise, his brief amount of time in the bank, and the presence of [a] firearm”).

²⁸ See *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005) (“Fundamentally, it is the province of the jury to assess the credibility of witnesses.”). To be sure, the jury could have determined that the degree of attention paid by Jones was inadequate. But the point of this reliability inquiry is to keep identifications that are wholly unreliable from going to the jury, not to exclude less-than-perfect identifications altogether simply because there are questions left for the jury to resolve.

while witnessing the shooting.²⁹ Jones testified that this was not the first time he had heard gunshots, and when asked by defense counsel, Jones stated that he was not disturbed by the shooting. In fact, Jones prompted his mother, who was a nurse, to return to the scene to render aid to Casas. Once at the scene, Jones began counting the empty shell casings, as he had apparently been taught to do in educational courses in criminal justice and criminal investigation.³⁰ In sum, that “Jones’s attention was drawn to the shooting”³¹ did not affect the attention to detail Jones paid to the crime and its actors, as evidenced by the detail with which Jones described the shooting.

3. THE ACCURACY OF THE PRIOR DESCRIPTION
OF THE ASSAILANT MADE BY THE WITNESS

Regarding the third *Biggers* factor, the description of the shooter that Jones provided to the police accurately matched defendant. When Bridgeport Township Officer Tyler Poirer pulled over the Jeep in which Ramsey and defendant were traveling, defendant was wearing a white t-shirt and black shorts and he appeared to

²⁹ The fear and stress of a witness while observing a crime may affect the ability of the witness to accurately perceive the crime and its participants. See *Perry*, 565 US at 243 (stating that “whether the witness was under stress when he first encountered the suspect” is one factor bearing on the likelihood of misidentification); *Greene*, 704 F3d at 308 (stating that the degree of attention paid by the witness “to the robber at the time of the offense was greatly diminished due to her reasonable fear and the distraction of having a weapon pointed at her”). Here, however, Jones remained calm.

³⁰ See *Kurylczyk*, 443 Mich at 308 (opinion by GRIFFIN, J.) (finding the identification reliable in part because there was no evidence that the eyewitnesses “were panicked or otherwise psychologically debilitated by the crime” and noting that the eyewitnesses—bank tellers—relied on their training and reacted calmly during the bank robbery).

³¹ *Ante* at 52.

have a shaved head, or at least a very short hairstyle. Significantly, even general descriptions of physical characteristics and external features, such as the shooter's clothing, can be evidence in favor of reliability.³² The only aspect of defendant's appearance that arguably did not match the description of the shooter provided by Jones was the fact that defendant wore shorts when he was apprehended, not pants. All other aspects of that description accurately matched defendant, and this minor distinction goes to the weight afforded to this testimony, not to its reliability and admissibility.³³

The majority opinion goes astray by focusing too heavily on the fact that Jones misidentified the license plate of the Jeep in which the assailants fled and on the fact that Jones erroneously described Ramsey as weighing between 280 and 320 pounds and having a beard while he actually weighed about 150 pounds and

³² See *Brisco*, 565 F3d at 92 (explaining that even a minimal description of physical characteristics can be sufficient, stating “[t]he physical description provided by the victim substantially matched petitioner’s characteristics insofar as [petitioner] is a white male, five feet, ten inches tall, ‘stocky,’ and has brown hair”); *Brownlee*, 454 F3d at 134-135 (where four witnesses identified the suspect as a young black male, possibly in his thirties, wearing a dark t-shirt and a baseball cap at the time of the carjacking, these generalities of the witnesses’ descriptions of the suspect went more toward the weight of the identifications than reliability); *Howard*, 405 F3d at 473 (finding the description of the defendant by the witness sufficiently accurate where the witness described the perpetrator as “a black man with tan shorts on,” holding a “‘real short’” rifle with a clip, and having a distinctive “‘short flat-top’” haircut).

³³ See *Brownlee*, 454 F3d at 140 (finding the carjacking victim’s identification of the defendant sufficiently reliable despite the victim describing her assailant as wearing shorts, whereas the defendant wore blue jeans). The majority opinion takes issue with the general description of the shooter provided by Jones, emphasizing that Jones was unable to identify any specific physical characteristics of the shooter. While the description of the shooter offered by Jones only included the shooter’s general physical characteristics of race, gender, and hairstyle, the fact remains that this description accurately matched defendant.

had short facial hair stubble. But these discrepancies are substantially less relevant considering that the other characteristics of the Jeep provided by Jones accurately matched Ramsey's Jeep. More significantly, Jones did not identify Ramsey at the showup. Jones only identified defendant. Thus, with respect to defendant, the description offered by Jones was reasonably accurate.³⁴

4. THE LEVEL OF CERTAINTY THE WITNESS SHOWED AT THE PRETRIAL IDENTIFICATION PROCEDURE

As to the fourth *Biggers* factor, there is no evidence in the record regarding the level of certainty Jones displayed when he identified defendant as the shooter. At trial, Detective Sergeant Rivard simply testified that Jones identified defendant as the shooter. In contrast, Jones denied ever making the identification. Because there is no evidence regarding the level of certainty

³⁴ Further, while other evidence of guilt plays no part in the determination of whether the identification of defendant by Jones was reliable, it cannot be overlooked that defendant was the *passenger*, not the driver, of the Jeep that Officer Poirer pulled over just 11 minutes after receiving the dispatch call about the shooting. See *Manson*, 432 US at 116 (“Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment.”). Also, Rosei Watkins—another witness to the murder—positively identified Ramsey's Jeep as the one she saw fleeing the murder scene and testified at trial that the shooter's hairstyle was “short cut.” Watkins also testified that the driver was of normal build, which would be contrary to the assessment of the driver given by Jones. But when asked whether Watkins thought the driver was “as tall as 6-foot-5-inches,” Watkins testified that she “d[id]n't think *they* was [sic] that tall.” (Emphasis added.) Although Watkins made this statement while being questioned about the height of the driver (Ramsey), it is possible that her use of the word “they” indicated that she was referring to the height of both assailants.

Jones possessed at the time of the pretrial identification procedure, this factor does not weigh for or against the reliability of the identification of defendant by Jones.

5. THE LENGTH OF TIME BETWEEN
THE CRIME AND THE CONFRONTATION

Regarding the fifth *Biggers* factor, that Jones identified defendant approximately four or five hours after the shooting occurred weighs in favor of reliability. This time span between Jones witnessing the shooting and his identification of defendant at the police station is extremely brief. Thus, the identification was made while the shooting was fresh in the mind of Jones. This Court has found reliable an identification that occurred roughly two weeks after the crime.³⁵ Even where almost a month passes between the crime and the identification, we have held that this “relatively short period . . . ensures that the crime was still fresh in the victim’s mind”³⁶ This is not a case in which weeks or even months passed between the crime and the confrontation.³⁷ Jones identified defendant the same day he observed the murder of Casas, identifying defendant as the shooter within hours of the crime. This factor undoubtedly and strongly weighs in favor of reliability.

³⁵ *Kurylczyk*, 443 Mich at 307-308 (opinion by GRIFFIN, J.).

³⁶ *Gray*, 457 Mich at 120.

³⁷ *Manson*, 432 US at 116 (identification occurred within two days of crime); *Howard*, 405 F3d 459 (“Three months is not a great length of time between an observation and identification.”). But see *Biggers*, 409 US at 201 (holding that while a seven-month lapse between the crime and confrontation would be “a seriously negative factor in most cases,” the fact that the witness had not made a previous identification demonstrated that “[h]er record for reliability was . . . a good one”); *Greene*, 704 F3d at 309 (finding that a 17-month delay between the crime and the identification constituted “an unquestionably lengthy period of time that must weigh against reliability”).

6. THE TOTALITY OF THE *BIGGERS* FACTORS

Weighing these factors under the totality of the circumstances and against the corrupting effect of the overall suggestiveness of the identification process demonstrates that the identification of defendant by Jones retained strong indicia of reliability such that the suggestiveness of the showup did not lead to a substantial likelihood of misidentification. Jones identified defendant as the shooter while the incident was still very fresh in his mind. Jones had an unobstructed view of defendant during daylight hours. The opportunity of Jones to view the shooter was admittedly brief as the crime occurred quickly and while Jones and his mother fled from gunfire. But Jones, who was relatively calm throughout the incident, nonetheless had sufficient time to view the shooting and provide police with a general description of the physical characteristics and clothing of the shooter that ultimately matched defendant. In sum, the police station identification procedure was not so unduly suggestive that it outweighed its reliability. Any shortcomings in the identification procedure go to the weight of the evidence, not its admissibility.³⁸ Accordingly, the trial court and the Court of Appeals properly concluded that

³⁸ See *Cooper v Bergeron*, 778 F3d 294, 305 (CA 1, 2015) (“It is not uncommon . . . for a witness identification to involve an unduly suggestive procedure, as well as other circumstances that may weaken the accuracy of the witness’s recall, that—when viewed on the whole—nevertheless do not undermine the reliability of the evidence for purposes of admitting it at trial for the jury to decide its weight.”); *Brownlee*, 454 F3d at 140 (“The generality of the witnesses’ descriptions of the suspect, the relatively short period of time they saw him, and the other shortcomings pertaining to their identifications, go more to the weight of the evidence than the reliability of their identifications, and thus were issues for the jury.”); *Causey*, 834 F2d at 1285 (holding that the defendant’s claims for why the single photographic identification of him by the witness was unreliable “go to the *weight* the testimony

the evidence showing that Jones identified defendant as the shooter was admissible.

Given this conclusion, it is not necessary to discuss whether any error in admitting the identification made by Jones was harmless beyond a reasonable doubt. I am compelled, however, to address the majority opinion's concerns with juries being so susceptible to eyewitness identifications that they place "disproportionate weight" on such evidence.³⁹ The lack of faith in our jury system exhibited in the majority opinion is perplexing. As the Supreme Court of the United States explained in *Manson v Brathwaite*:

Surely, we cannot say that under all the circumstances of this case there is a very substantial likelihood of irreparable misidentification. Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.^[40]

We trust juries to make difficult credibility and reliability determinations every day, and I fail to see why this case should be any different.⁴¹ The only unique aspect of this case is testimony from Jones that he never identified defendant as the shooter at the police station, thus causing evidence of his identification to be

should be given by the jury and do not render the testimony so unreliable as to mandate its exclusion").

³⁹ *Ante* at 57.

⁴⁰ *Manson*, 432 US at 116 (quotation marks and citation omitted).

⁴¹ See *Perry*, 565 US at 245 ("[T]he jury, not the judge, traditionally determines the reliability of evidence."); *Young*, 472 Mich at 143 (holding that the credibility of a witness is an assessment reserved for the jury).

admitted through Detective Sergeant Rivard. But our rules of evidence specifically account for a situation like this, permitting prior statements of identification to be used as substantive evidence of guilt as long as the declarant (Jones) is subject to cross-examination regarding the identification.⁴² It makes no difference whether the declarant’s testimony at trial is consistent with the prior statement of identification.⁴³ There are many situations in which the story of a witness may change during the course of a criminal prosecution, and I decline to speculate why a discrepancy exists here. As in any other criminal prosecution, the jury here was tasked with weighing the reliability of the identification, as well as examining the demeanor, credibility, and veracity of both Jones and Detective Sergeant Rivard as they each testified.

Finally, numerous constitutional and evidentiary safeguards “caution juries against placing undue weight on eyewitness testimony of questionable reliability.”⁴⁴ These safeguards include defendant’s right to confront and cross-examine the witnesses against him;⁴⁵ his right to the effective assistance of counsel, who can place doubt in the jurors’ minds through cross-examination, opening statements, and closing

⁴² MRE 801(d)(1)(C).

⁴³ *People v Malone*, 445 Mich 369, 377; 518 NW2d 418 (1994) (“[S]tatements of identification are not limited by whether the out-of-court declaration is denied or affirmed at trial.”).

⁴⁴ *Perry*, 565 US at 245.

⁴⁵ See US Const, Am VI; Const 1963, art 1, § 20; *Perry*, 565 US at 245-246, quoting *Maryland v Craig*, 497 US 836, 845, 110 S Ct 3157, 111 L Ed 2d 666 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant.”); *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011) (“The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.”), quoting *Lee v Illinois*, 476 US 530, 540; 106 S Ct 2056; 90 L Ed 2d 514 (1986).

arguments;⁴⁶ an eyewitness-specific jury instruction, which instructs jurors on how to weigh identification evidence and to accord whatever weight, if any, they believe the identification deserves;⁴⁷ evidentiary rules that exclude relevant evidence if its probative value is outweighed by its prejudicial effect;⁴⁸ and the prosecution's burden of having to prove defendant guilty beyond a reasonable doubt.⁴⁹ While these constitutional and evidentiary safeguards do not displace the trial court's initial gatekeeper role to screen a police-arranged pretrial identification procedure for reliability, these safeguards ensured that the jury carefully weighed the reliability of the identification of defendant made by Jones rather than affording it "disproportionate weight," as the majority opinion concludes.⁵⁰

⁴⁶ US Const, Am VI; Const 1963, art 1, § 20; *Perry*, 565 US at 246; *Kurylczyk*, 443 Mich at 316 (opinion by GRIFFIN, J.) (holding that "any defects in the eyewitness identifications were brought out by defendant's counsel," who "vigorously cross-examined the witnesses and attacked their credibility").

⁴⁷ *Perry*, 565 US at 246 ("Eyewitness-specific jury instructions . . . warn the jury to take care in appraising identification evidence."); see also M Crim JI 7.8.

⁴⁸ See MRE 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

⁴⁹ *Perry*, 565 US at 247 ("The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence."); see also *People v Denson*, 500 Mich 385, 401; 902 NW2d 306 (2017) ("The prosecution bears the burden of proving every element of a charged offense beyond a reasonable doubt.").

⁵⁰ *Perry*, 565 US at 237 ("The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.").

IV. CONCLUSION

When viewed in totality and weighed against the corrupting effect of the suggestive identification itself, the identification of defendant made by Jones retained strong indicia of reliability and did not lead to a substantial likelihood of misidentification. The trial court properly admitted Detective Sergeant Rivard's testimony regarding this identification, allowing the jury to consider its ultimate weight. For these reasons, I would affirm the trial court and Court of Appeals, and I would affirm defendant's conviction and sentence.

MARKMAN, J., concurred with ZAHRA, J.

PEOPLE v REICHARD

Docket No. 157688. Argued on application for leave to appeal October 2, 2019. Decided March 30, 2020.

Tiffany L. Reichard was bound over to the Jackson Circuit Court on a charge of open murder under a felony-murder theory for having aided and abetted her boyfriend in an armed robbery during which he stabbed a man to death. Defendant moved to present evidence that her boyfriend had physically abused her and that she had participated in the armed robbery under duress. The court, Thomas D. Wilson, J., granted the motion. The prosecution filed an interlocutory application for leave to appeal, and the Court of Appeals, SAWYER, P.J., and BORRELLO and SERVITTO, JJ., reversed and remanded, holding that duress may not be used as a defense to first-degree felony murder when the claim of duress involves the defendant's participation in the underlying felony. 323 Mich App 613 (2018). Defendant sought leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 503 Mich 910 (2018).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

Duress may be asserted as an affirmative defense to felony murder if it is a defense to the underlying felony. *People v Gimotty*, 216 Mich App 254 (1996), and *People v Etheridge*, 196 Mich App 43 (1992), were overruled to the extent they held that duress is not an affirmative defense to felony murder.

1. Under MCL 750.316(1)(b), a person who commits murder in the perpetration of or attempt to perpetrate robbery, among other specified felonies, is guilty of first-degree murder. To convict a person of felony murder under this provision, the prosecution must show that the defendant acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. Thus, MCL 750.316(1)(b) operates only to elevate a second-degree murder to first-degree murder if it was committed in the commission of one of the enumerated felonies.

2. To merit an instruction on the common-law affirmative defense of duress, a defendant bears the burden of producing

some evidence from which a jury could conclude that the threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant, the fear or duress was operating upon the mind of the defendant at the time of the alleged act, and the defendant committed the act to avoid the threatened harm. Regarding the first factor, the threatening conduct or act of compulsion must be present, imminent, and impending, and the threat must have arisen without the negligence or fault of the person who insists upon it as a defense. Historically, duress was not permitted as an affirmative defense to murder, and Michigan has recognized this common-law rule. Other jurisdictions have also recognized the rule or adopted it by statute.

3. The Michigan Supreme Court has not directly addressed whether duress is a defense to felony murder, but the Michigan Court of Appeals has held that it is not on the ground that duress is not a defense to homicide. However, the rationale for precluding the use of duress as an affirmative defense for other types of murder is that when someone has a choice between sparing his or her own life or that of an innocent, the law expects that individual to spare the innocent person's life. But felony murder does not present that choice. Instead, in the felony-murder context, the individual faces a choice between whether to spare his or her own life or aid in a lesser felony, i.e., one that does not include as an element the killing of an innocent. Moreover, holding that duress may not be asserted as an affirmative defense to felony murder could lead to illogical and unacceptable results: if the underlying felony alone were charged, duress could be used as an affirmative defense; but, when they are charged together, a defendant might be acquitted of the underlying felony on the basis of duress, but then be found guilty of felony murder. The fact that MCL 750.316(1)(b) separately requires malice does not mean that duress cannot be an affirmative defense to felony murder because a successful defense would negate the aggravator element—i.e., commission of the underlying crime—by showing that the defendant was justified in committing the underlying felony. With the aggravator element negated, a prosecutor would still be able to proceed against the defendant on the lesser included offense of second-degree murder if the evidence supported that charge.

4. The Court of Appeals' judgment was reversed, and the case was remanded to the trial court. On remand, the trial court must provide a duress instruction if such an instruction is requested by

defendant and if a rational view of the evidence supports the conclusion that defendant aided the robbery out of duress.

Reversed and remanded for further proceedings.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrottenboer*, Chief Appellate Attorney, for the people.

Michael A. Faraone, PC (by *Michael A. Faraone*) for defendant.

Amicus Curiae:

D. J. Hilson, Kym L. Worthy, Jason W. Williams, and Timothy A. Baughman for the Prosecuting Attorneys Association of Michigan.

VIVIANO, J. The issue in this case is whether duress is an affirmative defense to a charge of felony murder. For the reasons below, we hold that duress may be asserted as an affirmative defense to felony murder if it is a defense to the underlying felony.

I. FACTS

Defendant is charged with open murder for assisting her boyfriend, Michael Beatty, in an armed robbery that resulted in the stabbing death of the victim, Matthew Cramton. According to the evidence presented at the preliminary examination, defendant agreed to help Beatty conduct a robbery by knocking on the door of Cramton's home. When Cramton came to the door, Beatty entered the home with a gun to rob him. Defendant acted as a lookout while Beatty was inside. When Beatty left Cramton's home, he was covered in blood and carrying a knife. Defendant then drove Beatty to his mother's house and helped him dispose of his clothing. Cramton died from multiple stab wounds.

Prior to trial, defendant filed a motion to present a duress defense to the felony-murder charge. Defendant claimed that Beatty had physically and sexually abused her in the past and that she aided him in the armed robbery that resulted in Cramton's death because she was under duress. Therefore, because defendant committed the underlying felony under duress, she contends that she cannot be guilty of felony murder. The trial court granted the motion, ruling that defendant would be permitted to present her duress defense.

The prosecutor appealed, and the Court of Appeals reversed. In deciding that duress cannot be asserted as a defense to felony murder, the Court of Appeals relied on *People v Henderson*, 306 Mich App 1, 5; 854 NW2d 234 (2014), which held that duress is not available as a defense to aiding and abetting murder. The panel reasoned:

It is the existence of the predicate felony that raises the principal's liability from second-degree murder to first-degree murder. We fail to see why aiding and abetting the murder itself should disallow the duress defense, while aiding and abetting the predicate felony would allow for it. That is, if this were simply a second-degree murder case but the facts otherwise the same, with defendant's liability being based upon an aiding and abetting theory, both defendant and the principal would be guilty of second-degree murder, and the duress defense would be unavailable to defendant. With the addition of the predicate felony, the principal's liability is raised to first-degree murder. Yet defendant's role as an aider and abettor has remained the same, so her criminal responsibility should also be raised to first-degree murder. Simply put, in both cases she aided and abetted a crime that resulted in the taking of a human life.¹

¹ *People v Reichard*, 323 Mich App 613, 617; 919 NW2d 417 (2018).

The Court of Appeals also posited that, to convict defendant under an aiding-and-abetting theory, the prosecutor would need to show “(1) that she intended to aid in the charged offense, or (2) that she knew that the principal intended to commit the charged offense, or (3) that the charged offense was a natural and probable consequence of the crime that she intended to aid and abet.”² Thus, the Court of Appeals reasoned:

If the prosecutor is able to make this showing, then defendant will have intentionally or knowingly participated in a homicide or, at a minimum, participated in a crime for which homicide was a natural and probable consequence. Therefore, to allow the duress defense in this context would, in fact, allow it to be used as a defense to murder.^[3]

Consequently, the Court of Appeals held “that the trial court erred by granting defendant’s motion to raise duress as a defense to the murder charge, including the felony-murder theory.”⁴ Defendant then sought leave to appeal in this Court. We ordered oral argument on the application, directing the parties to address “whether the Court of Appeals correctly determined that duress is not an available defense to the charge of felony murder under any circumstances.”⁵

II. STANDARD OF REVIEW

“Whether common law affirmative defenses are available for a statutory crime and, if so, where the burden of proof lies are questions of law.”⁶ As such, they are reviewed de novo.⁷

² *Id.* at 618.

³ *Id.* at 619.

⁴ *Id.*

⁵ *People v Reichard*, 503 Mich 910, 910 (2018).

⁶ *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

⁷ *Id.*

III. ANALYSIS

A. FELONY MURDER

Defendant was charged with open murder under a felony-murder theory with armed robbery as the underlying felony.⁸ MCL 750.316 provides, in part:

(1) . . . [A] person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole:

* * *

(b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first or second degree under [MCL 750.145n], torture under [MCL 750.85], aggravated stalking under [MCL 750.411i], or unlawful imprisonment under [MCL 750.349b].

At common law, the felony-murder doctrine “recognize[d] the intent to commit the underlying felony, in

⁸ Defendant was charged pursuant to MCL 767.71, which provides that “[i]n all indictments for murder and manslaughter it shall not be necessary to set forth the manner in which nor the means by which the death of the deceased was caused; but it shall be sufficient in any indictment for murder to charge that the defendant did murder the deceased” The offense of felony murder is set forth in MCL 750.316(1)(b), which is discussed in more detail below. The offense of armed robbery is set forth in MCL 750.529, which provides that “[a] person who engages in conduct proscribed under [MCL 750.530] and who in the course of engaging in that conduct, possesses a dangerous weapon . . . , is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.”

itself, as a sufficient mens rea for murder.”⁹ By contrast, under our felony-murder statute, malice has to be separately shown.¹⁰ As in every murder case, to convict a person of felony murder under this statute, “it must be shown that he acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm.”¹¹ Thus, MCL 750.316(1)(b) operates only to elevate a second-degree murder to first-degree murder if it was committed in the commission of one of the enumerated felonies.¹²

⁹ *People v Aaron*, 409 Mich 672, 717; 299 NW2d 304 (1980). See also *id.* at 689-698 (discussing the historical development of the common-law felony-murder doctrine).

¹⁰ *Id.* at 733 (holding that under the Michigan felony-murder statute, the mental element of murder is not satisfied by proof of the intention to commit the underlying felony, but instead must be separately shown).

¹¹ *Id.*; see also *People v Dumas*, 454 Mich 390, 397; 563 NW2d 31 (1997) (opinion by RILEY, J.) (noting that after *Aaron*, “the people must prove one of the three intents that define malice in every murder case”); *id.* at 414 (BOYLE, J., dissenting) (“The teaching of *Aaron* is that malice, with regard to a homicide, may not be imputed from the underlying felony.”); *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000), quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999) (“The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute . . .].”).

¹² *Aaron*, 409 Mich at 721. One author has referred to these kinds of statutes as “felony aggravator statutes.” Binder, *The Origins of American Felony Murder Rules*, 57 Stan L Rev 59, 141 (2004). Michigan was not alone in adopting a statute of this type. *Id.* (noting that felony aggravator statutes were enacted by 22 states, including Arkansas, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, Washington, West Virginia, and Wyoming).

B. DURESS

Defendant seeks to present a duress defense. “Duress is a common-law affirmative defense.”¹³ To merit a duress instruction, a defendant bears the burden of producing some evidence from which the jury could conclude the following:

“A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

D) The defendant committed the act to avoid the threatened harm.”^{14]}

Regarding the first factor, “[T]he threatening conduct or act of compulsion must be ‘present, imminent, and impending . . .,’ and . . . the threat ‘must have arisen without the negligence or fault of the person who insists upon it as a defense.’ ”¹⁵

Historically, duress was not permitted as an affirmative defense to murder. In the seventeenth century, Sir Matthew Hale wrote:

[I]f a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant’s fury he will kill an innocent person then present, the fear and actual force will not acquit him of the

¹³ *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997).

¹⁴ *Id.* at 247, quoting *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).

¹⁵ *Lemons*, 454 Mich at 245, quoting *People v Merhige*, 212 Mich 601, 610; 180 NW 418 (1920).

crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent[.]¹⁶

Blackstone, nearly a century later, explained the rule as follows:

Another species of compulsion or necessity is what our law calls *duress per minas*; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors; at least before the human tribunal. . . . This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences, so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent.¹⁷

The Court of Appeals first recognized the rule in *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987), in which the Court of Appeals held that “duress is not a valid defense to homicide in Michigan.” And it has repeatedly recognized the rule in subsequent cases.¹⁸

¹⁶ 1 Hale, *History of the Pleas of the Crown*, p 51.

¹⁷ 4 Blackstone, *Commentaries on the Laws of England*, p 30.

¹⁸ See, e.g., *People v Young*, 120 Mich App 645, 653; 327 NW2d 329 (1982) (BEASLEY, J., dissenting) (stating that “duress is never a defense to murder”); *People v Feldmann*, 181 Mich App 523, 532; 449 NW2d 692 (1990) (“The prosecution met its burden of disproving defendant’s duress defense beyond a reasonable doubt. . . . As for defendant’s murder charges, coercion was not a viable defense.”); *People v Travis*, 182 Mich App 389, 392; 451 NW2d 641 (1990) (“Duress is not a defense to homicide[.]”); *People v Etheridge*, 196 Mich App 43, 56; 492 NW2d 490 (1992) (“However, duress is not a valid defense to homicide.”); *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993) (rejecting

Other jurisdictions have also recognized the common-law rule or adopted it by statute.¹⁹

defendant's claim that she should have been afforded a duress defense based on *Dittis* when convicted of involuntary manslaughter); *People v Henderson*, 306 Mich App 1, 5; 854 NW2d 234 (2014) (“[I]t is well established that duress is not a defense to homicide.”). But see *People v Rolston*, 51 Mich App 146, 148; 214 NW2d 894 (1974) (holding that the defendant's acquittal of murder, which resulted after the defendant presented a duress defense, prevented further prosecution for other crimes arising out of the same criminal transaction).

We note that several treatises state more precisely that duress is not an affirmative defense to murder or intentional homicide, as opposed to homicide generally. See, e.g., 2 LaFare, Substantive Criminal Law (3d ed), Duress, § 9.7(b) (“[D]uress is no defense to the intentional taking of life by the threatened person”); 2 Robinson, Criminal Law Defenses, Duress, § 177(g) (“If a legislature concludes that no pressure is sufficient to cause the reasonable citizen to commit murder, a rule barring a duress excuse for murder is sound.”); 40 Am Jur 2d, Homicide, § 107 (“It is generally held that neither duress, coercion, nor compulsion are defenses to murder”); 40 CJS, Homicide, § 181 (“The rule encompasses denial of the defense to all forms of murder, including homicides resulting from an intent to do grievous bodily harm, as well as an actual intent to kill and seems to include all other offenses where an intent to kill is an essential element.”). *Dittis* is the first Michigan case to state that duress is not a defense to “homicide,” though *Dittis* involved first-degree murder. Nevertheless, as stated above, *Dittis*'s statement has been applied more broadly. See, e.g., *Moseler*, 202 Mich App at 299 (relying on *Dittis* to determine that duress is not a defense to involuntary manslaughter). We overrule *Dittis* and its progeny to the extent they purported to adopt this overly broad rule. Because it is not necessary in the instant case to consider whether duress may be an affirmative defense to any form of homicide other than felony murder, we do not consider this question further.

¹⁹ See 2 Robinson, Criminal Law Defenses, Duress, § 177 (noting that “the common law exclusion of duress . . . is also prevalent in modern statutes”); *id.* at n 58 (listing cases and statutes from 16 states that prohibit the use of duress as an affirmative defense to murder). But see *MacKool v State*, 363 Ark 295, 302; 213 SW3d 618 (2005) (allowing duress as an affirmative defense to murder on statutory grounds); *State v Heinemann*, 282 Conn 281, 298; 920 A2d 278 (2007) (same). Additionally, in some states, the fact that a defendant acted under duress may reduce his or her guilt. See, e.g., *Commonwealth v Vasquez*, 462 Mass 827, 835; 971 NE2d 783 (2012) (“Although we hereby reject duress as a

C. WHETHER DURESS IS AN AFFIRMATIVE
DEFENSE TO FELONY MURDER

This Court has not directly addressed whether duress is a defense to felony murder,²⁰ but the Court of Appeals has considered this argument. In *People v Gimotty*, 216 Mich App 254; 549 NW2d 39 (1996), the defendant was convicted of felony murder. A copерpetrator had gone into a women’s clothing store and stolen six dresses before getting into defendant’s vehicle, which defendant was driving. The police pursued them, and the defendant got into a fatal collision with a third party. The defendant claimed that he did not know his copерpetrator planned to steal any items and that his copерpetrator had slapped him on the head to force him to drive. The Court of Appeals found that no duress instruction was warranted because “[i]t is well settled that duress is not a defense to homicide.”²¹

defense to deliberately premeditated murder, murder committed with extreme atrocity or cruelty, and murder in the second degree, we do not foreclose the possibility that, in exceptional and rare circumstances of duress, justice may warrant reduction of a defendant’s guilt in our review under G.L. c. 278, § 33E.”)

²⁰ In *People v Repke*, 103 Mich 459, 472; 61 NW 861 (1895), this Court determined that a defendant convicted of first-degree murder was not entitled to a duress instruction because the defendant claimed he was threatened three days before the crime. In support of its holding, the Court noted that “[t]he necessity which will excuse a man for breach of law must be instant and imminent.” *Id.* See also *Lemons*, 454 Mich at 247. Although *Repke* may be read as implying that duress may be asserted as a defense to felony murder in an appropriate case, any such implication was not deliberately examined or decided by the Court and thus carries no precedential weight. See *People v Graves*, 458 Mich 476, 480; 581 NW2d 229 (1998), citing *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990) (opinion by BRICKLEY, J.) (discussing standards for stare decisis).

²¹ *Gimotty*, 216 Mich App at 257, citing *Etheridge*, 196 Mich App at 56; *Moseler*, 202 Mich App at 299; and *Travis*, 182 Mich App at 392. Moreover, in *Gimotty*, the Court of Appeals also determined that the

However, *Gimotty*'s conclusion makes little sense in light of the rationale for precluding the use of duress as an affirmative defense for other types of murder: that "though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent."²² That is, when someone has a choice between sparing his or her own life or that of an innocent, the law expects that individual to spare the innocent person's life. But felony murder does not present that choice. Instead, in the felony-murder context, the individual faces a choice between whether to spare his or her own life or aid in a lesser felony (i.e., one that does not include as an element the killing of an innocent).

As the Oklahoma Court of Criminal Appeals explained in *Tully v State*, 730 P2d 1206, 1210; 1986 OK CR 185 (Okla, 1986):

It is compatible with the common law policy of duress that the defense should attach where the defendant consented, by duress, only to the commission of the lesser crime and not to the killing, and, at the time of his participation in the lesser felony, had reason to believe his life or the life of another was immediately in danger unless he participated.^[23]

In *McMillan v State*, 428 Md 333, 353; 51 A3d 623 (2012), the court similarly explained that "[Black-

defendant could not assert a duress defense to the underlying felony because he could not show that he was threatened with conduct of sufficient magnitude to create fear of death or serious injury in the minds of reasonable persons. *Gimotty*, 216 Mich App at 257.

²² 4 Blackstone at 30; see also 1 Hale at 51.

²³ *Id.*

stone's] rationale disappears when the sole ground for the murder charge is that the defendant participated in an underlying felony, under duress, and the defendant's co-felons unexpectedly killed the victim, thereby elevating the charge to felony murder."²⁴

Moreover, holding that duress may not be asserted as an affirmative defense to felony murder could lead to illogical and "unacceptable results."²⁵ If the underlying felony alone were charged, duress could be used as an affirmative defense. But, where they are charged together, a defendant might be acquitted of the underlying felony on the basis of duress, but then be found guilty of felony murder.

Our conclusion is supported by courts and commentators alike. The Supreme Court of Kansas, relying on *Tully*, concluded "that, where compulsion is a defense to an underlying felony . . . so that the felony is justifiable, compulsion is equally a defense to charges of felony murder."²⁶ The Massachusetts Supreme Judicial Court similarly reasoned, "As duress is available against a charge of armed robbery, . . . it would seem to follow that it should also apply to armed robbery eventuating in death, i.e., a felony murder, especially

²⁴ *Id.* (citation and quotation marks omitted). See also *Rodriguez v State*, 174 So 3d 502, 506-507 (Fla App, 2015), citing *McMillan*, 428 Md at 353.

The Court of Appeals held that duress is not an affirmative defense to aiding and abetting in the underlying felony for felony murder because it is not a defense to aiding and abetting a murder. *Reichard*, 323 Mich App at 617. But the situations are not analogous. As explained, Blackstone's rationale is not applicable in the felony-murder context, in which someone faces a choice between sparing his or her own life or aiding in a lesser felony. Blackstone's rationale is applicable though when someone has a choice between sparing his or her own life or aiding and abetting the murder of an innocent person.

²⁵ *McMillan*, 428 Md at 354.

²⁶ *State v Hunter*, 241 Kan 629, 642; 740 P2d 559 (1987).

since religious or ethical objections would be felt less strongly here than in a case of premeditated murder.”²⁷ And, according to LaFave, “[D]uress is no defense to the intentional taking of life by the threatened person; but it is a defense to a killing done by another in the commission of some lesser felony participated in by the defendant under duress.”²⁸

²⁷ *Commonwealth v Robinson*, 382 Mass 189, 201 n 14; 415 NE2d 805 (Mass, 1981). Indeed, this appears to be the prevailing view. See also *Pugliese v Commonwealth*, 16 Va App 82, 95-96; 428 SE2d 16 (1993); *State v Gay*, 334 NC 467, 491-492; 434 SE2d 840 (1993); *People v Serrano*, 286 Ill App 3d 485, 490-493; 676 NE2d 1011 (1997); *People v Anderson*, 28 Cal 4th 767, 784; 50 P3d 368 (2002); *McMillan*, 428 Md at 353; *Rodriguez*, 174 So 3d at 506-507; *Doubleday v People*, 364 P3d 193, 197-198; 2016 CO 3 (Colo, 2016).

Of the state courts reaching the opposite conclusion, the vast majority are distinguishable because they have refused to recognize duress as an affirmative defense to felony murder on statutory grounds. See *State v Moretti*, 66 Wash 537, 540; 120 P 102 (1912) (basing its holding on a statute allowing for a duress defense for any crime “except murder”); *State v Encinas*, 132 Ariz 493, 496; 647 P2d 624 (1982) (basing its holding on a statute providing that duress “is unavailable for offenses involving homicide or serious physical injury”); *State v Rumble*, 680 SW2d 939, 940-941 & n 3 (Mo, 1984) (basing its holding on a statute providing for a duress defense except “[a]s to the crime of murder”); *Moore v State*, 697 NE2d 1268, 1273 & n 2 (Ind Ct App, 1998) (basing its holding on a statute providing for a duress defense except for “offense[s] against the person”); *State v Proctor*, 585 NW2d 841, 843 (Iowa, 1998) (basing its holding on a statute disallowing a duress defense for “act[s] by which one intentionally or recklessly causes physical injury to another”). Because Michigan has no similar statute, we find these cases unpersuasive. The only case we could locate reaching the opposite conclusion without reliance on a statute is *State v Perkins*, 219 Neb 491, 499; 364 NW2d 20 (1985). There, the court held, “The trial court did not err in refusing to instruct as to duress. As established in *State v Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979), *supp. op.* 204 Neb. 196, 281 N.W.2d 749, duress is not a defense to a charge of homicide.” *Perkins*, 219 Neb at 499. But neither *Perkins* nor *Fuller*, on which *Perkins* relies, provides any further analysis to support its holdings. *Fuller*, 203 Neb at 243 (“Duress or compulsion is no excuse to a charge of homicide.”), citing 22 CJS, Criminal Law, § 44, p 135. Therefore, we find *Perkins*’s reasoning unpersuasive.

²⁸ 2 LaFave, § 9.7(b).

The prosecution argues that, while duress may be allowed as an affirmative defense to felony murder under the common-law felony-murder doctrine, it should not be an affirmative defense under MCL 750.316(1)(b). Specifically, because duress may not be asserted as an affirmative defense to second-degree murder, and MCL 750.316(1)(b) operates only to elevate a second-degree murder to first-degree murder if it was committed in the commission of one of the enumerated felonies, the prosecution urges us to conclude that duress may not be asserted as a defense to felony murder.²⁹ However, that conclusion is a non sequitur. The fact that MCL 750.316(1)(b) separately requires malice does not mean that duress cannot be an affirmative defense to felony murder since a successful defense would negate the aggravator element (i.e., commission of the underlying crime), by showing that the defendant was justified in committing the underlying felony.³⁰ With the aggravator element negated, a prosecutor would still be able to proceed against the defendant on the lesser included offense of

²⁹ See *People v Carp*, unpublished per curiam opinion of the Court of Appeals, issued December 30, 2008 (Docket No. 275084), p 6 (“Significantly, felony-murder in Michigan cannot be established solely by the intent to commit a felony. [*Aaron*, 409 Mich] at 727. Rather, the requirement of malice to establish felony-murder is the same as the requirement of malice to establish second-degree murder; ‘the intent to kill, intent to do great bodily harm, or wanton and willful disregard of the likelihood that the natural tendency of a person’s behavior is to cause death or great bodily harm.’ *Id.* at 727-728. Thus, a finding of felony-murder necessarily entails a finding of malice to establish second-degree murder. Given that duress is not a defense to second-degree murder, duress cannot be a defense to felony-murder.”).

³⁰ *Lemons*, 454 Mich at 247 n 16 (“Although there has been disagreement among authorities with regard to this issue, we are persuaded that the correct view is that ‘even though [the defendant] has done the act the crime requires and has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is

second-degree murder if the evidence supported that charge.³¹ In other words, the defendant's duress defense to the underlying felony would only prevent the enhancement of second-degree murder to first-degree murder.

IV. CONCLUSION

In sum, we hold that duress may be asserted as an affirmative defense to felony murder if it is a defense to the underlying felony. That Michigan has a separate malice requirement for felony murder does not alter our conclusion.³² We therefore reverse the Court of Appeals' judgment and remand this case to the trial court for proceedings not inconsistent with this opinion. On remand, the trial court must provide a duress instruction if such an instruction is requested by defendant and if a rational view of the evidence supports the conclusion that defendant aided Beatty with the robbery out of duress.³³ We also overrule *Gimotty*, as well as *People v Etheridge*, 196 Mich App 43, 56; 492 NW2d 490 (1992), to the extent they hold that duress is not an affirmative defense to felony murder.

MCCORMACK, C.J., and MARKMAN, ZAHRA, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with VIVIANO, J.

justified because he has thereby avoided a harm of greater magnitude.'"), quoting 1 LaFave & Scott, *Substantive Criminal Law*, § 5.3, p 615 (citations omitted).

³¹ *People v Carter*, 395 Mich 434, 437; 236 NW2d 500 (1975) ("We hold that there were lesser included offenses to first-degree felony-murder. Second-degree murder is always a lesser included offense of first-degree murder.").

³² In its amicus brief, the Prosecuting Attorneys Association of Michigan contends that the burden of persuasion for duress should be on the defendant. However, because no party addressed this issue, we decline to reach it.

³³ *In re Piland, Minors*, 503 Mich 1032, 1033 (2019).

In re RELIABILITY PLANS OF
ELECTRIC UTILITIES FOR 2017–2021

Docket Nos. 158305 through 158308. Argued on application for leave to appeal November 7, 2019. Decided April 2, 2020.

The Association of Businesses Advocating Tariff Equity (ABATE) (Docket Nos. 158305 and 158306) and Energy Michigan, Inc. (Docket Nos. 158307 and 158308) each appealed an order of the Michigan Public Service Commission (MPSC) implementing MCL 460.6w. The MPSC order imposed a local clearing requirement on individual alternative electric suppliers. The name “alternative electric suppliers” reflects that these providers give consumers a choice (i.e., an alternative) about the upstream provider of their power; it has no relationship to renewable energy. The local clearing requirement represented the amount of capacity resources that were required to be in the local resource zone in which the electric supplier’s demand was served. Before MCL 460.6w was enacted, the MPSC did not impose a local clearing requirement on individual alternative electric suppliers; the Midcontinent Independent System Operator (MISO)—the regional transmission organization responsible for managing the transmission of electric power in a large geographic area—applied a local clearing requirement as a whole to the geographic area covered by MISO’s local clearing requirement. ABATE and Energy Michigan challenged the MPSC’s interpretation of MCL 460.6w, and Energy Michigan further asserted that the MPSC order improperly imposed new rules that were not promulgated in compliance with the Administrative Procedures Act (APA), MCL 24.201 *et seq.* The Court of Appeals, METER, P.J., and GADOLA and TUKEL, J.J., consolidated the appeals and reversed the MPSC’s decision, holding that no provision of MCL 460.6w clearly and unmistakably authorized the MPSC to impose a local clearing requirement on individual alternative electric suppliers and that the MPSC could impose a local clearing requirement only exactly as MISO does—on a zonal basis. 325 Mich App 207 (2018). Accordingly, the Court of Appeals concluded that the MPSC was not permitted to impose a local clearing requirement on any provider individually. Because the Court of Appeals held that MCL 460.6w did not provide the MPSC with the authority to impose a local clearing requirement on

individual alternative electric suppliers, the Court of Appeals found it unnecessary to reach the question whether the MPSC's decision concerning the local clearing requirement resulted in improperly imposed rules that were not promulgated in compliance with the APA. The MPSC and Consumers Energy Company sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the applications or take other action. 504 Mich 894 (2019); 504 Mich 895 (2019).

In a unanimous opinion by Chief Justice McCORMACK, the Supreme Court, in lieu of granting leave to appeal, *held*:

MCL 460.6w imposes resource adequacy requirements on electric service providers in Michigan and delegates authority to the MPSC to plan for energy capacity in the retail market by setting and enforcing capacity obligations for all energy providers in the state. MCL 460.6w authorizes the MPSC to determine both the local clearing requirement and the planning reserve margin requirement with the same text; no statutory language imposes additional requirements or limitations on the MPSC for setting the local clearing requirement versus the planning reserve margin requirement. However, despite the identical language describing the MPSC's authority for determining both elements of its capacity obligation, the Court of Appeals concluded that there was a difference based on its review of the entire statute. But that conclusion was unfounded; in fact, a contextual review of the statute supported the opposite conclusion. Furthermore, MCL 460.6w requires cooperation with MISO, not adopting MISO's methodology for one capacity obligation only. Nor does the requirement that a capacity charge must coordinate with, and not conflict with, MISO's planning process require the MPSC to duplicate MISO's zonal local clearing requirement. Accordingly, the Court of Appeals misread MCL 460.6w when it read into the statutory text a requirement that the MPSC impose Michigan's local clearing requirement using the same methodology MISO does. The Court of Appeals further misunderstood the differences between the wholesale and retail capacity markets when it held that the MPSC could not impose a local clearing requirement on alternative electric suppliers individually. The planning reserve margin requirement in MCL 460.6w includes no measure of in-zone resources as MISO's does with its zonal resource credits; instead, MCL 460.6w accounts for in-zone capacity in the providers' individual local clearing requirement. And the Court of Appeals did not make clear what the relevant "zone" would be in its interpretation of the local clearing requirement. If it meant that the MPSC could only impose

a local clearing requirement that maps exactly onto MISO's zonal measurement, that interpretation would make little sense given MISO's zone geography and the MPSC's authority. A contextual understanding of the MCL 460.6w capacity planning process and MISO's process supports a plain reading of the statute. In requiring that each provider, including alternative electric suppliers, meet an individual local clearing requirement, the MPSC did what the statute required of it to ensure reliability of retail electric markets in Michigan. Accordingly, the Court of Appeals erred when it held that the MPSC could not impose a local clearing requirement on alternative electric suppliers individually.

Reversed and remanded to the Court of Appeals for further proceedings, including addressing whether the MPSC's order complied with the APA.

PUBLIC UTILITIES — ALTERNATIVE ELECTRIC SUPPLIERS — IMPOSITION OF A LOCAL CLEARING REQUIREMENT BY THE PUBLIC SERVICE COMMISSION.

MCL 460.6w imposes resource adequacy requirements on electric service providers in Michigan and delegates authority to the Michigan Public Service Commission (MPSC) to plan for energy capacity in the retail market by setting and enforcing capacity obligations for all energy providers in the state; the MPSC may impose a local clearing requirement on alternative electric suppliers individually.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, *Ann M. Sherman*, Assistant Solicitor General, and *Steven D. Hughey* and *Spencer A. Sattler*, Assistant Attorneys General, for the Michigan Public Service Commission.

Kelly M. Hall and *Gary A. Gensch, Jr.*, for Consumers Energy Company.

Clark Hill PLC (by *Robert A. Strong* and *Michael J. Pattwell*) for the Association of Businesses Advocating Tariff Equity.

Varnum, LLP (by *Laura Chappelle*, *Tim Lundgren*, and *Brion B. Doyle*) for Energy Michigan, Inc.

Amici Curiae:

Rivenoak Law Group, PC (by *Valerie J. M. Brader* and *Catherine T. Dobrowitsky*) for the Michigan Chamber of Commerce.

Quarles & Brady LLP (by *Bradley D. Jackson*) for the Midcontinent Independent System Operator, Inc.

Lauren DuVal Donofrio for DTE Electric Company.

Sean P. Gallagher PLC (by *Sean P. Gallagher*) for Charles River Laboratories, Inc.; the Electricity Consumers Resource Council; and the United States Steel Corporation.

Foster, Swift, Collins & Smith, PC (by *Michael D. Homier* and *Laura J. Genovich*) for the Foundry Association of Michigan and the Michigan Schools Energy Cooperative.

Barnes & Thornburg LLP (by *Charles M. Denton* and *Aaron D. Lindstrom*) for the Michigan Chemistry Council and the Grand Rapids Area Chamber of Commerce.

MCCORMACK, C.J. In 2016, the Legislature passed Public Act 341 to ensure reliability of the state’s electric grid. The act charged the Michigan Public Service Commission (MPSC), which regulates retail electricity markets, with setting what are known as “capacity requirements” for a four-year period. Those capacity requirements are imposed upon the state’s electricity providers. MCL 460.6w. As explained below, “capacity” refers roughly to the electrical system’s ability to meet future demand, especially at times of very high demand.

At issue here is what exactly the MPSC can require of one category of those providers, known as “alterna-

tive electric suppliers,” under the act. Alternative electric suppliers sell electricity to retail customers in Michigan, but they use other providers’ infrastructure to deliver it. The name “alternative electric suppliers” reflects that these providers give consumers a choice (i.e., an alternative) about the upstream provider of their power; it has no relationship to renewable energy.

As the Court of Appeals correctly observed, Act 341 requires every provider in the marketplace to meet the capacity requirements set by the MPSC, and capacity is measured using both a “planning reserve margin requirement” and a “local clearing requirement.” *In re Reliability Plans of Electric Utilities for 2017–2021*, 325 Mich App 207, 224-225; 926 NW2d 584 (2018). To explain, the *planning reserve margin requirement* is the total amount of electricity that a given provider must make available to meet its customers’ demand (think quantity). The *local clearing requirement* is the amount of that electricity which the provider must produce or purchase locally (think location). Important to the question we decide here, these are not original concepts. Although the terms have slightly different meanings in different contexts, the body to whom the federal regulator (the Federal Energy Regulatory Commission) has delegated operational responsibility over the wholesale electricity markets affecting most of Michigan, the Mid-continent Independent System Operator (MISO), also uses these terms for its capacity planning.

While the Court of Appeals also correctly observed that the act requires each provider to meet the planning reserve margin requirement and the local clearing requirement as set by the MPSC, it held that “no provision of MCL 460.6w clearly and unmistakably authorizes the MPSC to impose a local clearing requirement on indi-

vidual alternative electric [suppliers].” *Id.* at 224. The panel’s mistaken conclusion hinged on its misunderstanding that the MPSC could impose a local clearing requirement only exactly as MISO does. *Id.* at 225-226.

In particular, the panel misread the statute’s requirements that the MPSC coordinate with the organizations that are responsible for federal regulation of the wholesale electricity market—in this case, MISO—to mean that the MPSC must impose a local clearing requirement in the very same methodological manner that MISO does. *Id.* at 226. MISO, a different regulatory body from the MPSC with a very different jurisdiction and mandate, imposes a local clearing requirement with reference to certain geographic zones. But Act 341 does not refer to or contemplate zones at all. Moreover, and confusingly, the panel did not say what the relevant “zone” is or might be under MCL 460.6w. And while the panel focused on the lack of clear language allowing the MPSC to impose the local clearing requirement on alternative electric suppliers individually, its holding that the MPSC could impose a local clearing requirement only on providers together within a zone means that the MPSC may not impose a local clearing requirement on *any* provider individually, a logical inference that calls the panel’s conclusion into still greater question. In short, its holding misread the statutory language, misunderstood MISO’s wholesale capacity measurements, and failed to appreciate how the MPSC’s regulatory jurisdiction differs from MISO’s.

The Legislature authorized the MPSC to set a planning reserve margin requirement *and* a local clearing requirement for each energy provider in the state, including alternative electric suppliers, and required each, in turn, to meet those capacity measurements individually or face the consequences set by statute. We reverse and remand to the Court of Appeals for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

A. ELECTRICITY MARKETS AND REGULATION

Background

Electricity is unique. First, it cannot be stored in very large quantities (yet). Second, for technical reasons implied by the laws of physics (not among the laws this Court interprets authoritatively), the supply of electricity must match demand in real time; otherwise, the electrical system is susceptible to massive and highly disruptive blackouts and brownouts, which can cascade across the state and the country. Third, much of everyday life depends on its reliable supply, from smartphone addiction to the operation of businesses to the defense of the nation. Given electricity's distinct qualities and our dependence on its ready availability for virtually everything, state and federal governments regulate power markets carefully, and the regulatory regime is complex.

By way of relevant background, state governments regulate retail power markets, while the federal government regulates wholesale power markets—where electricity generators send power to those who will ultimately deliver it to consumers—and the transmission of electricity among states.

Given the importance of meeting demand, the federal government also regulates “capacity.” As noted above, capacity is the ability to satisfy demand for electricity when demand peaks. In a capacity market, electricity suppliers make the guarantee that they can indeed meet demand at the hypothetical highest-use moments.¹

¹ Regulators overseeing capacity calculate peak demand using the hottest days of the year and add a “reserve margin”—that is, some

Michigan has four categories of electricity providers that sell to retail customers: (1) investor-owned utilities, commonly referred to, simply, as utilities (or public utilities); (2) municipally owned utilities (munis); (3) cooperative electric utilities (coops); and (4) alternative electric suppliers. The Legislature delegated regulatory authority to the MPSC to “regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities.” MCL 460.6(1).² Because alternative electric suppliers are not public utilities, they are not subject to the MPSC’s complete power and jurisdiction, although they are subject to the MPSC for some purposes. Compare MCL 460.6 with MCL 460.10g(1)(a).

Evolving regulatory regimes

Historically, geography determined a consumer’s electricity provider. The customer base for early utilities, munis, and coops was located within the geographic areas each served. For practical reasons—the

extra capacity—to ensure that suppliers meet even unexpectedly high spikes of demand. See, e.g., *Coalition of Midwest Power Producers, Inc v Midcontinent Indep Sys Operator, Inc*, 166 FERC ¶ 61,159, at p 3 (2019). For this opinion, it is sufficient to understand that the regulatory goal is making sure supply will always be adequate to meet demand. Electrical capacity is sometimes expressed intuitively by analogy to a shopping mall parking lot. Shopping malls typically build parking lots with far more space than is required on average days. But they do so to plan for the very unusual days (during the holiday shopping periods) when the demand for parking space spikes. But for such sound planning, malls could not accommodate peak demand for parking. The importance of a stable electrical supply makes planning for peak electricity demand essential. Thus, electricity providers offer capacity in the form of promises to supply and demonstrations that they have resources they can call upon to meet demand.

² Munis are exempt from this degree of MPSC regulation, MCL 460.6, as are coops, which are owned and self-regulated by the members they serve, MCL 460.33.

wires connecting providers and consumers only ran so far and could carry only so much electricity—a provider could sell electricity only within its geographical boundary, and a consumer could not receive service from a provider outside that boundary. This was the noncompetitive era of electricity.

The energy shortages of the 1970s along with technological and infrastructure improvements over recent decades eventually led to policy changes toward increased competition in electricity markets in many parts of the country. Reflecting such dynamics, the Legislature, in 2000, passed the Customer Choice and Electricity Reliability Act, Public Acts 141 and 142 of 2000, MCL 460.10 *et seq.*, in part to encourage the MPSC to promote competition in Michigan's electricity market. MCL 460.10(b). The acts allowed Michigan electric customers the opportunity to purchase electricity from an alternative electric supplier—a provider other than a local utility. 2000 PA 141. In 2008, the Legislature passed Public Act 286 to cap alternative electric suppliers' market share by tasking the MPSC with ensuring that no more than 10% of any utility's average retail sales are supplied with electricity from an alternative electric supplier.³ MCL 460.10a(1)(a). As noted above, alternative electric suppliers provide electricity to retail customers but do not physically deliver it to them. MCL 460.10g(1)(a). They meet demand by delivery through the existing local infrastructure.

³ This applies generally to all providers with some limits. Any retail customer of a coop with a peak load of one megawatt or greater shall be provided the opportunity to choose an alternative electric supplier. MCL 460.10x(1). The governing bodies of munis possess the authority to determine whether to permit their customers to choose an alternative electric supplier subject to the governing body's continuing jurisdiction to regulate rates, charges, terms, and conditions. MCL 460.10y(1).

Electricity sold by alternative electric suppliers may even be generated outside Michigan.⁴

While the MPSC regulates in-state retail energy markets in Michigan, the Federal Energy Regulatory Commission (FERC) regulates interstate wholesale energy and transmission markets under the Federal Power Act, 16 USC 791a *et seq.* 16 USC 824; see also *Fed Energy Regulatory Comm v Electric Power Supply Ass'n*, 577 US 260, 264-265; 136 S Ct 760; 193 L Ed 2d 661 (2016). This federal-wholesale and state-retail divide characterized electricity regulation for decades.⁵ The federal and state regulators may share and coordinate responsibility over capacity, sometimes referred to as “resource adequacy.” Federal and state regulators, however, both aim to ensure that suppliers of electricity have enough capacity so that customers have adequate resources available to them (and at fair prices) when demand is high.

The FERC has described this complicated, shared responsibility as follows:

[T]he question of jurisdiction over resource adequacy is a complex matter that represents “the confluence of state-federal jurisdiction.” While we are cognizant of the traditional role of state and local entities in regulating resource adequacy, we are also aware of our responsibility under the

⁴ Not every state allows alternative electric suppliers to engage in its retail electricity market. The 17 states that do, including Michigan, are considered part of a more competitive retail market. The states allowing some degree of choice are California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia. Competitive retail markets present a more complicated regulatory puzzle because alternative electric suppliers may obtain energy from another state and sell it within the state.

⁵ See generally Nordhaus, *The Hazy “Bright Line”: Defining Federal and State Regulation of Today’s Electric Grid*, 36 Energy L J 203 (2015).

[Federal Power Act] to ensure the reliability of the system and that wholesale rates are just and reasonable. We will defer to state and local entities' decisions when possible on resource adequacy matters, but in doing so we will not shirk our congressionally-mandated responsibilities. We find that the adequacy of resources can have a significant effect on wholesale rates and services and therefore is subject to Commission jurisdiction. [*California Indep Sys Operator Corp*, 119 FERC ¶ 61,076, at p 212 (2007) (citation omitted).]

In short, because capacity (resource adequacy) has wholesale as well as retail implications, both federal and state governments regulate it.

Since 1999, the FERC has granted regional institutions known as Regional Transmission Organizations the authority to oversee some aspects of energy markets within large regional areas in order to improve efficiency and grid reliability, eliminate opportunity for discriminatory transmission practices, improve market performance, and facilitate lighter direct federal regulation. *Regional Transmission Organizations*, 89 FERC ¶ 61,285, at p 3 (1999). Regional Transmission Organizations are independent bodies formed as collaborative efforts between public utilities, nonpublic utilities, state officials, and all affected interest groups to address all industry operational and reliability issues. *Regional Transmission Organizations*, 90 FERC ¶ 61,201, at pp 1, 4 (2000). Participation in a Regional Transmission Organization is voluntary for all members—but the FERC's goal was that all providers would promptly participate. *Id.* at 8-9. MISO is a Regional Transmission Organization. *Midwest Indep Transmission Sys Operator, Inc*, 97 FERC ¶ 61,326, at p 1 (2001).⁶

⁶ MISO has since been renamed. It is now known as the Midcontinent Independent System Operator, not the Midwest Independent System Operator, as it was in its 2001 application.

Federal capacity requirements within MISO

MISO has been the primary Regional Transmission Organization overseeing the wholesale electricity markets in the Midwest, including most of Michigan, since it was authorized by the FERC in 2001.⁷ *Id.* MISO's capacity market includes resource adequacy planning for its wholesale electric market. In plain English, MISO oversees a market to ensure that the supply of electricity will be sufficient to satisfy unexpectedly high demand. It does so looking ahead for a period of one year, successively.

MISO has divided its geographical jurisdiction into 10 "local resource zones" to maximize efficiency in the different wholesale markets. See Figure 1 below.

Figure 1. Map of MISO's United States Region, Separated by Zone.⁸



⁷ The MISO coverage region includes at least parts of 15 states: Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, South Dakota, Texas, and Wisconsin.

⁸ MISO, *2019/2020 Planning Resource Auction (PRA) Results* (April 12, 2019), p 5, available at <<https://perma.cc/5VVH-UGUH>> (accessed February 24, 2020).

Michigan participates in two of MISO's zones. Most of the Lower Peninsula is in Local Resource Zone 7 (all but the southwest corner of the state, which MISO does not regulate at all; we will return to that point later),⁹ and the Upper Peninsula is in Zone 2, along with most of Wisconsin.

The federal capacity planning process—through MISO—works about like this: each annual planning year, MISO requires all energy providers within a given MISO zone, including alternative electric suppliers, to submit documentation of the electric output each provider expects to be able to reliably produce during the upcoming year. MISO uses this reported amount to regulate capacity. In connection with the same forecasting, MISO also sets what it calls a planning reserve margin requirement for each provider. *Midcontinent Indep Sys Operator, Inc*, 165 FERC ¶ 61,067, at p 2 (2018). MISO's planning reserve margin requirement is largely, but not only, a quantity measure; it also includes a location requirement. That is, the planning reserve margin requirement requires each provider to have sufficient "Zonal Resource Credits" from within a given MISO zone. Put differently, to meet its planning reserve margin requirement, as

⁹ The southwest portion of Michigan's Lower Peninsula is not included in any MISO region on this map. Although most providers in Michigan joined MISO and are included in one of these two MISO zones, the providers in the southwest corner of the Lower Peninsula did not. Instead, they joined a different FERC-approved Regional Transmission Organization, PJM Interconnection, which coordinates and oversees wholesale electricity markets across all or part of 13 states (Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia) and the District of Columbia. See FERC, *Electric Power Markets* <<https://www.ferc.gov/market-assessments/mkt-electric/overview.asp>> (accessed February 24, 2020) [<https://perma.cc/9YVJ-JDGF>].

required by MISO, a provider must demonstrate the availability of not only enough capacity, but enough *local* capacity.

A local element is an important part of capacity planning because when there are insufficient local resources available to meet demand, resources must come from afar. Given the constraints of the electrical grid in moving power large distances from state to state, distant resources can undermine reliability. See, e.g., Borenstein & Bushnell, *Electricity Restructuring: Deregulation or Reregulation?*, 23 Reg 46, 51 (2000). Thus, there is a connection between the efficient and reliable supply of electricity, on the one hand, and meeting demand at least in part through local resources, on the other hand, which is why efficiency still requires some geographically based planning.

At the risk of slight oversimplification (a risk worth running in this context), technological and infrastructural dynamics presented the opportunity for greater competition by making possible the upstream supply of electricity from providers beyond a local utility only up to a point. To some extent, though, the supply of electricity is still constrained by local and regional factors. There is thus a trade-off between promoting competition in the form of facilitating supply from alternative and potentially far-off sources and protecting reliability by ensuring that most demand is satisfied locally and regionally to avoid the congestion that threatens reliability.

To help strike that balance, MISO determines the amount of local energy required by a provider's planning reserve margin requirement *in part* by imposing the local clearing requirement. The local clearing requirement establishes the total amount of capacity that must originate within a MISO zone to reduce the

risk of blackouts. *Midcontinent Indep Sys Operator, Inc*, 165 FERC ¶ 61,067, at p 2 (2018). MISO determines its local clearing requirement first by calculating the amount of resources a zone's grid could reasonably be expected to import during peak demand times. This provides an indication of the extent to which congestion constraints limit the amount of out-of-zone resources that can be used to satisfy (peak) demand. The rest must therefore be supplied locally or zonally in order to meet that demand. *Midcontinent Indep Sys Operator, Inc*, 148 FERC ¶ 61,091, at p 2 (2014). Thus the local clearing requirement is a component of each provider's planning reserve margin obligation, and MISO's "Zonal Resource Credits" are used to verify satisfaction of the local clearing requirement.

Stay with us. There are three ways an electricity provider can accumulate the Zonal Resource Credits to satisfy MISO's version of the local clearing requirement, but one is less attractive than the others. It can: (1) self-supply those in-zone resources (i.e., generate it locally); (2) contract with other providers within the zone (i.e., buy it locally); or, if it cannot do either of those, it can (3) participate in MISO's single-year "Planning Resource Auction." MISO's Planning Resource Auction is an auction to set wholesale capacity prices MISO conducts for each planning year. The auction serves as a marketplace through which any registered provider can sell or purchase units of capacity (essentially, guarantees of an ability to call on resources to meet demand).

After the auction, MISO totals the amount of in-zone capacity the zone's providers report through self-supply (option 1), in-zone contracting (option 2), and the auction (option 3). If MISO concludes that the total in-zone capacity cannot meet demand at the highest

peak moments (i.e., cannot satisfy the *local* clearing requirement), MISO punishes those providers in the zone who relied on the auction for enough Zonal Resource Credits to meet their planning reserve margin requirement. MISO does so by raising the auction's clearing price to a "penalty rate."¹⁰ The penalty rate thus increases prices on every provider that cannot meet its planning reserve margin requirement with local resources—that is, those that resorted to the auction. In other words, if MISO believes that too much electricity will be coming into a given zone from other zones thereby jeopardizing reliability, MISO makes it expensive for providers who are not producing or buying electricity within that zone to rely on the capacity auction. *Midcontinent Indep Sys Operator, Inc*, 162 FERC ¶ 61,176, at p 24 (2018).

Thus, for purposes of the wholesale power market overseen by MISO, every provider has individual capacity obligations that include requirements for total quantity (how much power) and location (where it comes from). And with respect to the latter, MISO's planning reserve margin requirement requires each energy provider to produce or purchase in-zone capacity, or risk paying a steep price. MISO's penalty rate is imposed on individual providers—individual providers

¹⁰ For any year in which the local clearing requirement is not met, MISO sets the auction rate at the cost of new entry, which is based on the estimated costs to build a new natural-gas-fueled combustor turbine plant in the zone. Historically, the cost of new entry is significantly higher than the auction's clearing price. For example, in MISO's Zone 7 (most of Michigan's Lower Peninsula), the 2017/2018 auction clearing price was \$1.50 per unit and the cost of new entry was \$260.00 per unit. MISO, *2017/2018 Planning Resource Auction Results* (April 14, 2017), p 8, available at <<https://cdn.misoenergy.org/2017-2018%20Planning%20Resource%20Adequacy%20Results87196.pdf>> (accessed February 24, 2020) [<https://perma.cc/NG3A-65QW>].

must pay it, and each provider pays in proportion to the amount it relied on the auction for its Zonal Resource Credits.

B. MISO'S 2016 TARIFF AND PUBLIC ACT 341

The specific authority that Regional Transmission Organizations like MISO derive from the FERC is reflected in “tariffs.” The FERC must approve tariffs with respect to all terms and conditions of electrical service, rates charged (prices), schedules, contracts, and service agreements. Thus, when MISO seeks any change in its rate-making authority, it must apply for a new tariff with the FERC. The FERC either approves MISO’s tariff, thereby setting rates and other terms, or not.

In November 2016, MISO sought the FERC’s approval of a newly proposed three-year capacity auction to complement its single-year auction described above. MISO’s goal in devising a three-year auction was greater assurance of longer-term grid reliability (three years instead of one) in states with competitive retail markets. The idea was that the best way to plan for longer-term reliability was to make plans for a longer term. MISO would have allowed these states to permit electricity suppliers to participate in a three-year auction instead of the one-year auction. *Midcontinent Indep Sys Operator, Inc*, MISO Transmittal Letter to the FERC, sent November 1, 2016 (FERC Docket No. ER17-284), p 5, available at <<https://perma.cc/7R8Q-5P6J>>. MISO’s proposal also included giving these states an opportunity to implement a “prevailing state compensation mechanism,” which would allow the state, instead of MISO, to take responsibility over its own long-term resource adequacy planning. *Id.* at 24.

More than a month later, with bipartisan support in both chambers and—to complicate matters—while MISO’s tariff request for a three-year auction plan was pending before the FERC, the Michigan Legislature passed Public Act 341 to promote and ensure the long-term reliability of Michigan’s electric grid. 2016 PA 341; 2016 Senate Journal 2137; 2016 House Journal 2502. The act imposes resource adequacy requirements on Michigan’s electricity providers in the retail market that are enforced by the MPSC.¹¹

Because the Legislature passed Act 341 while MISO’s application for the multi-year auction was pending before the FERC, the act recognized that the MPSC’s specific charge would depend on whether the FERC approved MISO’s pending tariff application. If the FERC approved it, then the MPSC could decide whether to allow Michigan electricity suppliers to have the option to participate in the three-year MISO auction, leaving longer-term planning to MISO, or, instead, whether the MPSC would implement a prevailing *state* compensation mechanism that would obviate the need for MISO’s planning. MCL 460.6w(1). If the FERC did not approve MISO’s pending tariff, Act 341 provided that the MPSC would have to implement a state reliability mechanism—its own plan to ensure the reliability of the state’s electric grid, as directed by MCL 460.6w(8). MCL 460.6w(2); MCL 460.6w(12)(h). Act 341 thus reflected a legislative view that if the FERC accepted MISO’s proposed tariff to move to a three-year auction, the MPSC would be best equipped

¹¹ MCL 460.6w uses the terms “resource adequacy” and “capacity” to explain the obligations providers must meet under the law. Throughout the statute and this opinion, the terms refer to the same idea—an amount of local resources that gives the regulator confidence that the system will be reliably strong to reduce the likelihood of blackouts during the predicted conditions of highest electricity use.

to decide whether MISO's increasingly advanced capacity planning was best for Michigan.

The FERC rejected MISO's tariff.¹² *Midcontinent Indep Sys Operator, Inc*, 158 FERC ¶ 61,128, at p 4 (2017). That triggered the MPSC's obligation under MCL 460.6w to develop and implement a state reliability mechanism. MCL 460.6w(2). The statute required the MPSC to develop a state reliability mechanism that would ensure that each electric provider could meet capacity obligations in the state retail market for four years forward. MCL 460.6w(8) and (12)(h). The statute further required the MPSC to set new "capacity obligations," employing the familiar MISO measurement terms—a *planning reserve margin requirement* (how much) and a *local clearing requirement* (sourced locally). And finally the statute gave the MPSC enforcement tools to use when a provider failed to meet the capacity obligations, necessary for any capacity requirement to work in practice. MCL 460.6w(8).

To meet these new legislative mandates, the MPSC held technical conferences to engage the various electric providers collaboratively about how each would meet the requirements, as the methodology and math in this area can be challenging. *In re Reliability Plans*, order of the Public Service Commission, entered Sep-

¹² The FERC's order rejecting MISO's tariff mentioned several reasons: (1) the proposal did not show that it was "just and reasonable, and not unduly discriminatory or preferential"; (2) the proposed multi-year auction would be used only in a small portion of MISO's total load because it only applied in competitive retail markets and would create a bifurcated MISO capacity market by time and price; (3) the FERC was not persuaded that such a market would lead to efficient and desirable outcomes; (4) such a market might create price volatility; and (5) MISO had not explained or provided clear language to show that these bifurcated markets would not lead to improper or inefficient allocations. *Midcontinent Indep Sys Operator, Inc*, 158 FERC ¶ 61,128, at pp 2-4 (2017).

tember 15, 2017 (Case No. U-18197), pp 2-4. The MPSC also accepted comments from stakeholders on issues related to timing, methodology, and the local clearing requirement in particular. *Id.*

Act 341 defined the local clearing requirement and the planning reserve margin requirement for state-law purposes as follows:

“Local clearing requirement” means the amount of capacity resources required to be in the local resource zone in which the electric provider’s demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider’s demand is served and by the commission under subsection (8). [MCL 460.6w(12)(d).]¹³

“Planning reserve margin requirement” means the amount of capacity equal to the forecasted coincident peak demand that occurs when the appropriate independent system operator footprint peak demand occurs plus a reserve margin that meets an acceptable loss of load expectation as set by the commission or the appropriate independent system operator under subsection (8). [MCL 460.6w(12)(e).]

Following the MPSC’s technical conferences—which included consultation with MISO, as specifically required by MCL 460.6w(8)(c) and (d)—and the comments submitted by stakeholders, the MPSC presented its final order at its September 15, 2017 meeting. *Id.* at 30, 35.

The MPSC concluded that MCL 460.6w authorized it to set a local clearing requirement for each individual provider, requiring that each provider either

¹³ Each time MCL 460.6w uses the term “the appropriate independent system operator,” it refers to the Regional Transmission Organization. It is generally MISO, but, as noted, PJM Interconnection is the appropriate independent system operator for the southwest portion of the state.

own or have contractual rights to enough resources within the state to meet a local clearing requirement as set by the MPSC for four years forward. *Id.* at 47. The MPSC put off implementation of a new local clearing requirement for planning years 2018 through 2021 so that it could gather more information about how to assess it through a formal hearing process. *Id.*¹⁴ The MPSC designed this phased-in approach to mitigate any burden the local clearing requirement placed on alternative electric suppliers in particular. *Id.* at 22-23.

C. APPEAL OF THE MPSC'S ORDER

The Association of Businesses Advocating Tariff Equity (ABATE) and Energy Michigan, Inc., each appealed the MPSC's September 15, 2017 order. They argued that the MPSC exceeded its authority by determining that it could impose a forward-looking local clearing requirement on individual alternative electric suppliers. The Court of Appeals consolidated the cases and reversed the MPSC's decision. *In re Reliability Plans*, 325 Mich App at 210 & n 3. The panel concluded that MCL 460.6w(8)(c) did not use "clear and unmistakable language" allowing the MPSC to impose a local clearing requirement on alternative electric suppliers individually. *Id.* at 225, citing *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 155-156; 596 NW2d

¹⁴ The MPSC later opened a contested-case proceeding for determining the process and requirements for a forward locational requirement for generation resources under MCL 460.6w. *In re Contested Case Proceeding*, order of the Public Service Commission, entered October 11, 2017 (Case No. U-18444). The contested case concluded with the MPSC continuing to recommend the incremental approach but allowing certain out-of-zone resources to count as exceptions toward meeting an entity's forward local clearing requirement. *In re Contested Case Proceeding*, order of the Public Service Commission, entered June 28, 2018 (Case No. U-18444), p 131.

126 (1999).¹⁵ The panel further concluded that MCL 460.6w authorized the MPSC to impose a local clearing requirement on a zonal basis only and that therefore the MPSC did not have the authority “to impose a local clearing requirement on individual providers.” *In re Reliability Plans*, 325 Mich App at 226.

Consumers Energy Company and the MPSC sought leave to appeal. We directed the Clerk to schedule oral argument on the applications, addressing “whether the Court of Appeals erred in holding that 2016 PA 341 does not authorize the Michigan Public Service Commission to impose a local clearing requirement on individual alternative electric suppliers.” *In re Reliability Plans of Electric Utilities for 2017–2021*, 504 Mich 894, 894 (2019); *In re Reliability Plans of Electric Utilities for 2017–2021*, 504 Mich 895, 895 (2019).

II. STANDARD OF REVIEW

We review whether the MPSC exceeded its scope of authority, a question of law, de novo. *Consumers Power Co*, 460 Mich at 157. We also review de novo questions of statutory interpretation. *Mich Ass’n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019). Reviewing an issue de novo means that we review the

¹⁵ Energy Michigan also argued in the Court of Appeals that the MPSC’s order imposed new rules on electric providers in Michigan without required compliance under the Administrative Procedures Act, MCL 24.201 *et seq.* *In re Reliability Plans*, 325 Mich App at 210. The panel did not consider this argument, finding it unnecessary to do so once it determined that MCL 460.6w did not provide the MPSC with the authority to impose a local clearing requirement on individual alternative electric suppliers. *Id.* at 234-235. Because the issue goes beyond the scope of the briefing we requested and was not addressed by all parties in the lower courts, we decline to address it, but it should be addressed by the Court of Appeals on remand.

legal issue independently, without deference to the lower court. *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018).

III. ANALYSIS

ACT 341 AUTHORIZES THE MPSC TO IMPOSE
A LOCAL CLEARING REQUIREMENT ON
ALL ENERGY PROVIDERS, INCLUDING ALTERNATIVE
ELECTRIC SUPPLIERS, INDIVIDUALLY

Final decisions, rulings, and orders of the MPSC must be authorized by law. Const 1963, art 6, § 28. The MPSC has no common-law powers; it has only the authority granted to it by the Legislature. *Consumers Power Co*, 460 Mich at 155-156. The MPSC has the authority to interpret the statutes it administers and enforces. *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993). Courts give the agency's statutory interpretation respectful, nonbinding consideration and do not overturn it absent cogent reasons. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008).

What authority a statute gives an agency is a matter of statutory interpretation. The primary goal of statutory interpretation is to give effect to the Legislature's intent. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 85; 878 NW2d 816 (2016). Statutory interpretation begins with examining the plain language of the statute. *Id.* When that language is clear and unambiguous, no further judicial construction is required or permitted. Here, the parties do not dispute that Act 341 delegated authority to the MPSC to plan for energy capacity in the retail market by setting and enforcing capacity obligations for all energy providers in the state. They disagree only about one particular aspect of that authority: whether the MPSC can impose one of those obligations, a local clearing requirement, on alternative electric suppliers individually.

The Court of Appeals correctly concluded that Subsection (8)(b) of the act requires each electric provider to show that it could meet the capacity obligations set by the MPSC, *In re Reliability Plans*, 325 Mich App at 224, and that those capacity obligations include both a planning reserve margin requirement and a local clearing requirement, *id.* at 226. The statute also clearly gives the MPSC enforcement tools to use if a provider fails to show that it can meet these MPSC-set capacity obligations. For electric utilities, the MPSC has full jurisdiction and control, so it may use one of its preexisting regulatory tools. MCL 460.6w(8)(b)(iii). For cooperative or municipally owned utilities, the MPSC does not have the same degree of control, but the Attorney General has the power to sue when a provider does not meet its capacity obligations. MCL 460.6w(8)(b)(ii). And when an alternative electric supplier cannot make a successful demonstration, the MPSC's tool under the act is to require that the provider pay a "capacity charge" taken up after a contested case under MCL 460.6w(3).¹⁶ MCL 460.6w(8)(b)(i).

Yet the Court of Appeals held that the MPSC could not impose a local clearing requirement on alternative electric suppliers individually. *Id.* at 224-225. The panel asserted that "reading MCL 460.6w as a whole indicates that the MPSC must impose a local clearing requirement on alternative electric suppliers in a manner consistent with MISO—that is, on a zonal basis and not individually." *Id.* at 226.¹⁷ While the panel held

¹⁶ The capacity charge is a penalty rate for alternative electric suppliers that do not provide enough local electricity resources. Although the rate amounts may be different, the concept parallels the cost-of-new-entry penalty rate MISO uses for providers who cannot meet in-zone capacity.

¹⁷ The Court of Appeals reached this conclusion without providing any guidance about what it meant by a "zonal basis." Given its reliance on its understanding of MISO's process, a zonal basis could refer to MISO's

only that the zonal requirement meant the MPSC could not impose any location requirement on alternative electric suppliers individually, if the MPSC is limited to determining a local clearing requirement only for a zone, *no* individual provider would have to produce or purchase any set amount of locally produced electricity.¹⁸

This holding reflects a number of missteps. First, it read into the statutory text a requirement that the MPSC impose Michigan’s local clearing requirement using the same methodology MISO does. That misreading moreover misunderstood how MISO’s local clearing requirement really functions. MISO’s zonal local clearing requirement is only a tool for setting *individual provider* in-zone capacity requirements in another capacity measurement—Zonal Resource Credits. In addition, MCL 460.6w does not refer to zones at all, MISO’s or any other zones. Nor is it at all clear why zones would be relevant to the MPSC, Michigan’s regulator for regulating providers within this state.

A. THE COURT OF APPEALS MISREAD THE TEXT OF MCL 460.6w

The Court of Appeals justified its conclusion that the MPSC could only set a local clearing requirement “on a zonal basis” based on its “review of the entire statute.” *In re Reliability Plans*, 325 Mich App at 225. But that conclusion was not rooted in the statute’s text.

zones. Or it could define the state as the relevant zone for this statute. For reasons explored later, neither interpretation makes sense.

¹⁸ Although most utilities use many local resources, the age of generation facilities and availability of in-state resources may change in time. It is possible that even these producers will have to rely on importing resources to meet their customers’ demand. See Brief for DTE Energy as Amicus Curiae (November 19, 2018) (Docket No. 158305) at 8 n 6. The purpose of MCL 460.6w is to ensure long-term reliability of the grid, and the MPSC needs to have a mechanism to ensure that all producers help guarantee that the system is not in constant danger of blackouts.

As explained, MCL 460.6w authorizes the MPSC to set two capacity obligations—the local clearing requirement and planning reserve margin requirement. MCL 460.6w(8)(c); see also *In re Reliability Plans*, 325 Mich App at 224. The statute authorizes the MPSC to determine both obligations with the same text. The MPSC must “[r]equire . . . that *each* alternative electric supplier, cooperative electric utility, or municipally owned electric utility demonstrate to the commission . . . that [it] . . . owns or has contractual rights to sufficient capacity to meet *its capacity obligations . . .*” MCL 460.6w(8)(b) (emphasis added). No statutory language imposes additional requirements or limitations on the MPSC for setting the local clearing requirement versus the planning reserve margin requirement; they are only addressed in the plural.

Perhaps given this text, the appellees do not challenge the MPSC’s authority to impose a planning reserve margin requirement on providers individually; that is what the statute says. But despite the identical language describing the MPSC’s authority for determining both elements of capacity obligation, the Court of Appeals decided there was a difference based on its “review of the entire statute.” *In re Reliability Plans*, 325 Mich App at 225. That contextual reading, according to the panel, “suggests that the MPSC is obligated to apply the local clearing requirement in a manner consistent with MISO.” *Id.* We see no contextual reason to ignore the statute’s clear language. The parallel treatment of the MPSC’s authority as to both capacity obligations is meaningful—the MPSC can set a planning reserve margin requirement for each provider individually, and it can do the same for a local clearing requirement.

No less, we read the contextual language differently too. The statute requires cooperation with MISO, not adopting MISO’s methodology for one capacity obligation only.¹⁹ On its face, the statute requires the MPSC to seek the appropriate independent system operator’s assistance when it sets a local clearing requirement and planning reserve margin requirement:

In order to determine the capacity obligations, request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and planning reserve margin requirement. If the appropriate independent system operator declines, or has not made a determination by October 1 of that year, the commission shall set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements. [MCL 460.6w(8)(c).]

The statute’s emphasis on cooperation makes sense: state retail capacity planning should be coordinated with federal interstate wholesale capacity planning.

The Court of Appeals read the requirement that the capacity obligations were to be “consistent with federal reliability requirements” somehow to mean that the MPSC must “observe MISO’s general practice of imposing local clearing requirements on a zonal, not an individual, basis.” *In re Reliability Plans*, 325 Mich App at 226. But the text of Subsection 8(c) does not support that reading whatsoever.

¹⁹ Wherever the statute required the MPSC to seek assistance from or coordinate with “the appropriate independent system operator,” the Court of Appeals substituted in MISO. *In re Reliability Plans*, 325 Mich App at 216 n 7 (quotation marks omitted). This ignores both that another independent system operator, PJM Interconnection, plays a regulatory role in Michigan and that the voluntary nature of participation in an independent system operator means that MISO may not always be predominant in the state. When this opinion refers to MISO instead of “the appropriate independent system operator” it is to demonstrate that, even operating under the Court of Appeals’ assumption, it reached the wrong result.

The statute gives the MPSC clear instructions: it must seek the technical assistance of the independent system operator (MISO) in determining the capacity obligations by October 1. *If* the independent system operator (MISO) declines to provide that assistance, or does not provide it by October 1, *then* the MPSC “shall set *any* required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements.” MCL 460.6w(8)(c) (emphasis added).

In fact, the MPSC sought and received technical assistance from MISO in determining a planning reserve margin requirement and a local clearing requirement before October 1, satisfying Subsection (8)(c). See *In re Reliability Plans*, order of the Public Service Commission, entered September 15, 2017 (Case No. U-18197), pp 30, 35, 48-49. The language of Subsection (8)(c) providing for what the MPSC must do in the event it lacked MISO’s assistance by October 1 was therefore not relevant here.

But even if MISO had not provided that assistance (or had not done so by October 1) and the MPSC was therefore to set the capacity measurements “consistent with federal reliability requirements,” still the Court of Appeals’ interpretation of “consistent with” was flawed. “Consistent” does not mean “exactly the same as.” Rather, it means “agreeing or accordant; compatible; not self-contradictory[.]” See *Random House Webster’s College Dictionary* (2d ed, 2003); see also *Merriam-Webster’s Collegiate Dictionary* (11th ed) (“[M]arked by agreement : COMPATIBLE — usu. used with *with*[.]”). As MISO itself explained, the MPSC’s local clearing requirement was consistent with its resource adequacy planning and the FERC’s precedent to defer to states that choose different but complementary adequacy requirements.

Additionally, the MPSC’s authority to assess a penalty—a “capacity charge”—on alternative electric suppliers that do not meet their capacity obligations also requires coordination with the federal resource capacity process. MCL 460.6w(8)(b)(i). The Court of Appeals believed that the statutory language in this section also “militate[s] against the MPSC’s imposition of any local clearing requirements beyond what MISO has established and instead impose[s] on the MPSC a continuing obligation to observe MISO’s general practice of imposing local clearing requirements on a zonal, not an individual, basis.” *In re Reliability Plans*, 325 Mich App at 226. This too misreads the text:

A capacity charge shall not be assessed for any portion of capacity obligations for each planning year for which an alternative electric supplier can demonstrate that it can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator allows to meet the capacity obligation of the electric provider. The preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable. [MCL 460.6w(6)].

The statute requires that if there is a federal resource adequacy process, the MPSC’s assessment of a capacity charge cannot “conflict[] with” it. MISO has consistently described the MPSC’s proposed plan as complementary to its single-year capacity auction—the federal resource adequacy process. See, e.g., Brief for MISO as Amicus Curiae (November 5, 2018) (Docket No. 158305) at 2. The requirement that a capacity charge must also coordinate with, and not conflict with, MISO’s planning process does not require the MPSC to duplicate MISO’s zonal local clearing requirement.

“Conflict” is defined as “to be contradictory, at variance, or in opposition; clash; disagree” or “incompatibility or interference, as of one idea, event, or activity

with another[.]” *Random House Webster’s College Dictionary* (2d ed, 2003); see also *Merriam-Webster’s Collegiate Dictionary* (11th ed) (defining “conflict,” in part, as “to show antagonism or irreconcilability: fail to be in agreement or accord <his statement conflicts with the facts>”). As MISO has explained, an individually imposed local clearing requirement in the state retail market does not conflict with its wholesale capacity planning process; it meets separate but complementary goals. *In re Contested Case Proceeding*, order of the Public Service Commission, entered June 28, 2018 (Case No. U-18444), p 111 (quoting MISO’s August 30, 2017 reply comments to the MPSC’s investigation into the electric supply reliability plans of Michigan’s electric utilities for the years 2017 through 2021, Case No. U-18197, “Rather, MISO’s resource adequacy processes are complementary to the reliability mechanisms of the states”).

B. THE COURT OF APPEALS
MISUNDERSTOOD MISO’S CAPACITY PLANNING

The Court of Appeals made another mistake in determining that the MPSC was only permitted to impose a zonal local clearing requirement like MISO does. The panel’s interpretation misunderstood the differences between the wholesale and retail capacity markets, and especially MISO’s capacity planning process and the local clearing requirement’s function in that process.

As explained, MISO’s authority is limited to that approved by the FERC, which regulates the interstate power and capacity wholesale and transmission electricity markets. *Electric Power Supply*, 577 US at 277.²⁰

²⁰ The United States Supreme Court decided *Electric Power Supply* in 2016, in the midst of the 17-month period after which the statute at issue was introduced and when it became Act 341. The United States

Any rate, rule, or practice the FERC approves for MISO's implementation must affect interstate wholesale rates but may not affect retail electricity sales. *Id.* at 279. The states have regulatory authority over electricity sales that stay within state boundaries, especially retail sales. *Id.* at 279-280. While MISO oversees the wholesale markets and the MPSC oversees the retail markets, the two regulatory bodies work cooperatively to ensure grid reliability and work together on capacity planning in particular, relevant to both.

MCL 460.6w codified this cooperation. MCL 460.6w uses capacity measurement vocabulary also used by MISO in its capacity planning and has the same goal—ensuring grid reliability by requiring that each provider supply enough electric capacity and enough local capacity.

The Legislature enacted MCL 460.6w to require each electricity provider to demonstrate enough capacity, including in-state capacity, to meet peak demand. But the statute's planning reserve margin requirement includes no measure of in-zone resources as MISO's does with Zonal Resource Credits; it measures capacity (quantity) only. Instead, the statute accounts for in-zone capacity in the providers' individual local clearing requirement. MCL 460.6w(8).

Supreme Court also decided *Hughes v Talen Energy Mktg, LLC*, 578 US 150; 136 S Ct 1288; 194 L Ed 2d 414 (2016), which held that a state's program to subsidize new power generation was preempted by federal law. The Court of Appeals cited legislative history to support its reading of the statute, finding meaning in the iterations of the text before the version that passed into law. *In re Reliability Plans*, 325 Mich App at 228-232. The Michigan Chamber of Commerce's brief as amicus curiae explaining that the changes in bill drafts instead reflected the Legislature's shifting view of its authority given these United States Supreme Court opinions persuasively rebuts the panel's assumption about the legislative history. See Brief for the Michigan Chamber of Commerce as Amicus Curiae (October 26, 2018) (Docket No. 158305) at 5.

The Court of Appeals' view that the MPSC must impose its local clearing requirement zonally because MISO uses a zonal measurement provides no hints about the economic tools the MPSC could employ to ensure that each Michigan electricity provider contributed to some zonal local clearing requirement or how the MPSC could restructure market costs—as MISO does—to penalize the providers responsible for years in which they do not meet it. In particular, the Court of Appeals did not make clear what the relevant “zone” would be in its interpretation of the local clearing requirement. If it meant that the MPSC could only impose a local clearing requirement that maps exactly onto MISO's zonal measurement, that interpretation makes little sense given MISO's zone geography and the MPSC's authority. MISO oversees 10 regional zones that span 15 states, and its boundaries are not drawn according to state lines. (See Figure 1 of this opinion again). MISO's Zone 1, for instance, includes all of North Dakota and parts of Montana, South Dakota, Minnesota, Wisconsin, Iowa, and Illinois. All providers in Zone 2—which includes Michigan's Upper Peninsula and most of Wisconsin—and all in Zone 7—which includes most of Michigan's Lower Peninsula only—meet MISO's capacity measurements for the zone in which they participate. The MPSC, in contrast, is charged with ensuring the reliability of Michigan's grid for retail consumers throughout the state.

The MPSC lacks any authority over Wisconsin providers, which it would need to impose a local clearing requirement over MISO Zone 2. And while the MPSC has authority over the southwest corner of the state that participates in a zone regulated by PJM Interconnection, a different Regional Transmission Organization, the MPSC similarly has no authority over those parts of Delaware, the District of Columbia, Illinois,

Indiana, Kentucky, Maryland, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia overseen by that system operator.

A contextual understanding of the MCL 460.6w capacity planning process and MISO's process therefore supports a plain reading of the statute.

IV. CONCLUSION

In requiring that each provider, including alternative electric suppliers, meet an individual local clearing requirement, the MPSC did what the statute required of it to ensure reliability of retail electric markets in Michigan. We reverse the judgment of the Court of Appeals and remand to the Court of Appeals for further proceedings consistent with this opinion, including addressing whether the MPSC's order complied with the Administrative Procedures Act.

MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

DeRUITER v TOWNSHIP OF BYRON

Docket No. 158311. Argued on application for leave to appeal October 3, 2019. Decided April 27, 2020.

Christie DeRuiter, a registered qualifying medical marijuana patient and a registered primary caregiver to qualifying patients, brought an action in the Kent Circuit Court against Byron Township, alleging that the township's zoning ordinance—which required that a primary caregiver obtain a permit before cultivating medical marijuana and that the caregiver cultivate the marijuana within a dwelling or garage in a residentially zoned area within the township as part of a regulated home occupation at a full-time residence—directly conflicted with and was therefore preempted by the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq.* DeRuiter cultivated marijuana in an enclosed, locked facility at a commercially zoned property she rented in the township; she did not obtain a permit from the township before cultivating the medical marijuana as a primary caregiver. At the township's direction, DeRuiter's landlord ordered her to stop cultivating medical marijuana at the property or face legal action. When the township attempted to enforce its zoning ordinance, DeRuiter filed the instant action, seeking a declaratory judgment regarding the ordinance's legality; the township countersued, seeking a declaration that the ordinance did not conflict with the MMMA. Both parties moved for summary disposition, and the court, Paul J. Sullivan, J., granted summary disposition in favor of DeRuiter, holding that the ordinance directly conflicted with the MMMA and that it was therefore preempted by the act. The Court of Appeals, HOEKSTRA, P.J., and MURPHY and MARKEY, JJ., affirmed the trial court order, concluding that the MMMA preempted defendant's home-occupation zoning ordinance because the ordinance directly conflicted with the MMMA by prohibiting what the MMMA permitted and because the ordinance improperly imposed regulations and penalties upon persons who engage in the MMMA-compliant medical use of marijuana. 325 Mich App 275 (2018). Byron Township applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 503 Mich 942 (2019).

In a unanimous opinion by Justice BERNSTEIN, the Supreme Court, in lieu of granting leave to appeal, *held*:

Under the conflict-preemption doctrine, the MMMA does not nullify a municipality's inherent authority to regulate land use under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.*, as long as (1) the municipality does not prohibit or penalize the cultivation of medical marijuana and (2) the municipality does not impose regulations that are unreasonable and inconsistent with regulations established by state law. MCL 333.26424(b)(2) states that primary caregivers and qualifying patients must keep their plants in an enclosed, locked facility in order for those individuals to be entitled to the MMMA protections in MCL 333.26424(a) and (b). Because an enclosed, locked facility may be found in various locations on various types of property, the township's ordinance limiting where medical marijuana must be cultivated within the locality did not directly conflict with the MMMA's requirement that marijuana plants be kept in an enclosed, locked facility. The township's ordinance requiring primary caregivers to obtain a permit and pay a fee before using a building or structure within the township to cultivate medical marijuana also did not directly conflict with the MMMA because the ordinance did not effectively prohibit the medical use of marijuana.

1. Generally, local governments may control and regulate matters of local concern when that power is conferred by the state. However, state law may preempt a local regulation either expressly or by implication. Implied preemption can occur when the state has occupied the entire field of regulation in a certain area (field preemption) or when a local regulation directly conflicts with state law (conflict preemption). A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits; there is no conflict between state and local law when a locality enacts regulations that are not unreasonable and inconsistent with regulations established by state law so long as the state regulatory scheme does not occupy the field. That is, while a local ordinance is preempted when it bans an activity that is authorized and regulated by state law, a local governmental unit may add to the conditions in a statute as long as the additional requirements do not contradict the requirements set forth in the statute. A court must review both the statute and the local ordinance to determine whether conflict preemption applies.

2. MCL 333.26424(a) and (b) provide that qualifying patients and primary caregivers are immune from arrest, prosecution, or

penalty in any manner, including, but not limited to, civil penalty or disciplinary action for the medical use of marijuana in accordance with the MMMA. In turn, MCL 333.26424(b)(2) provides that primary caregivers and qualifying patients must keep their plants in an enclosed, locked facility in order to qualify for the immunity. This requirement sets forth the type of structure marijuana plants must be kept and grown in for a patient or a caregiver to be entitled to the MMMA protections in MCL 333.26424(a) and (b), but the provision does not address where marijuana may be grown. Under *Ter Beek v City of Wyoming*, 495 Mich 1 (2014), a local ordinance conflicts with the MMMA when the ordinance results in a complete prohibition of the medical use of marijuana; however, the MMMA does not foreclose all local regulation of marijuana. In that regard, the act does not nullify a municipality's inherent authority to regulate land use under the MZEA as long as (1) the municipality does not prohibit or penalize the cultivation of medical marijuana and (2) the municipality does not impose regulations that are unreasonable and inconsistent with regulations established by state law. Because an enclosed, locked facility may be found in various locations on various types of property, a local regulation limiting where medical marijuana must be cultivated within a locality does not conflict with the statutory requirement that marijuana plants be kept in an enclosed, locked facility. In this case, the township's ordinance allowed for the medical use of marijuana by a registered primary caregiver but placed limitations on where the caregiver could cultivate marijuana within the township. The ordinance's geographical restriction added to and complemented the limitations imposed by the MMMA; it did not directly conflict with the MMMA. While the ordinance went further in its regulation than the MMMA, the township appropriately used its authority under the MZEA to craft an ordinance that did not directly conflict with the MMMA's provision requiring that marijuana be cultivated in an enclosed, locked facility. The township also had authority under the MZEA to require zoning permits and permit fees for the use of buildings and structures within its jurisdiction. The township's ordinance requiring primary caregivers to obtain a permit and pay a fee before using a building or structure within the township to cultivate medical marijuana did not directly conflict with the MMMA because the ordinance did not effectively prohibit the medical use of marijuana, and DeRuiter did not argue that the requirements for obtaining a permit were so unreasonable as to create a conflict. To the extent that DeRuiter argued that the immunity provisions of the MMMA contributed to a blanket prohibition on local governments

regulating the medical use of marijuana with respect to time, place, and manner of such use, that argument sounded in field preemption; but neither the trial court nor the Court of Appeals reached the issue of field preemption, and DeRuiter conceded that her appeal did not concern the issue of field preemption. The Court of Appeals erred by affirming the trial court's grant of summary disposition in favor of DeRuiter.

Reversed and remanded to the trial court for further proceedings.

MUNICIPAL ORDINANCES — STATUTES — PREEMPTION — MICHIGAN MEDICAL MARIHUANA ACT.

State law may preempt a local regulation either expressly or by implication; implied preemption can occur when the state has occupied the entire field of regulation in a certain area (field preemption) or when a local regulation directly conflicts with state law (conflict preemption); under the conflict-preemption doctrine, the Michigan Medical Marihuana Act does not nullify a municipality's inherent authority to regulate land use under the Michigan Zoning Enabling Act as long as (1) the municipality does not prohibit or penalize the cultivation of medical marijuana and (2) the municipality does not impose regulations that are unreasonable and inconsistent with regulations established by state law (MCL 333.26421 *et seq.*; MCL 125.3101 *et seq.*).

Dodge & Dodge, PC (by *David A. Dodge*) for Christie DeRuiter.

McGraw Morris, PC (by *Craig R. Noland* and *Amanda M. Zdarsky*) and *Mika Meyers PLC* (by *Ross A. Leisman* and *Ronald M. Redick*) for Byron Township.

Amici Curiae:

Bauckham, Sparks, Thall, Seeber & Kaufman, PC (by *Robert E. Thall* and *Catherine P. Kaufman*) for the Michigan Townships Association.

Rosati Schultz Joppich & Amtsbuechler PC (by *Thomas R. Schultz*) for the Michigan Municipal League and the Government Law Section of the State Bar of Michigan.

Pollicella & Associates, PLLC (by *Denise Pollicella, Jacqueline Langwith, and Kyle A. Debruycker*) for Cannabis Attorneys of Michigan.

BERNSTEIN, J. In this case, we address whether defendant-counterplaintiff Byron Township’s zoning ordinance, which regulates the location of registered medical marijuana caregiver activities and requires that a “primary caregiver”¹ obtain a permit before cultivating medical marijuana, is preempted by the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq.*² Specifically, Byron Township’s ordinance requires that medical marijuana caregivers cultivate marijuana as a “home occupation” at a full-time residence. Byron Township Zoning Ordinance, § 3.2.H.1. Plaintiff-counterdefendant, Christie DeRuitter, a registered qualifying patient³ and primary caregiver under the MMMA,⁴ cultivated medical marijuana on rented commercially zoned property. DeRuitter’s landlord was directed by the Byron Township

¹ For purposes of the Michigan Medical Marihuana Act, MCL 333.26421 *et seq.*, a “primary caregiver” means “a person who is at least 21 years old and who has agreed to assist with a patient’s medical use of marihuana . . .” MCL 333.26423(k). Primary caregivers with a registry identification card possess immunity from criminal prosecution under Michigan law for cultivating marijuana for their qualifying patients. MCL 333.26424(b).

² This opinion addresses zoning in the context of medical marijuana use and the MMMA. It does not address any zoning issues that may arise from the voter-initiated legalization of recreational marijuana. See 2018 IL 1, effective December 6, 2018.

³ “Qualifying patient” means “a person who has been diagnosed by a physician as having a debilitating medical condition.” MCL 333.26423(l).

⁴ Although DeRuitter is both a registered qualifying patient and a primary caregiver, her challenge to Byron Township’s zoning ordinance concerns only her rights as a primary caregiver.

supervisor to cease and desist the cultivation of medical marijuana or face legal action. After Byron Township attempted to enforce its zoning ordinance, DeRuiter sought a declaratory judgment regarding the ordinance's legality. Byron Township countersued and also sought a declaratory judgment regarding the ordinance's legality, arguing that the ordinance did not conflict with the MMMA. The trial court held that § 3.2 of Byron Township's zoning ordinance directly conflicted with, and was therefore preempted by, the MMMA. The trial court granted DeRuiter's motion for summary disposition and denied Byron Township's motion for summary disposition. The Court of Appeals affirmed the trial court in a published opinion. *DeRuiter v Byron Twp*, 325 Mich App 275, 287; 926 NW2d 268 (2018).

Because we conclude that the Byron Township Zoning Ordinance does not directly conflict with the MMMA, we reverse the Court of Appeals' judgment and remand this case to the trial court for proceedings consistent with this opinion.

I. FACTS

Christie DeRuiter, a licensed qualifying patient and registered primary caregiver under the MMMA, began growing marijuana on rented commercially zoned property because she did not want to grow marijuana at her residence. DeRuiter grew the marijuana in an "enclosed, locked facility." See MCL 333.26423(d).

After learning of DeRuiter's cultivation of medical marijuana on commercially zoned property, the Byron Township supervisor determined that DeRuiter's growing operation constituted a zoning violation under the Byron Township Zoning Ordinance. The zoning ordi-

nance contains a locational restriction⁵ that allows for the cultivation of medical marijuana by primary caregivers, but only as “a home occupation.” Byron Township Zoning Ordinance, § 3.2.H.1.⁶ “Home occupation” is defined by Byron Township as follows:

An occupation or profession that is customarily incidental and secondary to the use of a dwelling. It is customarily conducted within a dwelling, carried out by its occupants utilizing equipment customarily found in a home and, except for a sign allowed by this Ordinance, is generally not distinguishable from the outside. [Byron Township Zoning Ordinance, § 2.5.]

Under this home-occupation requirement, the ordinance mandates that the “medical use” of marijuana by a primary caregiver be “conducted entirely within a dwelling⁷ or attached garage, except that a registered primary caregiver may keep and cultivate [medical marijuana], in an enclosed, locked facility” Byron Township Zoning Ordinance, § 3.2.H.2.d (quotation marks omitted). The ordinance also requires that “[t]he medical use of marijuana shall comply at all times with the MMMA and the MMMA General Rules, as amended.” Byron Township Zoning Ordinance, § 3.2.H.2.a.

⁵ We use “locational restriction” in this opinion to denote a zoning restriction that regulates where an activity may occur within a municipality.

⁶ The township amended § 3.2 of the Byron Township Zoning Ordinance on July 11, 2016. The postamendment version of the zoning ordinance is at issue in this case.

⁷ The term “dwelling unit” is defined as “[a] building or portion of a building, designed for use and occupancy by one family for living and sleeping purposes and with housekeeping facilities. A recreational vehicle, vehicle chassis, tent or other transient residential use is not considered a dwelling.” Byron Township Zoning Ordinance, § 2.3. Byron Township’s zoning ordinance does not permit dwellings by right in commercially zoned districts. See Byron Township Zoning Ordinance, §§ 6.1 and 6.2.

Furthermore, Byron Township requires that primary caregivers obtain a permit to grow medical marijuana. Byron Township Zoning Ordinance, § 3.2.H.3. If a primary caregiver who holds a permit departs from the requirements of either the ordinance or the MMMA, their permit can be revoked. Byron Township Zoning Ordinance, § 3.2.H.3.c. Byron Township's zoning ordinance clarifies that a permit is not required for a qualifying patient's cultivation of marijuana for personal use and that a permit is not required for a qualifying patient's possession or use of marijuana in their dwelling. Byron Township Zoning Ordinance, § 3.2.H.5 and § 3.2.H.6. DeRuiter did not obtain a permit from Byron Township before cultivating medical marijuana as a primary caregiver.

In March 2016, Byron Township sent DeRuiter's landlord a letter, directing the landlord to cease and desist DeRuiter's cultivation of medical marijuana and to remove all marijuana and related equipment or be subject to enforcement action. The letter asserted that violations of the zoning ordinance were a nuisance *per se*.

In May 2016, DeRuiter filed a complaint, seeking a declaratory judgment that Byron Township's zoning ordinance was preempted by the MMMA and that it was, therefore, unenforceable. She took issue with the ordinance's permit requirement and locational restriction. She also sought injunctive relief to prevent Byron Township from enforcing the ordinance. Byron Township filed a counterclaim, seeking a declaratory judgment and abatement of the alleged nuisance.

The trial court granted DeRuiter's motion for summary disposition, denied Byron Township's motion for summary disposition, and dismissed Byron Township's counterclaim. The trial court held that the zoning

provisions in question directly conflicted with the MMMA and that, as a result, those provisions were preempted and unenforceable. Specifically, the trial court held that Byron Township’s zoning ordinance impermissibly subjected primary caregivers to penalties for the medical use of marijuana and for assisting qualifying patients with the medical use of marijuana regardless of a caregiver’s compliance with the MMMA. According to the trial court, these penalties clearly conflicted with the MMMA, which prohibits penalizing qualifying patients and primary caregivers who are in compliance with the MMMA. See MCL 333.26424(a) and (b). The trial court also determined that Byron Township could not prohibit what the MMMA explicitly authorized—the medical use of marijuana under MCL 333.26427(a). According to the trial court, Byron Township ran afoul of these principles by requiring that a primary caregiver obtain a permit to cultivate marijuana, placing locational restrictions on that cultivation, and subjecting caregivers to fines and penalties for noncompliance.

Byron Township appealed. The Court of Appeals affirmed the trial court in a published opinion, holding that “the trial court did not err by ruling that a direct conflict exist[s] between defendant’s ordinance and the MMMA resulting in the MMMA’s preemption of plaintiff’s home-occupation ordinance.” *DeRuiter*, 325 Mich App at 287. Byron Township filed an application for leave to appeal in this Court. We ordered oral argument on the application, directing the parties to address “whether the defendant’s zoning ordinance pertaining to the location of registered medical marijuana caregivers is preempted by the [MMMA].” *DeRuiter v Byron Twp*, 503 Mich 942 (2019).

II. STANDARDS OF REVIEW

“Whether a state statute preempts a local ordinance is a question of statutory interpretation and, therefore, a question of law that we review de novo.” *Ter Beek v City of Wyoming*, 297 Mich App 446, 452; 823 NW2d 864 (2012) (*Ter Beek I*), aff’d 495 Mich 1 (2014). “We also review de novo the decision to grant or deny summary disposition and review for clear error factual findings in support of that decision.” *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014) (*Ter Beek II*) (citations omitted).

The MMMA was enacted by voter referendum in 2008. “Statutes enacted by the Legislature are interpreted in accordance with legislative intent; similarly, statutes enacted by initiative petition are interpreted in accordance with the intent of the electors.”⁸ *People v Mazur*, 497 Mich 302, 308; 872 NW 2d 201 (2015). “We begin with an examination of the statute’s plain language, which provides ‘the most reliable evidence’ of the electors’ intent.” *Id.*, citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). “If the statutory language is unambiguous, . . . [n]o further judicial construction is required or permitted because we must conclude that the electors intended the meaning clearly expressed.” *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012) (quotation marks and citations omitted; alteration in original).

⁸ The Legislature subsequently amended the MMMA. See 2012 PA 512, effective April 1, 2013; 2012 PA 514, effective April 1, 2013; 2016 PA 283, effective December 20, 2016. Because these amendments do not concern preemption or local zoning restrictions, we are primarily concerned with the electorate’s intent when determining whether a direct conflict exists between the MMMA and the Byron Township Zoning Ordinance.

III. ANALYSIS

Generally, local governments may control and regulate matters of local concern when such power is conferred by the state. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 117-118; 715 NW2d 28 (2006). State law, however, may preempt a local regulation either expressly or by implication. *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 702; 918 NW2d 756 (2018), citing *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). Implied preemption can occur when the state has occupied the entire field of regulation in a certain area (field preemption) or when a local regulation directly conflicts with state law (conflict preemption). *Mich Gun Owners, Inc*, 502 Mich at 702. In the context of conflict preemption, a direct conflict exists when “the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits.” *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977).

We only address whether the MMMA is in direct conflict with the township’s zoning ordinance. We do not address field preemption because the trial court did not base its preemption ruling on that doctrine. See *DeRuiter*, 325 Mich App at 287 (declining to address field preemption because “the trial court never based its ruling on field preemption of zoning”). Likewise, we do not consider express preemption because DeRuiter has not argued that the MMMA expressly preempts the zoning ordinance at issue.

Conflict preemption applies if “the ordinance is in direct conflict with the state statutory scheme[.]” *Llewellyn*, 401 Mich at 322. An examination of whether the MMMA directly conflicts with the zoning ordinance

must necessarily begin with an examination of both the relevant provisions of the MMMA and of the ordinance.

The MMMA affords certain protections under state law for the medical use of marijuana. MCL 333.26424. The MMMA defines the phrase “medical use of marijuana” as “the acquisition, possession, cultivation, manufacture, extraction, use, internal possession, delivery, transfer, or transportation of marijuana, marijuana-infused products, or paraphernalia relating to the administration of marijuana to treat or alleviate a registered qualifying patient’s debilitating medical condition or symptoms associated with the debilitating medical condition.” MCL 333.26423(h). The MMMA states, in pertinent part, that a qualifying patient “is not 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 . . . for the medical use of marijuana in accordance with this act[.]” MCL 333.26424(a). The MMMA also provides the same immunity to a primary caregiver in “assisting a qualifying patient . . . with the medical use of marijuana in accordance with this act.” MCL 333.26424(b). As a condition of immunity under either subsection, the MMMA requires a primary caregiver or qualifying patient who cultivates marijuana to keep their plants in an “enclosed, locked facility.” MCL 333.26424(a); MCL 333.26424(b)(2).⁹

⁹ An “enclosed, locked facility” may be a “closet, room, or other comparable, stationary, and fully enclosed area . . .” MCL 333.26423(d). The facility may be outdoors “if [marijuana plants] are not visible to the unaided eye from an adjacent property when viewed by an individual at ground level or from a permanent structure and are grown within a stationary structure that is enclosed on all sides, except for the base,” or it may be in a vehicle under certain conditions. *Id.*

Both lower courts held that the zoning ordinance here directly conflicts with the MMMA because the ordinance allows Byron Township to sanction a registered primary caregiver’s “medical use of marijuana” when that use occurs in a commercially zoned location. In affirming the trial court’s holding, the Court of Appeals relied on our decision in *Ter Beek II*. Like the case before us, *Ter Beek II* involved a challenge to a local zoning ordinance on the basis that the ordinance was preempted by the MMMA. In that case, we were tasked with deciding whether the city of Wyoming’s zoning ordinance conflicted with, and was thus preempted by, the immunity provisions of the MMMA, MCL 333.26424(a) and (b). *Ter Beek II*, 495 Mich at 19.

We said yes. The zoning ordinance in *Ter Beek II* prohibited land uses that were contrary to federal law and subjected such land uses to civil sanctions. Because the manufacture and possession of marijuana is prohibited under federal law, the Wyoming ordinance at issue in *Ter Beek II* had the effect of banning outright the medical use of marijuana in the city. As a result, there was no way that patients and caregivers could engage in the medical use of marijuana under the MMMA without subjecting themselves to a civil penalty.

The Byron Township ordinance is different than the ordinance we considered in *Ter Beek II*. It allows for the medical use of marijuana by a registered primary caregiver but places limitations on where the caregiver may cultivate marijuana within the township (i.e., in the caregiver’s “dwelling or attached garage” as part of a regulated “home occupation”). See Byron Township Zoning Ordinance, § 3.2.H.1 and § 3.2.H.2.d. But despite the differences, DeRuiter argues that the Byron Township ordinance is in direct conflict with the

MMMA because the act protects a registered caregiver from “penalty in any manner” for “assisting a qualifying patient . . . with the medical use of marihuana” so long as the caregiver abides by the MMMA’s volume limitations and restricts the cultivation to an “enclosed, locked facility.” See MCL 333.26424(b). The Court of Appeals agreed.

Admittedly, our preemption analysis in *Ter Beek II* considered the MMMA’s prohibition on the imposition of a “penalty in any manner.” *Ter Beek II*, 495 Mich at 24. But while we sided with the plaintiff in *Ter Beek II*, we cautioned that “*Ter Beek* does not argue, and we do not hold, that the MMMA forecloses all local regulation of marijuana[.]” *Id.* at 24 n 9.

Were we to accept DeRuiter’s argument, the only allowable restriction on where medical marijuana could be cultivated would be an “enclosed, locked facility” as that term is defined by the MMMA. MCL 333.26423(d). Because the MMMA does not otherwise limit cultivation, the argument goes, any other limitation or restriction on cultivation imposed by a local unit of government would be in conflict with the state law.¹⁰ We disagree. The “enclosed, locked facility” requirement in the MMMA concerns what type of structure marijuana plants must be kept and grown in for a patient or caregiver to be entitled to the protections offered by MCL 333.26424(a) and (b); the requirement does not speak to *where* marijuana may be grown. In other words, because an enclosed, locked facility could be found in various locations on various types of

¹⁰ DeRuiter argues that the MMMA permits her to cultivate medical marijuana in any enclosed, locked facility. She does not contend that it was impossible or impractical for her to cultivate marijuana in her home in accordance with Byron Township’s zoning ordinance. Consequently, we do not address this latter possibility.

property, regardless of zoning, this requirement is not in conflict with a local regulation that limits *where* medical marijuana must be cultivated.

This result is not at odds with *Ter Beek II*, which involved an ordinance that resulted in a complete prohibition of the medical use of marijuana, despite the MMMA’s authorization of such use, see MCL 333.26427(a). A local ordinance is preempted when it bans an activity that is authorized and regulated by state law. For example, in *Nat’l Amusement Co v Johnson*, 270 Mich 613, 614; 259 NW 342 (1935), we considered a city ordinance that banned a person from “‘tak[ing] part in any amusement or exhibition which shall result in a contest to test the endurance of the participants.’” We concluded that the ordinance was preempted by a state statute that regulated “endurance contests” and made it unlawful to participate in such contests “except in accordance with the provisions of this act.” *Id.* at 615 (quotation marks omitted). We explained:

Where an amusement, which has been lawful and unregulated, is not evil *per se* but may be conducted in a good or bad manner, is the subject of legislation, regulatory, not prohibitory, it would seem clear that the legislature intended to permit continuance of the amusement, subject to statutory conditions. The statute makes it unlawful to conduct a walkathon only in violation of certain conditions. This is merely a common legislative manner of saying that it is lawful to conduct it if the regulations are observed. [*Id.* at 616-617.]

We presumed that “the city may add to the conditions” in the statute but found it impermissible that “the ordinance attempt[ed] to prohibit what the statute permit[ted].” *Id.* at 617. As with the ordinance in *Nat’l Amusement*, Wyoming’s ordinance in *Ter Beek II* had the effect of wholly prohibiting an activity (the medical

use of marijuana) that the MMMA allows. But that does not mean that local law cannot “add to the conditions” in the MMMA. *Id.* DeRuiter’s argument would result in an interpretation of the MMMA that forecloses all local regulation of marijuana—the exact outcome we cautioned against in *Ter Beek II*. See *Ter Beek II*, 495 Mich at 24 n 9. DeRuiter nevertheless emphasizes our statement that “the [Wyoming] 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.” *Id.* at 20. We appreciate the apparent contradiction and take this opportunity to clarify. Our analysis in *Ter Beek II*—in particular, our focus on whether the MMMA permitted the city to impose a sanction for violating the Wyoming ordinance—suggested that the MMMA’s immunity language was the source of the conflict. That was true in *Ter Beek II* because the ordinance left no room whatsoever for the medical use of marijuana.

In *Ter Beek II*, the conflict giving rise to that preemption can be viewed as whether the city of Wyoming had completely prohibited the medical use of marijuana that the electors intended to permit when they approved the MMMA.¹¹ That view meshes with our caselaw, as indicated in our discussion of *Nat’l Amusement*. More recently, we declined to find a conflict between state and local law when a locality enacted regulations that are not “unreasonable and inconsis-

¹¹ While this Court has stated that “[t]he MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan,” *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012), the act plainly evinces an intent to permit that use, under certain circumstances, by persons who have a legitimate medical need. See MCL 333.26422 (findings and declarations).

tent with regulations established by state law,” so long as the state regulatory scheme did not occupy the field. *Detroit v Qualls*, 434 Mich 340, 363; 454 NW2d 374 (1990) (holding that a city ordinance regulating the quantity of fireworks a retailer may store was not in conflict with a state law that limited possession to a “reasonable amount”). Similarly, in *Miller v Fabius Twp Bd*, 366 Mich 250, 255-257; 114 NW2d 205 (1962), we held that a local ordinance that prohibited powerboat racing and water skiing between the hours of 4:00 p.m. and 10:00 a.m. was not preempted by a state law that prohibited the activity “ ‘during the period 1 hour after sunset to 1 hour prior to sunrise.’ ” In both cases, we quoted favorably the following proposition:

The mere fact that the State, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has *expressly* licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail. [*Miller*, 366 Mich at 256-257, quoting 37 Am Jur, Municipal Corporations, § 165, p 790.

See also *Qualls*, 434 Mich at 362, quoting 56 Am Jur 2d, Municipal Corporations, § 374, pp 408-409.]

Under this rule, an ordinance is not conflict preempted as long as its additional requirements do not contradict the requirements set forth in the statute.¹²

Plaintiff has not argued that the state’s authority to regulate the medical use of marijuana is exclusive. The geographical restriction imposed by Byron Township’s zoning ordinance adds to and complements the limitations imposed by the MMMA; we therefore do not believe there is a contradiction between the state law and the local ordinance. As in *Qualls* and *Miller*, the local ordinance goes further in its regulation but not in a way that is counter to the MMMA’s conditional allowance on the medical use of marijuana. We therefore hold that the MMMA does not nullify a municipality’s inherent authority to regulate land use under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.*,¹³ so long as the municipality does not

¹² See *Nat’l Amusement Co*, 270 Mich at 616, quoting 43 CJ, p 218 (“In order that there be a conflict between a State enactment and a municipal regulation both must contain either express or implied conditions which are inconsistent and irreconcilable with each other. Mere differences in detail do not render them conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand. . . . As a general rule, additional regulation to that of a State law does not constitute a conflict therewith.”) (quotation marks omitted).

¹³ The MZEA provides that “[a] local unit of government may provide by zoning ordinance for the regulation of land development and . . . regulate the use of land and structures . . .” MCL 125.3201(1). Moreover, even if the “enclosed, locked facility” requirement did concern where marijuana must be grown, this would not necessarily preclude a local governmental unit from imposing additional locational restrictions. *Rental Prop Owners Ass’n of Kent Co v Grand Rapids*, 455 Mich 246, 262; 566 NW2d 514 (1997) (“The mere fact that the state, in the exercise of the police power, has made certain regulations does not

prohibit or penalize all medical marijuana cultivation, like the city of Wyoming’s zoning ordinance did in *Ter Beek II*, and so long as the municipality does not impose regulations that are “unreasonable and inconsistent with regulations established by state law.” *Qualls*, 434 Mich at 363. In this case, Byron Township appropriately used its authority under the MZEA to craft a zoning ordinance that does not directly conflict with the MMMA’s provision requiring that marijuana be cultivated in an enclosed, locked facility.¹⁴

DeRuiter also argues that Byron Township’s permit requirement directly conflicts with the MMMA because it impermissibly infringes her medical use of marijuana. Again, we disagree. As with the zoning ordinance’s locational restriction, the permit requirement does not effectively prohibit the medical use of marijuana.¹⁵ The MZEA allows Byron Township to require

prohibit a municipality from exacting additional requirements.”) (quotation marks and citations omitted).

¹⁴ We do not decide whether Byron Township’s ordinance conflicts with other aspects of the MMMA. Nor do we decide if the ordinance, which also precludes cultivating medical marijuana outside or in a structure detached from a residence, see Byron Township Zoning Ordinance, § 3.2.G.1 and § 3.2.H.2.d, has the practical consequence of prohibiting DeRuiter from cultivating the number of marijuana plants she is expressly permitted by the MMMA, see MCL 333.26426(d); MCL 333.26424(a); MCL 333.26424(b)(2).

¹⁵ Byron Township’s zoning ordinance provides that “[t]he operations of a registered primary caregiver, as a home occupation, shall be permitted only with the prior issuance of a Township permit.” Byron Township Zoning Ordinance, § 3.2.H.3. Additionally, “[a] complete and accurate application shall be submitted . . . and an application fee in an amount determined by resolution of the Township Board shall be paid.” Byron Township Zoning Ordinance, § 3.2.H.3.a. To obtain a permit from the township, a caregiver must demonstrate that their grow operation is located in a full-time residence and provide state identification, their MMMA registry identification card, information about the equipment used to cultivate marijuana, and a description of the location being used

zoning permits and permit fees for the use of buildings and structures within its jurisdiction.¹⁶ Accordingly, Byron Township may require primary caregivers to obtain a permit and pay a fee before they use a building or structure within the township for the cultivation of medical marijuana. We express no opinion on whether the requirements for obtaining a permit from the township are so unreasonable as to create a conflict with the MMMA because that argument has not been presented to us.

To the extent DeRuiter argues that the immunity provisions of the MMMA contribute to a blanket prohibition on local governments regulating the “medical use” of marijuana with respect to time, place, and manner of such use, *that* argument sounds in field preemption. DeRuiter made this claim in the trial court. But because the trial court and the Court of Appeals held that the ordinance was conflict preempted, neither court reached the issue.¹⁷ Accordingly, we decline to address it at this time.

IV. CONCLUSION

We hold that Byron’s Township’s home-occupation zoning ordinance does not directly conflict with the MMMA. Accordingly, we reverse the Court of Appeals’ holding to the contrary and remand to the trial court

to grow medical marijuana. Byron Township Zoning Ordinance, § 3.2.H.3.b. “A permit shall be granted if the application demonstrates compliance with [the] Ordinance, the MMMA and the MMMA General Rules.” *Id.*

¹⁶ The MZEA authorizes municipalities to “charge reasonable fees for zoning permits as a condition of granting authority to use . . . buildings . . . and structures . . . within a zoning district established under this act.” MCL 125.3406(1).

¹⁷ At oral argument before this Court, DeRuiter conceded that her appeal does not concern field preemption.

for further proceedings consistent with this opinion.
We do not retain jurisdiction.

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO,
CLEMENT, and CAVANAGH, JJ., concurred with
BERNSTEIN, J.

FOSTER v FOSTER

Docket No. 157705. Argued October 3, 2019 (Calendar No. 3). Decided April 29, 2020.

Deborah L. Foster brought an action in the Dickinson Circuit Court, Family Division, against Ray J. Foster, seeking to enforce a consent judgment of divorce (the consent judgment) between the parties that provided that defendant would pay plaintiff 50% of his military disposable retired pay accrued during the marriage or, if defendant waived a portion of his military retirement benefits in order to receive military disability benefits, that he would continue to pay plaintiff an amount equal to what she would have received had defendant not elected to receive such supplemental disability benefits (the offset provision). Defendant retired from the United States Army in September 2007 after more than 22 years of service. Because defendant was injured during combat, he was eligible for combat-related special compensation (CRSC) under 10 USC 1413a, and defendant applied for CRSC around the time of his retirement. In February 2008, defendant received notice that he was eligible for CRSC retroactive to October 2007. Plaintiff had filed for divorce in November 2007, and the consent judgment was entered in December 2008. Plaintiff was receiving slightly more than \$800 per month under the consent judgment until February 2010. When defendant began receiving CRSC, his disposable retirement benefit amount had been reduced, and plaintiff's monthly payment was reduced to a little more than \$200 per month. Beginning in February 2010, defendant failed to pay plaintiff the difference between the reduced amount of retirement pay she was receiving and the amount that she had received shortly after entry of the consent judgment. Numerous hearings took place to compel defendant to pay plaintiff the difference between the amount plaintiff would have been entitled to under the consent judgment had defendant not received CRSC and the amount plaintiff actually received after the government commenced paying defendant CRSC. The trial court, Thomas D. Slagle, J., entered an order finding defendant in contempt of court for failure to pay plaintiff in compliance with the consent judgment. Defendant appealed in the Court of Appeals, arguing that the trial court

erred by not finding plaintiff's attempts to enforce the consent judgment preempted by federal law. The Court of Appeals, MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ., concluded that the matter was not preempted by federal law and affirmed the trial court's contempt order in an unpublished per curiam opinion issued on October 13, 2016 (Docket No. 324853). Defendant sought leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration in light of *Howell v Howell*, 581 US ___; 137 S Ct 1400 (2017). 501 Mich 917 (2017). On remand, the Court of Appeals, in an unpublished per curiam opinion issued on March 22, 2018 (Docket No. 324853), again affirmed the trial court's finding of contempt, concluding that *Howell* did not overrule the Court of Appeals' decision in *Megee v Carmine*, 290 Mich App 551 (2010). Defendant again sought leave to appeal in the Supreme Court, and the Supreme Court granted the application. 503 Mich 892 (2018).

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

Megee, which had held that the portion of retirement pay that the plaintiff waived to receive CRSC was compensable to the defendant in the division of assets pursuant to divorce proceedings, was overruled. Under 38 USC 1101 *et seq.*, veterans who became disabled as a result of military service are eligible for disability benefits. However, in order to prevent veterans from receiving double payment in the form of retirement pay and disability benefits, federal law typically insists that, to receive disability benefits, a retired veteran must give up an equivalent amount of retirement pay. And since retirement pay is taxable while disability benefits are not, the veteran often elects to waive retirement pay in order to receive disability benefits. An exception to the typical bar against receipt of both retirement pay and disability benefits—and the one most relevant to the instant matter—is CRSC, which is separate from standard disability benefits. Under the Uniformed Services Former Spouses' Protection Act, 10 USC 1408 *et seq.*, state courts were authorized to treat “disposable retired pay” as divisible community property in a divorce. Under *Howell*, however, federal law completely preempts the states from treating waived military retirement pay as divisible community property. *Howell* held that a state court may not order a veteran to indemnify a former spouse for any loss in a former spouse's share of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related

disability benefits. Disability pay cannot become divisible marital property through the use of an order requiring the veteran to “reimburse” or “indemnify” the spouse, rather than an order dividing a portion of waived retirement pay outright. To the extent that *Howell* was not concerned with CRSC specifically, the United States Supreme Court has signaled that *Howell* is nevertheless applicable to such benefits: on the basis of its decision in *Howell*, the United States Supreme Court has vacated state-court decisions ruling that veterans could be forced to reimburse former nonveteran spouses in divorce proceedings if they had waived retirement pay in order to receive CRSC under 10 USC 1413a, and those types of benefits were the very same kind at issue in this case. Accordingly, *Howell* and *Mansell v Mansell*, 490 US 581 (1989), preclude any provision of a divorce judgment requiring that a nonveteran former spouse receive payments in an amount equal to what he or she would have received if the veteran former spouse had not waived his or her retirement pay in order to obtain CRSC. A “reimbursement” or “indemnification” to compensate for the reduction of payments resulting from the nonveteran spouse’s share of partially waived military retirement pay is effectively no different than a direct division of the disability benefits themselves. Furthermore, because CRSC is not “retired pay” under 10 USC 1413a(g), it would not be subject to division as a marital asset under 10 USC 1408(c). Any amounts waived that lead to the receipt of CRSC would likewise not be divisible in this manner. Additionally, the parties’ agreement under the offset provision of the consent judgment that plaintiff continue to receive funds equal to those she would have received had defendant not elected to receive CRSC constituted an impermissible assignment under 38 USC 5301(a)(3)(A). Accordingly, the trial court was preempted under federal law from including the offset provision in the consent judgment. Plaintiff also argued that defendant’s appeal was an impermissible collateral attack on the divorce judgment, and the Court of Appeals agreed. But the Court of Appeals analyzed the issue in a conclusory fashion. That portion of the Court of Appeals judgment had to be vacated and the case remanded for the Court of Appeals to address the effect of preemption on the trial court’s subject-matter jurisdiction to enter the consent judgment of divorce containing the offset provision and to address defendant’s ability to challenge the consent judgment on collateral review.

Court of Appeals opinion and judgment concluding that defendant’s contentions amounted to an improper collateral attack on the consent judgment vacated; remainder of the Court of Appeals opinion and judgment reversed. Case remanded to the Court of

Appeals to address the effect of this holding on defendant's ability to challenge the terms of the consent judgment.

Justice VIVIANO, concurring, fully agreed with the majority's reasoning and holding that the trial court was preempted under federal law from including the offset provision in the consent judgment and also agreed that the case should be remanded to the Court of Appeals so that the Court of Appeals may consider whether defendant may challenge the offset provision on collateral review. Justice VIVIANO wrote separately to properly frame the inquiry, to clarify caselaw, and to point to some of the pertinent authorities that might aid the Court of Appeals as it addresses whether the particular type of preemption at issue in this case is jurisdictional. Defendant's assertion of federal preemption as a defense to a contempt proceeding brought to enforce the offset provision in the parties' divorce judgment is a collateral attack on a final judgment. Therefore, in order to modify his divorce judgment in this collateral proceeding, defendant must establish that the type of federal preemption at issue deprives state courts of subject-matter jurisdiction. However, contrary to defendant's assertion, not all federal preemption deprives state courts of subject-matter jurisdiction; state courts are only deprived of jurisdiction when Congress has designated a federal forum for resolution of the class of disputes at issue. Furthermore, a majority of state courts have found that federal law does not deprive them of subject-matter jurisdiction over the type of veterans' and military disability benefits at issue in this case, instead holding that military benefits can be divided under the law of *res judicata*.

DIVORCE — CONSENT JUDGMENTS — DIVISION OF MARITAL PROPERTY —
VETERAN'S RETIREMENT PAY — WAIVER OF RETIREMENT PAY TO RECEIVE
SERVICE — RELATED DISABILITY BENEFITS.

A state court may not order a veteran to indemnify a former spouse for any loss in a former spouse's share of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits, including combat-related special compensation; disability pay cannot become divisible marital property through the use of an order requiring the veteran to reimburse or indemnify the spouse, rather than an order dividing a portion of waived retirement pay outright (10 USC 1408; 10 USC 1413a).

Adam L. Kruppstadt, PC (by *Adam L. Kruppstadt*)
for plaintiff.

Carson J. Tucker for defendant.

Amici Curiae:

Willingham & Coté, PC (by *Kimberlee A. Hillock*) and *Francis White Law, PLLC* (by *Brian K. Lewis*) for Operation Firing for Effect, Forgotten Warriors Project, Inc., and Veterans of Foreign Wars.

Kent L. Weichmann and Mika Meyers PLC (by *Elizabeth K. Bransdorfer*) for the Family Law Section of the State Bar of Michigan.

ZAHRA, J. This case involves a dispute between former spouses who entered into a consent judgment of divorce (the consent judgment), which provided that defendant would pay plaintiff 50% of his military retirement benefits. Beyond that, the parties agreed that if defendant waived a portion of his military retirement benefits in order to receive military disability benefits, he would continue to pay plaintiff an amount equal to what she would have received had defendant not elected to receive such supplemental disability benefits. Defendant elected to increase his disability benefits when he applied for Combat-Related Special Compensation (CRSC), a form of military disability benefits, pursuant to 10 USC 1413a. He started receiving CRSC shortly after the divorce. As a result, defendant's retirement benefits decreased, which in turn decreased the share of the retirement benefits payable to plaintiff. When defendant failed to reimburse plaintiff for the reduced payment she received in connection with defendant's lowered military retirement benefits, plaintiff sought relief in the Dickinson Circuit Court, asking that the consent judgment be enforced. The trial court and the Court of Appeals enforced the plain terms of the consent judgment and required defendant to reim-

burse plaintiff for the reduction in her interest in defendant's retirement benefits. Defendant argues that federal law preempts state law in regard to the division of veteran benefits and, thus, the consent judgment is unenforceable.

We conclude that federal law preempts state law such that the consent judgment is unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her due to his election to receive CRSC. Although the Court of Appeals indicated its agreement with plaintiff's assertion that defendant was engaging in an improper collateral attack against the consent judgment, the panel did not discuss the effect of federal preemption on the trial court's subject-matter jurisdiction or defendant's ability to challenge the terms of the consent judgment outside of direct appeal. Because these questions remain important, we vacate that portion of the Court of Appeals' opinion agreeing with plaintiff that defendant was engaging in an improper collateral attack and reverse the balance of the Court of Appeals' opinion in this case. Moreover, we overrule the Court of Appeals' opinion in *Megee v Carmine*, which held that a veteran is obligated to compensate a former spouse in an amount equal to the share of retirement pay that the nonveteran spouse would have received, pursuant to a divorce judgment, had the veteran not elected to waive military retirement pay in favor of CRSC.¹ This case is remanded to the Court of Appeals so that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment.

¹ *Megee v Carmine*, 290 Mich App 551, 574-575; 802 NW2d 669 (2010).

I. FACTS AND PROCEDURAL HISTORY

Defendant, Ray Foster, commenced service in the United States Army in 1985, prior to his marriage to plaintiff, Deborah Foster. During the marriage, defendant was deployed in the Iraq war and suffered serious and permanently disabling combat injuries. Thereafter, defendant continued his military career and, after more than 22 years of service, he retired in September 2007. Because defendant was injured during combat, he was eligible for CRSC under 10 USC 1413a, and defendant applied for CRSC around the time of his retirement. In February 2008, defendant received notice that he was eligible for CRSC retroactive to October 2007.

Plaintiff filed for divorce in November 2007, and a final consent judgment of divorce was entered in December 2008. Before entering that judgment, the trial court conducted a hearing regarding the proposed consent judgment. Defendant testified that he was receiving both military retirement pay and military disability benefits based on his combat-related injuries. The litigants, through counsel, agreed that defendant's disability benefits were not subject to division by the court because they were not marital property under federal law. At the time of the divorce, plaintiff was gainfully employed as a registered nurse.

The proposed property settlement awarded plaintiff 100% of any interest she acquired in retirement and pension benefits as a result of her employment during the marriage. Additionally, plaintiff was to receive 50% of defendant's disposable retirement pay that accrued during the marriage.² The parties also agreed to the

² The consent judgment provided that plaintiff would receive 50% of defendant's disposable retirement pay based on that portion of the retirement that accrued during the course of the marriage. Plaintiff

inclusion of the following provision (the offset provision) in the proposed consent judgment:

If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court.

At the divorce hearing, the trial court inquired as to why the language of this provision suggested that defendant was not currently receiving any disability benefits when, in fact, he was. Counsel explained that it was intended to apply in the event that defendant was offered an increase in disability benefits because such an increase would diminish the retirement benefits owed to plaintiff under the proposed settlement. The trial court inquired into defendant's understanding of this provision:

The Court: . . . Mr. Foster, you do acknowledge that if you were to defer any of your current military retirement pay or convert it to disability pay, or if your military retirement pay were reduced because the level of your

understood that this meant she would receive something slightly less than a 50/50 split because defendant was employed in the military before the marriage.

disability pay was increased, you acknowledge this Court's ability to enforce payment to Ms. Foster [of] the level of benefits that she would be entitled [to] presently from your retirement pay?

[*Defendant*]: Yes.

No specific amounts were mentioned at the hearing or in the actual consent judgment. Suffice it to say, however, that plaintiff received slightly more than \$800 per month until February 2010. When defendant began receiving CRSC,³ his disposable retirement benefit amount was reduced, and plaintiff's monthly payment was reduced to a little more than \$200.⁴

Defendant nonetheless failed to pay plaintiff the difference between the reduced amount of retirement pay she received beginning in February 2010 and the amount that she had received shortly after entry of the consent judgment. Consequently, numerous hearings took place in the trial court over several years, all of which were designed to compel defendant to pay plaintiff the difference between the amount plaintiff would have been entitled to under the consent judgment had defendant not received CRSC and the amount plaintiff actually received after the government commenced

³ Retirement pay is taxable, whereas disability benefits are not, and so defendant was economically incentivized to waive retirement pay in favor of disability benefits. See *Howell v Howell*, 581 US ___, ___; 137 S Ct 1400, 1403; 197 L Ed 2d 781 (2017), citing *McCarty v McCarty*, 453 US 210, 211-215; 101 S Ct 2728; 69 L Ed 2d 589 (1981).

⁴ The Court of Appeals concluded that defendant became eligible to receive CRSC after entry of the consent judgment. This is contrary to defendant's testimony, and we have found nothing in the record to support this conclusion. Defendant testified at the September 30, 2010 show-cause hearing that he applied for CRSC when he applied to retire and that he received correspondence from the Veteran's Administration that he was approved to receive those benefits retroactive to October 2007. Defendant claimed that he shared this correspondence with his lawyer.

paying defendant CRSC. These proceedings culminated in the order from which defendant appeals that found him in contempt of court for failure to pay plaintiff in compliance with the consent judgment. The court ordered him to pay plaintiff \$1,000 per month, with \$812 credited as current payments due under the consent judgment and \$188 to be credited against the arrearage of \$34,398 until the arrearage was paid in full. Defendant has been paying plaintiff in monthly installments since the contempt order was entered. Payments were guaranteed by an “appearance bond” in the amount of \$9,500 and secured with a lien on his mother’s home.

Defendant appealed in the Court of Appeals, arguing that the trial court erred by not finding plaintiff’s attempts to enforce the consent judgment preempted by federal law. The Court of Appeals concluded that the matter was not preempted by federal law and affirmed the trial court’s contempt order.⁵ Defendant sought leave to appeal in this Court. In lieu of granting leave to appeal, we vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration in light of the opinion of the Supreme Court of the United States in *Howell v Howell*.⁶ On remand, the Court of Appeals again affirmed the trial court’s finding of contempt, concluding that *Howell* did not overrule the Court of Appeals’ decision in *Megee*.⁷

⁵ *Foster v Foster*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2016 (Docket No. 324853), pp 1, 5 (*Foster I*), vacated 501 Mich 917 (2017).

⁶ *Foster v Foster*, 501 Mich 917 (2017), citing *Howell*, 581 US ___; 137 S Ct 1400.

⁷ *Foster v Foster (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2018 (Docket No. 324853) (*Foster II*), pp 1, 7.

The panel reasoned that *Howell* was distinguishable because it involved general service-connected disability benefits and because the *Howell* opinion rested squarely on the language in former 10 USC 1408(a)(4)(B), which provided—and still provides in 10 USC 1408(a)(4)(A)(ii)—that “disposable retired pay” means a member’s total monthly retired pay less amounts that “are deducted from the retired pay . . . as a result of . . . a waiver of retired pay required by law in order to receive compensation under title 5 or title 38[.]”⁸ The Court of Appeals also observed that the *Megee* decision distinguished CRSC from general service-connected disability pay found in Title 38 on the basis of CRSC’s status as *Title 10* compensation.⁹ Given that CRSC is at issue in the instant case, and that *Howell* did not concern or analyze a waiver of retirement pay in favor of CRSC, the Court of Appeals concluded that *Megee* was on point and remained binding precedent.¹⁰ Defendant again sought relief in this Court, and we granted his application for leave to appeal to consider the federal-preemption question, the continuing viability of *Megee*, and the propriety of the contempt order entered against defendant.¹¹

II. ANALYSIS

Defendant argues that under federal law as outlined in *Howell*, veterans’ disability benefits are—and always have been—non-disposable, indivisible benefits that constitute a personal entitlement free from state legal process. He contends that CRSC is categorically

⁸ *Id.* at 7, citing *Howell*, 581 US at ___; 137 S Ct at 1402-1404.

⁹ *Foster II*, unpub op at 7.

¹⁰ *Id.*, citing MCR 7.215(J)(1).

¹¹ *Foster v Foster*, 503 Mich 892 (2018).

precluded from being considered disposable retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA) and that federal law thus preempts the states from an exercise of authority that would result in the division of such benefits. This remains true, defendant asserts, even when a consent judgment of divorce uses language effectively "indemnifying" or "reimbursing" a nonveteran spouse for payments that would have been received if retirement pay had not been waived in order to receive disability benefits, as opposed to language dividing received disability benefits outright.

A. LEGAL BACKGROUND

Background information on the framework providing for military retired pay and military disability benefits, including CRSC, is useful to review before assessing the merits of the parties' arguments. "Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay."¹² Retirement pay is calculated on the basis of the years served and the rank attained by the retiring veteran.¹³

In *McCarty v McCarty*, the Supreme Court of the United States held that federal law precludes state courts from treating military retirement pay as divisible marital property in divorce proceedings.¹⁴ Specifically, the Supreme Court interpreted federal statutes governing retirement benefits and concluded that it

¹² *Mansell v Mansell*, 490 US 581, 583; 109 S Ct 2023; 104 L Ed 2d 675 (1989) (citations omitted).

¹³ *Id.* Additional retired pay may be warranted when a service member is recalled to active duty. *McCarty*, 453 US at 223 n 16, citing 10 USC 1402.

¹⁴ *McCarty*, 453 US at 223-232.

was the intent of Congress that military retired pay “actually reach the beneficiary.”¹⁵ Thus, under *McCarty*, “[r]etired pay [could not] be attached to satisfy a property settlement incident to the dissolution of a marriage.”¹⁶

Congress responded with the enactment of the USFSPA.¹⁷ Under the new statutory scheme, state courts were authorized to treat “disposable retired pay” as divisible community property in a divorce.¹⁸ The pertinent statutory text reads:

Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.^{19]}

The Act defines “disposable retired pay” as follows:

[T]he total monthly retired pay to which a member is entitled less amounts which—

(i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

¹⁵ *Id.*

¹⁶ *Id.* at 228.

¹⁷ 10 USC 1408 *et seq.* See also *Mansell*, 490 US at 584; *King v King*, 149 Mich App 495, 498; 386 NW2d 562 (1986).

¹⁸ 10 USC 1408(c)(1). See also *Mansell*, 490 US at 584.

¹⁹ 10 USC 1408(c)(1).

(iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(iv) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.^[20]

Nearly eight years after the USFSPA was enacted, the Supreme Court of the United States in *Mansell v Mansell* confirmed that the USFSPA “does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans’ disability benefits.”²¹ *Mansell* concluded that *McCarty* had not been abrogated by the USFSPA, leaving in place the general rule that state-court authority over veterans’ benefits is preempted by federal law.²²

“Veterans who became disabled as a result of military service are eligible for disability benefits.”²³ Nonetheless, in order to prevent veterans from receiving double payment in the form of retirement pay *and* disability benefits, “federal law typically insists that, to receive disability benefits, a retired veteran must give up an equivalent amount of retirement pay. And, since retirement pay is taxable while disability ben-

²⁰ 10 USC 1408(a)(4)(A).

²¹ *Mansell*, 490 US at 594-595.

²² *Id.* at 588-594.

²³ *Id.* at 583.

efits are not, the veteran often elects to waive retirement pay in order to receive disability benefits.”²⁴

An exception to the typical bar against receipt of both retirement pay and disability benefits—and the one most relevant to the instant matter—is CRSC, which is separate from standard VA disability benefits.²⁵ “To be eligible for CRSC, a person must be a member of the uniformed services who is entitled to retired pay and who has a combat-related disability.”²⁶ CRSC is calculated as the amount of monthly retirement pay the veteran would be entitled to under Title 38, “determined without regard to any disability of the retiree that is not a combat-related disability.”²⁷ The maximum amount of allowable CRSC is “the reduction in retired pay that is applicable to the retiree for that month under sections 5304 and 5305 of title 38.”²⁸

B. FEDERAL PREEMPTION

We now turn to defendant’s contention that the offset provision of the consent judgment was preempted by federal law. Whether federal law preempts state action is a question of law that this Court reviews *de novo*.²⁹ Likewise, the interpretation of a statute is a question of law that we review *de novo*.³⁰ A court’s refusal to enter a stay is reviewed for an abuse of

²⁴ *Howell*, 581 US at ___; 137 S Ct at 1403, citing *McCarty*, 453 US at 211-215.

²⁵ 10 USC 1413a.

²⁶ 10 USC 1413a(c).

²⁷ 10 USC 1413a(b)(1).

²⁸ 10 USC 1413a(b)(2).

²⁹ *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

³⁰ *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008).

discretion,³¹ as is the decision to impose a security bond.³² A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.³³

The Supremacy Clause of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , 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.^[34]

Federal law may preempt state law in multiple ways, one of which has come to be known as “field preemption.”³⁵ This type of preemption recognizes that “Congress may have intended ‘to foreclose any state regulation in the *area*,’ irrespective of whether state law is consistent or inconsistent with ‘federal standards.’”³⁶ Where applicable, the duly enacted laws passed by Congress effectively forbid the states from taking action in the field preempted.³⁷ In assessing defendant’s claims, we are mindful of guidance provided by the Supreme Court of the United States, which stated that

³¹ *Larion v Detroit*, 149 Mich App 402, 410; 386 NW2d 199 (1986).

³² *In re Surety Bonds for Costs*, 226 Mich App 321, 331; 573 NW2d 300 (1997).

³³ *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

³⁴ US Const, art VI, cl 2.

³⁵ *Oneok, Inc v Learjet, Inc*, 575 US 373, 377; 135 S Ct 1591; 191 L Ed 2d 511 (2015). See also *Mich Cannery & Freezers Ass’n, Inc v Agricultural Mktg & Bargaining Bd*, 467 US 461, 469; 104 S Ct 2518; 81 L Ed 2d 399 (1984).

³⁶ *Oneok, Inc*, 575 US at 377, quoting *Arizona v United States*, 567 US 387, 401; 132 S Ct 2492; 183 L Ed 2d 351 (2012).

³⁷ *Oneok, Inc*, 575 US at 377.

“ [t]he purpose of Congress is the ultimate touchstone’ in every preemption case”³⁸ and that “Congress may indicate its preemptive intent in two ways: ‘explicitly . . . in a statute’s language’ or, by implication, through a statute’s ‘structure and purpose.’ ”³⁹ In determining whether field preemption functions as a bar to state law, we must examine whether the trial court’s order in this case obstructs “the accomplishment and execution of the full purposes and objectives of Congress.”⁴⁰

In *Howell v Howell*, the Supreme Court of the United States reiterated its conclusion from *Mansell*, stating that “federal law completely pre-empts the States from treating waived military retirement pay as divisible community property.”⁴¹ From this, the *Howell* Court broadly held that a state court may not order a veteran to indemnify a former spouse for any loss in a former spouse’s share of the veteran’s retirement pay caused by the veteran’s waiver of retirement pay to receive service-related disability benefits.⁴² Further, it makes no difference whether a military veteran waives retirement pay postjudgment or prejudgment as part of an overall divorce settlement.⁴³ Disability pay cannot become divisible marital property through the use of an order requiring the veteran to “reimburse” or

³⁸ *Arbuckle v Gen Motors LLC*, 499 Mich 521, 532; 885 NW2d 232 (2016), quoting *Retail Clerks Int’l Ass’n v Schermerhorn*, 375 US 96, 103; 84 S Ct 219; 11 L Ed 2d 179 (1963).

³⁹ *Arbuckle*, 499 Mich at 532, quoting *Jones v Rath Packing Co*, 430 US 519, 525; 97 S Ct 1305; 51 L Ed 2d 604 (1977).

⁴⁰ See *Hines v Davidowitz*, 312 US 52, 67; 61 S Ct 399; 85 L Ed 581 (1941).

⁴¹ *Howell*, 581 US at ___; 137 S Ct at 1405.

⁴² *Id.* at ___; 137 S Ct at 1402, 1406.

⁴³ *Id.* at ___; 137 S Ct at 1405.

“indemnify” the spouse, rather than an order dividing a portion of waived retirement pay outright.⁴⁴

To the extent that *Howell* was not concerned with CRSC specifically, the Supreme Court has signaled that *Howell* is nevertheless applicable to such benefits. For example, in *Merrill v Merrill*, the Supreme Court of Arizona addressed the application of a state law to a divorce involving a veteran and a nonveteran former spouse.⁴⁵ The statute stated that in dividing property in a proceeding for the dissolution of a marriage, Arizona state courts could not:

1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 10 United States Code § 1413a or 38 United States Code chapter 11.
2. Indemnify the veteran’s spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.
3. Award any other income or property of the veteran to the veteran’s spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.^[46]

In cases of postdecree reductions of military retirement pay caused by the veteran spouse’s election to receive

⁴⁴ *Id.* at ___; 137 S Ct at 1406. The *Howell* Court was not ignorant of the hardship that this holding might work on divorcing spouses. *Id.* at ___; 137 S Ct at 1406. Indeed, the Court noted that state courts remained free to account for the waiver of military retirement pay when calculating or recalculating the need for spousal support. *Id.* at ___; 137 S Ct at 1406, citing *Rose v Rose*, 481 US 619, 630-634, 632 n 6; 107 S Ct 2029; 95 L Ed 2d 599 (1987); 10 USC 1408(e)(6).

⁴⁵ *Merrill v Merrill*, 238 Ariz 467, 468; 362 P3d 1034 (2015), vacated 581 US ___; 137 S Ct 2156 (2017).

⁴⁶ Ariz Rev Stat Ann 25-318.01.

CRSC, however, the Arizona Supreme Court held that, so long as the decree was entered before the statute's effective date, the statute did not preclude entry of an order indemnifying the nonveteran spouse to compensate for the lesser payments that resulted from the reduction.⁴⁷ Similarly, in *In re Marriage of Cassinelli*, the California Court of Appeals upheld an order forcing a retired and disabled veteran to reimburse his former spouse for the reduction of her share of his retirement pay in a community property settlement resulting from his waiver of retirement pay to receive disability pay that included CRSC.⁴⁸ Specifically, the California Court of Appeals held that a state court "could properly order [the veteran spouse] to reimburse [the nonveteran spouse] for her lost community property interest" without violating "either federal law or finality principles."⁴⁹

In both cases, the Supreme Court of the United States granted certiorari and vacated the judgments of the state courts before remanding for reconsideration in light of *Howell*.⁵⁰ That is, on the basis of its decision in *Howell*, the Supreme Court vacated state court decisions ruling that veterans could be forced to reimburse former nonveteran spouses in divorce proceedings if they had waived retirement pay in order to

⁴⁷ *Merrill*, 238 Ariz at 470.

⁴⁸ *In re Marriage of Cassinelli*, 4 Cal App 5th 1285, 1291, 1297; 210 Cal Rptr 3d 311 (2016), vacated sub nom *Cassinelli v Cassinelli*, 583 US ___, 138 S Ct 69 (2017).

⁴⁹ *Cassinelli*, 4 Cal App 5th at 1291. See also *id.* at 1299 ("[A] state court can order a military spouse who has waived retired pay to reimburse a civilian spouse for the latter's loss of a community property interest in the retired pay without violating *Mansell*.").

⁵⁰ *Merrill*, 581 US ___, 137 S Ct 2156; *Cassinelli*, 583 US ___, 138 S Ct 69.

receive CRSC under 10 USC 1413a. Such benefits are of the very same kind at issue in this case.

Applying these principles to the matter at hand, we conclude that *Howell* and *Mansell* preclude any provision of a divorce judgment requiring that a nonveteran former spouse receive payments in an amount equal to what he or she would have received if the veteran former spouse had not waived his or her retirement pay in order to obtain CRSC.⁵¹ The *Howell* Court broadly stated that, in the wake of *Mansell*, “federal law completely pre-empts the States from treating waived military retirement pay as divisible community property.”⁵² A “reimbursement” or “indemnification” to compensate for the reduction of payments resulting from the nonveteran spouse’s share of partially waived military retirement pay is effectively no different than a direct division of the disability benefits themselves.⁵³

Plaintiff asserts that, under the plain language of 10 USC 1408(a)(4)(A)(ii), only those reductions in retired pay stemming from waivers required in order to receive compensation under *Title 5* or *Title 38* are excluded from “disposable retired pay.” This implies that reductions in funds resulting from waivers to receive benefits under *Title 10*, like CRSC, may not be excluded from “disposable retired pay.” Therefore, main-

⁵¹ Plaintiff does not appear to argue that *Howell* is inapplicable to the instant case simply because it was decided more than eight years after the parties entered into the consent judgment at issue. To assuage any doubt as to the applicability of *Howell* to this matter for this reason, however, it is important to note that *Howell* is merely a clarification of *Mansell*. See *Howell*, 581 US at ___; 137 S Ct at 1405 (“This Court’s decision in *Mansell* determines the outcome here.”). Because *Mansell* was decided in 1989—long before the parties were divorced—the date of the *Howell* opinion’s issuance is of no matter.

⁵² *Howell*, 581 US at ___; 137 S Ct at 1405 (emphasis added).

⁵³ *Id.* at ___; 137 S Ct at 1405-1406.

tains plaintiff, the reduction can be accounted for in a marital-asset division under 10 USC 1408(c)(1). The Court of Appeals was apparently persuaded by this logic.⁵⁴ But plaintiff and the panel below ignored the language of 10 USC 1413a(g) stating that “[p]ayments under this section[, which provides for CRSC payments,] are not retired pay.” Pursuant to 10 USC 1408(a)(4)(A), disposable retired pay is calculated, prior to accounting for reductions (including those resulting from waivers of retired pay), by totaling the amount of “monthly retired pay” to which a veteran is entitled. Because CRSC is not “retired pay” under Title 10, it would not be subject to division as a marital asset under 10 USC 1408(c). Any amounts waived that lead to the receipt of CRSC would likewise not be divisible in this manner.⁵⁵

⁵⁴ See *Foster II*, unpub op at 7.

⁵⁵ The Court of Appeals misunderstood the nature of CRSC benefits in this regard. See *id.* (distinguishing the case from *Howell* because *Howell* “did not concern or analyze a waiver of retirement pay in favor of CRSC disability pay”); *Megee*, 290 Mich App at 565 (distinguishing the case from *Mansell* because the “plaintiff here did not waive his right to retirement pay in order to receive compensation under title 5 or title 38, but to receive title 10 compensation”). Defendant’s election of CRSC did not directly require a waiver of retired pay. Rather, defendant’s election to receive CRSC benefits would have been contingent on receiving disability benefits, 10 USC 1413a(b), and the increase in disability benefits was what would have legally triggered the decrease in retirement pay. See 38 USC 5304; 38 USC 5305. A letter dated April 14, 2010, from the Defense Finance and Accounting Service to plaintiff confirms that the reduction in the amount paid to plaintiff “was due to the increase in [defendant’s] Va Disability” benefits.

Moreover, it makes sense that 10 USC 1408(a)(4)(A)(ii) would not include language allowing for the deduction of amounts waived to receive CRSC under Title 10 because the limitation to consideration of amounts waived in order to receive compensation under Title 5 or Title 38 was enacted in 1982. PL 97-252, § 1002; 96 Stat 718. The provision in Title 10 allowing for CRSC, 10 USC 1413a, was not enacted until 20 years later, in 2002. PL 107-314, § 636; 116 Stat 2458.

This analysis is not undone by plaintiff's insistence that this case is distinguishable from *Howell* because the parties *consented* to plaintiff's continued receipt of funds equal to those she would have received had defendant not elected to receive CRSC. Under 38 USC 5301(a)(1):

Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title [38 USC 1901 *et seq.*], or of servicemen's indemnity.

Subsection (a)(3)(A) further states that

in any case where a beneficiary entitled to compensation . . . enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, . . . such agreement shall be deemed to be an assignment and is prohibited.

“A consent judgment is in the nature of a contract, and is to be construed and applied as such.”⁵⁶ Among the key elements of any contract in Michigan is consideration.⁵⁷ Thus, the consent judgment in this case effec-

⁵⁶ *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008).

⁵⁷ *McInerney v Detroit Trust Co*, 279 Mich 42, 46; 271 NW 545 (1937).

tively amounted to “an agreement . . . under which agreement . . . [plaintiff] acquire[d] for consideration the right to receive” an amount equivalent to what she would have received had defendant not waived retirement pay to receive CRSC.⁵⁸ This is, under federal statute, an impermissible “assignment.”⁵⁹

C. EFFECT ON *MEGEE v CARMINE*

With the preceding analysis in mind, it is appropriate to conclude that *Howell* overruled the Michigan Court of Appeals’ judgment in *Megee v Carmine*. In *Megee*, the veteran spouse (the plaintiff) elected to receive CRSC, which resulted in a diminution of his retirement pay and the nonveteran spouse’s (the defendant’s) 50% award stemming from that amount.⁶⁰ The *Megee* panel held:

[A] military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment’s property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has the authority to divide a military spouse’s CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay

⁵⁸ See 38 USC 5301(a)(3)(A).

⁵⁹ See *id.*

⁶⁰ *Megee*, 290 Mich App at 561.

can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired.^[61]

This is, however, exactly the conduct that *Howell* and *Mansell* endeavored to preclude. Regardless of the voluntary nature of the waiver or the temporal relation of the waiver to the consent judgment, the *Megee* panel ultimately held that the portion of retirement pay that the plaintiff waived to receive CRSC was compensable to the defendant in the division of assets pursuant to divorce proceedings. We therefore overrule *Megee*.

D. PROCEEDINGS ON REMAND

Plaintiff argues that the instant appeal constitutes an impermissible collateral attack on the consent judgment. The panel below agreed with her in this regard (before ruling on the merits of the parties' contentions), but did so in a conclusory fashion, stating that "defendant is engaging in an improper collateral attack on the divorce judgment" and citing *Kosch v Kosch*, a 1999 decision of the Court of Appeals.⁶² But *Kosch* merely held that the defendant's failure in that case to file an appeal from the original judgment of divorce categorically precluded a collateral attack on the merits of that decision.⁶³ This is ordinarily true *except in cases concerning jurisdictional*

⁶¹ *Id.* at 566-567, 574-575.

⁶² *Foster II*, unpub op at 2, 6, citing *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999) (quotation marks and citation omitted).

⁶³ *Kosch*, 233 Mich App at 353.

error.⁶⁴ The *Kosch* opinion did not discuss this particular nuance. With this in mind, we leave it to the Court of Appeals on remand to address the effect of our holdings today on the trial court's subject-matter jurisdiction to enter the consent judgment of divorce containing the offset provision at issue and to address defendant's ability to challenge the consent judgment on collateral review.

III. CONCLUSION

The trial court was preempted under federal law from including in the consent judgment the offset provision on which plaintiff relies. The broad language of *Howell* precludes a provision requiring that plaintiff receive reimbursement or indemnification payments to compensate for reductions in defendant's military retirement pay resulting from his election to receive *any disability benefits*, including CRSC as provided for under Title 10.

Nevertheless, we express no opinion on the effect our holdings have on defendant's ability to challenge, on collateral review, the consent judgment. The Court of Appeals did not substantively review this point or the effect of federal preemption on the trial court's subject-matter jurisdiction. We therefore vacate that portion of the March 22, 2018 opinion and judgment of the Court of Appeals concluding that defendant's contentions amounted to an improper collateral attack on the consent judgment, and we reverse the balance of the panel's opinion. We remand the case to the Court of Appeals so

⁶⁴ See *Pettiford v Zoellner*, 45 Mich 358, 361; 8 NW 57 (1881); *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935); *Couyoumjian v Anspach*, 360 Mich 371, 386; 103 NW2d 587 (1960).

that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment.

MCCORMACK, C.J., and MARKMAN, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with ZAHRA, J.

VIVIANO, J. (*concurring*). I concur fully in the reasoning of the majority opinion and its holding that the trial court was preempted under federal law from including the offset provision on which plaintiff relies in the consent judgment of divorce.¹ I also agree with the majority's decision to remand this case to the Court of Appeals so that it may consider whether defendant may challenge this provision of the consent judgment on collateral review. I write separately to more fully address questions that will arise on remand and that are, in my view, inadequately developed by the parties' briefs.

I. THE PARTIES' DIVORCE JUDGMENT IS FINAL AND MAY NOT BE MODIFIED UNLESS THE FAMILY COURT DID NOT HAVE SUBJECT-MATTER JURISDICTION OVER THE PARTIES' DIVORCE ACTION

Although some portions of a divorce judgment are subject to modification, such as alimony or child support, the property-settlement provisions of a divorce judgment "are final and, as a general rule, cannot be modified." *Colestock v Colestock*, 135 Mich App 393, 397; 354 NW2d 354 (1984), citing *Boucher v Boucher*, 34 Mich App 213; 191 NW2d 85 (1971). Thus, "[a]

¹ I believe a more precise way to state the Court's holding is that MCL 552.18, the statute that provides the trial court's authority to divide pension, annuity, or retirement benefits as part of the marital estate in a divorce judgment, is preempted by federal law to the extent it otherwise permits division of the type of veterans' and military disability benefits at issue in this case.

judgment of divorce dividing marital property is res judicata and not subject to collateral attack, even if the judgment may have been wrong or rested on a subsequently overruled legal principle.” *Colestock*, 135 Mich App at 397-398, citing *McGinn v McGinn*, 126 Mich App 689; 337 NW2d 632 (1983).

In *Buczowski v Buczowski*, 351 Mich 216, 222-223; 88 NW2d 416 (1958), this Court examined whether a spouse could move to vacate a separate-maintenance decree when the moving spouse did not appeal the decree, had already accepted money under the settlement, and waited four years after entry of the decree to assert defects with it. The sole challenge to the decree was that the court lacked jurisdiction to enter it because it contained a legally invalid provision. *Id.* at 220-221. The Court declined to vacate the decree, explaining as follows:

We are cited to no authority to support this contention and it is manifestly in error. The court had jurisdiction of the parties and it had jurisdiction of the subject matter of the suit, that is, support and maintenance. Having such jurisdiction it also had jurisdiction to make an error if, indeed, it did. . . .

The failure to distinguish between “the erroneous exercise of jurisdiction” and “the want of jurisdiction” is a fruitful source of confusion and errancy of decision. In the first case the errors of the trial court can only be corrected by appeal or writ of error. In the last case its judgments are void, and may be assailed by indirect as well as direct attack. * * * The judgment of a court of general jurisdiction, with the parties before it, and with power to grant or refuse relief in the case presented, though (the judgment is) contrary to law as expressed in the decisions of the supreme court or the terms of a statute, is at most only an erroneous exercise of jurisdiction, and as such is impregnable to an assault in a collateral proceeding.

The loose practice has grown up, even in some opinions, of saying that a court had no “jurisdiction” to take certain legal action when what is actually meant is that the court had no legal “right” to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. It must constantly be borne in mind, as we have pointed out in *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544[; 260 NW 908 (1935)], that:

There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases.

[*Buczowski*, 351 Mich at 221-222 (cleaned up).]

We have often cited *Jackson City Bank* for this proposition, including most recently last term in *In re Ferranti*, 504 Mich 1, 22; 934 NW2d 610 (2019), in which we quoted the very next paragraph from that case:

“[W]hen there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist. But in cases where the court has undoubted jurisdiction of the subject matter, and of the parties, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack, yet the judgment or decree is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed

from. It may not be called in question collaterally.” [*Ferranti*, 504 Mich at 22, quoting *Jackson City Bank*, 271 Mich at 544-545.]

In *McGinn*, a case also involving military pensions, the Court of Appeals explained the importance of finality in the context of divorce judgments:

Public policy demands finality of litigation in the area of family law to preserve surviving family structure. To permit divorce judgments which have long since become final to be reopened so as to award military pensions to the husband as his separate property would flaunt [sic] the rule of *res judicata* and upset settled property distributions upon which parties have planned their lives. The consequences would be devastating, not only from the standpoint of the litigants, but also in terms of the work load of the courts. [*McGinn*, 126 Mich App at 693 (citation omitted).]

As defendant appears to concede, these finality concerns are certainly implicated in this case because defendant’s assertion of federal preemption as a defense to a contempt proceeding brought to enforce the offset provision in the parties’ divorce judgment is a collateral attack on a final judgment. See generally *Kirby v Mich High Sch Athletic Ass’n*, 459 Mich 23, 40; 585 NW2d 290 (1998) (noting that “[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt”).

Therefore, in order to modify his divorce judgment in this collateral proceeding, defendant must establish that the type of federal preemption at issue deprives state courts of subject-matter jurisdiction. See *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 51 n 3; 832 NW2d 728 (2013) (“[T]he [l]ack of jurisdiction of the subject matter may be raised at any time and the parties to an action cannot confer

jurisdiction by their conduct or action nor can they waive the defense by not raising it.”) (quotation marks and citation omitted). But instead of focusing his analysis on whether the federal statutes governing veterans’ and military disability benefits deprive the state courts of subject-matter jurisdiction, defendant makes the sweeping assertion that all types of federal preemption deprive state courts of subject-matter jurisdiction.² Although I believe defendant’s assertion is demonstrably incorrect, some of our precedents do appear at first glance to support it. And, as defendant acknowledges, the issue could also have implications far beyond this case if the entire spectrum of federal-preemption claims could potentially be raised to mount collateral attacks on final judgments in myriad types of cases. See Defendant’s Brief on Appeal (February 27, 2019) at 6 (“There should be no doubt that an order . . . preempted by federal law is void and may be attacked, challenged, and nullified at any time, even on appeal, indeed, even after the time for appeal has passed.”). Therefore, before addressing the precise legal issue in this case, I will first explain why defendant’s assertion that all types of federal

² See Defendant’s Brief on Appeal (February 27, 2019) at 2 (“As a *prima facie* jurisdictional matter, this Court has long held where federal law preempts state law, as it absolutely does in this case, the courts of this state lack subject matter jurisdiction to enter an order contrary to the prevailing federal rule.”); *id.* (“Where subject-matter jurisdiction is lacking due to federal preemption, any judgments and orders entered in contravention of the prevailing federal law are void and subject to collateral attack, notwithstanding consent of the parties or the length of time that has passed since such judgments or orders were entered.”); *id.* at 33 (“Where federal pre-emption applies to bar a state court’s actions, a reviewing court must address the preemptive effect of the federal law on the lower court’s jurisdiction because state courts do not have subject matter jurisdiction to enter orders contrary to the federal mandate.”); *id.* (“A state court that rules incorrectly on a matter preempted by federal law acts in excess of its jurisdiction. Such rulings, and the judgments they spring from, are *void ab initio* and exposed to collateral attack.”).

preemption deprive state courts of subject-matter jurisdiction is wrong as a matter of law.

II. CONTRARY TO DEFENDANT'S SWEEPING ASSERTION,
NOT ALL TYPES OF FEDERAL PREEMPTION DEPRIVE
STATE COURTS OF SUBJECT-MATTER JURISDICTION

The law in this area has been aptly summarized as follows:

State courts have subject-matter jurisdiction over federal preemption defenses. The preemption doctrine does not deprive state courts of subject matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum.

Accordingly, where state and federal courts have concurrent jurisdiction over a federal cause of action, and a state proceeding on such cause of action presents a federal preemption issue, the proper course is to seek resolution of that issue by the state court. Similarly, there are some cases in which a state law cause of action is preempted by federal law, but only a state court has jurisdiction to so rule. A finding of preemption will generally not remove the case from the jurisdiction of the state court but will only alter the law applied by that court. [21 CJS, Courts, § 272 (emphasis added; citations omitted).]

It is well settled that “[s]tate courts are adequate forums for the vindication of federal rights.” See *Burt v Titlow*, 571 US 12, 19; 134 S Ct 10; 187 L Ed 2d 348 (2013). See *id.* (“The States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.”) (cleaned up). See also *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich

479, 493; 697 NW2d 871 (2005) (“It has long been established that, so long as Congress has not provided for exclusive federal-court jurisdiction, state courts may exercise subject-matter jurisdiction over federal-law claims whenever, by their own constitution, they are competent to take it. State courts possess sovereignty concurrent with that of the federal government, subject only to limitations imposed by the Supremacy Clause. Thus, state courts are presumptively competent to assume jurisdiction over a cause of action arising under federal law. If concurrent jurisdiction otherwise exists, subject-matter jurisdiction over a federal-law claim is governed by state law.”) (cleaned up).

Notably, these same principles apply when federal courts are analyzing whether a preemption claim deprives the federal courts of subject-matter jurisdiction. In *Violette v Smith & Nephew Dyonics, Inc.*, 62 F3d 8, 11 (CA 1, 1995), cert den 517 US 1167 (1996), the defendant argued for the first time on appeal that the plaintiff’s state-law products-liability claims were preempted by certain provisions of a federal statute. Relying upon *Int’l Longshoremen’s Ass’n, AFL-CIO v Davis*, 476 US 380; 106 S Ct 1904; 90 L Ed 2d 389 (1986), the defendant argued that “preemption is a jurisdictional matter which cannot be waived and may be raised at any time.” *Violette*, 62 F3d at 11. Distinguishing between “choice-of-forum” and “choice-of-law” preemption, the federal court explained:

[W]here Congress has designated another forum for the resolution of a certain class of disputes, such as the National Labor Relations Board in *Davis*, such designation deprives the courts of jurisdiction to decide those cases. Where, however, the question is whether state tort or federal statutory law controls, preemption is not jurisdictional and is subject to the ordinary rules of appellate

adjudication, including timely presentment and waiver.
[*Id.* at 11-12 (citation omitted).]

Since the type of preemption at issue in *Violette* presented a “choice-of-law” question, it was “not . . . jurisdictional, and was waived when not presented in the district court.” *Id.* at 12.

Our Court of Appeals correctly explained the two-part preemption inquiry as follows:

Where preemption exists, . . . state courts will not always be prevented from acting. A litigant may still enforce rights pursuant to the Federal law in state courts unless the Constitution or Congress has, expressly or impliedly, given a Federal court exclusive jurisdiction over the subject matter. *Mondou v New York, N H & H R Co*, 223 US 1; 32 S Ct 169; 56 L Ed 327 (1912); *Clafin v Houseman*, 93 US 130; 23 L Ed 833 (1876). See Hart and Wechsler, *The Federal Courts and The Federal System* (2d ed), pp 427-438. Thus, we must determine whether Congress has preempted states from legislating or regulating the subject matter of the instant case, and, if it has, whether it has also vested exclusive jurisdiction of that subject matter in the Federal court system. [*Marshall v Consumers Power Co*, 65 Mich App 237, 244-245; 237 NW2d 266 (1976).]

Defendant cites *Henry v Laborers’ Local 1191*, 495 Mich 260; 848 NW2d 130 (2014), for the proposition that federal preemption deprives state courts of subject-matter jurisdiction. In *Henry*, after observing that the defendants first raised the issue of preemption in the Court of Appeals, we stated that “preemption is a question of subject-matter jurisdiction” and that, “[a]s such, this Court must consider it.” *Id.* at 287 n 82. Although our statement that “preemption is a question of subject-matter jurisdiction” was made without qualification, the above statements were supported by the following quotation from *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.” Thus, our assertion was made in the context of *Garmon* preemption and was indisputably correct in that context since Congress has established an exclusive federal forum, the National Labor Relations Board, to adjudicate certain claims under the National Labor Relations Act (NLRA).³ And, even if the Court purported to make such a broad holding, it would be dicta since it was “not necessarily involved nor essential to determination of the case” See *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) (quotation marks and citation omitted). For these reasons, I do not believe that *Henry* may properly be read as supporting defendant’s sweeping assertion that all types of preemption deprive the state courts of subject-matter jurisdiction.⁴

³ The term “*Garmon* preemption” was coined after the United States Supreme Court’s decision in *San Diego Bldg Trades Council v Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 775 (1959). See *id.* at 245 (“When an activity is arguably subject to § 7 or § 8 of the [NLRA], 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.”). Our Court and the Court of Appeals have found preemption under *Garmon* in a number of cases. See, e.g., *Henry*, 495 Mich 260; *Bebensee v Ross Pierce Electric Corp*, 400 Mich 233; 253 NW2d 633 (1977); *Calabrese v Tendercare of Mich, Inc*, 262 Mich App 256, 266; 685 NW2d 313 (2004); *Sargent v Browning-Ferris Indus*, 167 Mich App 29, 33-36; 421 NW2d 563 (1988); *Bescoe v Laborers’ Union Local No 334*, 98 Mich App 389, 395-409; 295 NW2d 892 (1980). See also *Town & Country Motors, Inc v Local Union No 328*, 355 Mich 26; 94 NW2d 442 (1959) (holding before *Garmon* was decided that the circuit court had no jurisdiction over the case because the NLRA preempted the area of labor law at issue).

⁴ The same analysis applies to other “choice-of-forum” federal-preemption cases. In *Ass’n of Businesses Advocating Tariff Equity v Pub*

Defendant also cites *Ryan v Brunswick Corp*, 454 Mich 20, 40; 557 NW2d 541 (1997), in which after finding that plaintiff's common-law products-liability claims were preempted under the Federal Boat Safety Act (FBSA), 46 USC 4301 *et seq.*, this Court held that "summary disposition pursuant to MCR 2.116(C)(4) and (C)(8) was proper."⁵ In reciting the applicable legal

Serv Comm, 192 Mich App 19, 24; 480 NW2d 585 (1992), the Court of Appeals held that "the issue of federal preemption is one of jurisdiction, and questions of subject-matter jurisdiction can be raised at any time, even if not raised before the appeal is taken." (Citation omitted.) However, as in *Henry*, this broad assertion was made in the context of a choice-of-forum preemption question, i.e., whether the Public Service Commission lacked jurisdiction to disallow recovery of costs approved by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 USC 717 *et seq.*, which gives exclusive authority to FERC to set interstate natural gas rates. See also *Mississippi Power & Light Co v Mississippi ex rel Moore*, 487 US 354, 377; 108 S Ct 2428; 101 L Ed 2d 322 (1988) (Scalia, J., concurring) ("It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.").

⁵ After finding that the plaintiff's tort claim was preempted by federal law, the trial court explained its ruling as follows:

[T]he Court necessarily lacks jurisdiction to hear this matter and, accordingly, partial summary disposition is appropriate under (C)(4) for the lack of subject matter jurisdiction, and also as I think correctly argued by the defendant, it fails to state a claim upon which relief can be granted because the failure to equip its product with a propeller guard or to warn of its absence is something that the manufacturer of an outboard or inboard outdrive boat propulsion unit cannot be held liable for. Since that is the case, I grant the defendant's motion for partial summary disposition under both (C)(4) and (C)(8) for those reasons I've indicated. [*Id.* at 22 n 3 (quotation marks omitted).]

The Court of Appeals affirmed on both grounds, *Ryan v Brunswick Corp*, 209 Mich App 519, 526; 531 NW2d 793 (1995), and, as mentioned above, so did this Court. Since the referenced court rules provide alternate grounds for summary disposition (under (C)(4) for lack of subject-matter jurisdiction and under (C)(8) for failure to state a claim on which relief can be granted), it is unclear which of these holdings is precedentially binding. The ambiguity in the Court's holding can perhaps best be

principles, the Court stated that “[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction.” *Id.* at 27. However, the Court did not cite any authority whatsoever for this assertion. Nor did we address whether Congress had designated a federal forum for resolution of these types of disputes. And, in any event, our preemption holding in *Ryan* was abrogated by *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002), which held that the FBSA does not expressly or implicitly preempt state common-law claims. In light of the ambiguous nature of our holding (noted above), the lack of authority for it, and its abrogation by the United States Supreme Court, I do not think the jurisdictional assertion in *Ryan* carries much precedential weight.⁶ Finally, and perhaps most

explained by the fact that the Court did not need to focus on whether the preemption at issue was jurisdictional—for example, to decide if preemption could be raised for the first time on appeal or in a collateral attack on a final judgment. Thus, to the extent that the Court erred by affirming summary disposition under (C)(4)—which, in the absence of an exclusive federal forum for resolution of claims under the FBSA, seems apparent—it was only a labeling error since dismissal under (C)(8) was the proper way to dispose of the case after finding the type of preemption at issue.

⁶ The broad assertion from *Ryan*—that “[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction”—has been cited on a number of occasions. In two cases, the Court of Appeals cited *Ryan* but found no preemption and thus did not need to apply *Ryan*’s broad assertion. See, e.g., *People v Kanaan*, 278 Mich App 594; 751 NW2d 57 (2008) (holding that 42 USC 1320a-7b does not preempt the Medicaid False Claim Act, MCL 400.601 *et seq.*); *Konynenbelt v Flagstar Bank FSB*, 242 Mich App 21; 617 NW2d 706 (2000) (holding that the plaintiff’s state-law claims were not preempted by the Home Owners’ Loan Act, 12 USC 1461 *et seq.*, or the Depository Institutions Deregulation and Monetary Control Act, 12 USC 1735f-7a). In a third case, the Court of Appeals cited *Ryan* and found preemption but remanded to the trial court for entry of summary disposition in favor of the defendant without specifying whether the dismissal was for lack

significantly, such a broad reading of this one statement in *Ryan* would conflict with the holding and basic jurisdictional principles set forth in *Office Planning Group* and other cases finding that our state courts have concurrent jurisdiction over certain claims governed by federal law.⁷ It would also leave Michigan

of subject-matter jurisdiction. See *Martinez v Ford Motor Co*, 224 Mich App 247; 568 NW2d 396 (1997) (holding that the plaintiff's state-law tort claim was preempted by the National Motor Vehicle Safety Act, 15 USC 1381 *et seq.*).

But in *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132; 796 NW2d 94 (2010), citing *Ryan*, the Court of Appeals affirmed the circuit court's order granting summary disposition for defendant under MCR 2.116(C)(4) on the ground that it lacked subject-matter jurisdiction over the claim. In that case, the Court of Appeals determined that the trial court correctly held that it lacked subject-matter jurisdiction over plaintiff's wrongful-discharge claim since it was preempted by the Labor-Management Reporting and Disclosure Act, 29 USC 401 *et seq.* *Id.* at 149. But the Court of Appeals did not ground its holding on a designation by Congress of an alternate federal forum for resolution of these types of disputes. Moreover, it is not entirely clear on which basis the circuit court granted summary disposition, since defendant's motions were brought under MCR 2.116(C)(4), (C)(8), and (C)(10), and since on reconsideration, the trial court clarified that "summary disposition of plaintiff's claim had been granted under the substantive-preemption doctrine, not the jurisdictional-preemption doctrine." *Id.* at 138. Finally, although the Court of Appeals noted that *Ryan* had been "overruled in part on other grounds," *id.* at 140, the majority did not discuss whether the broad assertion from *Ryan* remained good law once its operative preemption holding was abrogated by the United States Supreme Court. Like in *Ryan*, the ambiguity in the Court's holding in *Packowski* is perhaps best thought of as a labeling error since the Court did not need to focus on the issue of whether the preemption at issue was jurisdictional—for example, to decide if preemption could be raised for the first time on appeal or in a collateral attack on a final judgment.

⁷ See, e.g., *Arbuckle v Gen Motors LLC*, 499 Mich 521, 533-534; 885 NW2d 232 (2016) (holding that since state courts have concurrent jurisdiction over cases involving collective-bargaining agreements under § 301(a) of the Labor Management Relations Act, 29 USC 185(a), a state court had jurisdiction to decide the merits of the case even though

citizens without any forum to enforce federal laws when Congress has conferred exclusive jurisdiction upon state courts to enforce them.⁸

Thus, contrary to the sweeping assertions in defendant's brief, not all federal preemption deprives state courts of subject-matter jurisdiction. Instead, state courts are only deprived of jurisdiction when Congress has designated a federal forum for resolution of the class of disputes at issue. Although two of our cases might have caused some confusion on this point, I do not believe that they may fairly be read as supporting the demonstrably incorrect proposition of law for which defendant cites them.

III. FOLLOWING UNITED STATES SUPREME COURT PRECEDENT,
A MAJORITY OF OUR SISTER STATE COURTS HAVE HELD
THAT FEDERAL LAW DOES NOT DEPRIVE STATE COURTS
OF SUBJECT-MATTER JURISDICTION OVER THE TYPE OF
VETERANS' AND MILITARY DISABILITY BENEFITS
AT ISSUE IN THIS CASE

As the majority notes, in *McCarty v McCarty*, the United States Supreme Court held that “upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws.” *McCarty v McCarty*, 453 US 210, 211; 101 S Ct 2728; 69 L Ed 2d 589 (1981). In response, Congress passed the Uniformed Services Former Spouses' Protection Act

§ 301 preempts state substantive law); *Betty v Brooks & Perkins*, 446 Mich 270, 287 n 21; 521 NW2d 518 (1994) (same); *Flanagan v Comau Pico*, 274 Mich App 418, 429-431; 733 NW2d 430 (2007) (same); *Local 495 UAW v Diecast Corp*, 52 Mich App 372, 377-379; 217 NW2d 424 (1974) (same). See also *In re Lager Estate*, 286 Mich App 158, 164; 779 NW2d 310 (2009) (noting that “federal courts generally have subject-matter jurisdiction over ERISA claims” but that state courts have concurrent jurisdiction over claims brought by a beneficiary to recover benefits due under a personal savings plan).

⁸ See, e.g., *Wade v Blue*, 369 F3d 407, 410 (CA 4, 2004).

(USFSPA), 10 USC 1408, which permits state courts to treat veterans' "disposable retired pay" as divisible property during divorce proceedings. 10 USC 1408(c).

In *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), the United States Supreme Court addressed whether the USFSPA allows state courts to treat retirement pay waived by a retired service member in order to receive disability benefits as property divisible upon divorce. The Court rejected the civilian spouse's argument that the USFSPA was intended to broadly reject *McCarty* and completely restore to state courts the authority they had prior to *McCarty*. *Id.* at 588, 593-594. Instead, the majority found that the USFSPA only partially superseded *McCarty*, holding that "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 594-595. Importantly, in a footnote, the *Mansell* Court discussed the state court's application of the doctrine of res judicata:

In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. 5 Civ. No. F002872 (Jan. 30, 1987). Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us. [*Mansell*, 490 US at 586 n 5.]

On remand in *Mansell*, the California Court of Appeal rejected the veteran spouse's argument that the "judg-

ment was void for want of subject matter jurisdiction.” *In re Marriage of Mansell*, 217 Cal App 3d 219, 227; 265 Cal Rptr 227 (1989). The California Court of Appeal characterized the *McCarty* holding as merely “that state courts were bound to apply federal law in determining the character of military pension benefits. There was no divestiture of jurisdiction.” *Id.* at 228. The United States Supreme Court subsequently denied the petition for certiorari. *Mansell v Mansell*, 498 US 806 (1990).

One prominent commentator describes the denial of the second petition for certiorari as “one of the most important facts in all of the *Mansell* litigation,” explaining as follows:

It shows that footnote 5 in the *Mansell* opinion is more than mere words. The Court did not merely state in the abstract that division of military benefits under state law principles of res judicata was outside the scope of federal appellate jurisdiction; it refused to reverse *or even review on the merits* a state court decision applying those principles. It reached this result even though the net effect of the second California decision was to reach (under a different supporting theory) the exact same end result as the first California decision—a decision which the Supreme Court had reversed in a published decision. Together with footnote 5 in the published opinion, the Court’s denial of review is a very strong statement that division of military benefits on a theory of res judicata is not prohibited by federal law.

* * *

If *McCarty* and *Mansell* did involve subject matter jurisdiction, the husband in *Mansell* would have been right; the original order dividing benefits outside the scope of the USFSPA *would* have been void. The Supreme Court’s unanimous refusal to hear the case a second time, and its sudden acquiescence in a result which it had so recently reversed, combined with the language of footnote

5 of the published opinion, suggest strongly that the Supreme Court agreed with the courts of California. *McCarty* and *Mansell* state a rule of substantive federal law, and not a rule of subject matter jurisdiction. [2 Turner, *Equitable Distribution of Property* (4th ed), § 6:6, pp 54-55.]⁹

Shortly after *McCarty* was decided, the United States Supreme Court was presented with an issue similar to that in the present case. In *In re Marriage of Sheldon*, the California Court of Appeal declined to apply *McCarty* retroactively. *In re Marriage of Sheldon*, 124 Cal App 3d 371, 376-384; 177 Cal Rptr 380 (1981). The military spouse filed a petition for certiorari. See *Sheldon v Sheldon*, 456 US 941 (1982). Specifically, one of the issues raised was:

Does federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law? [Turner, § 6:6, p 49.]

The United States Supreme Court dismissed the appeal “for want of a substantial federal question.” *Sheldon*, 456 US at 941. Unlike denial of a petition for certiorari, “[a] dismissal for want of a substantial

⁹ See also Turner, *State Court Treatment of Military and Veteran’s Disability Benefits: A 2004 Update*, 16 *Divorce Litig* 76, 80 (2004) (“Because *Mansell* ultimately permitted the division of the benefits at issue, it is clearly wrong to hold, as a few decisions have held, that federal law deprives state courts of subject-matter jurisdiction over veteran’s and military disability benefits. *Mansell* is not a rule of subject-matter jurisdiction; rather, it is a rule of substantive law. When no prior order and no prior agreement exists, federal law requires that disability benefits be awarded to the owning spouse, and it preempts any state law to the contrary. When a prior order exists, however, federal law permits state courts to divide military and veteran’s disability benefits, as they were actually divided in the *Mansell* litigation.”).

federal question is an adjudication on the merits, and it carries the same precedential value as a full opinion.” Turner, § 6:6, p 49, citing *Hicks v Miranda*, 422 US 332, 344; 95 S Ct 2281; 45 L Ed 2d 223 (1975) (emphasis omitted).¹⁰ Therefore, according to the author, *Sheldon* “establish[es] that the ruling in *McCarty* does not apply retroactively and that decisions which erroneously divide preempted benefits are not void for lack of subject matter jurisdiction.” Turner, § 6:6, p 49 (emphasis omitted).

As the author explains, because *McCarty* is not retroactive and thus does not void final state court orders, military benefits can be divided by state courts under the law of *res judicata*:

Initial division of military benefits must be made under federal substantive law, which requires that the benefits be awarded only to the service member and not to the former spouse. If the service member requests that the state court apply federal substantive law, and the state court instead applies state substantive law, *McCarty* requires that the state court decision be reversed. But if the service member never raises the issue—if he or she allows the state court to enter an erroneous order dividing military benefits under state substantive law, as happened in most of the pre-*McCarty* cases—*Sheldon* recognizes that *McCarty* does not support reversal of the state court judgment. Federal *substantive* law controls the issue, but under either federal or state procedural rules, a decision which is based upon the wrong substantive law cannot be collaterally attacked after it becomes final. [*Id.* at 50.]

The author notes that “[a] strong majority of state courts have recognized, often in reliance upon postremand history of *Mansell*, that the doctrine of *McCarty* and *Mansell* is a rule of federal substantive law only.”

¹⁰ See also *White v White*, 731 F2d 1440, 1443 (CA 9, 1984); *Evans v Evans*, 75 Md App 364, 374; 541 A2d 648 (1988).

Id. at 55.¹¹ And, perhaps of even more relevance here, “[a] strong majority of state court cases likewise hold that military benefits of all sorts can be divided under the law of res judicata.” *Id.* at § 6:9, p 72.¹² The issue of res judicata was not presented in *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017), and therefore, *Howell* does not appear to provide any guidance on this issue.¹³

¹¹ See *id.* at n 24 (listing cases). The author also notes that “[a] minority of state courts persist in holding to the contrary.” *Id.* at 55. See also *id.* at n 25 (listing cases).

¹² See *id.* at 72-73 n 4 (listing cases). Again, the author notes that a minority of state courts hold to the contrary. See *id.* at 74 n 9 (listing cases) and text accompanying. However, he observes that “[n]one of these decisions cite either *Sheldon* or footnote 5 in *Mansell*,” and “[n]one have showed any awareness of the postremand history of *Mansell*.” *Id.* at 74.

¹³ See *Turner*, § 6:9, p 72 (“The issue of res judicata was not presented on the facts in the most recent Supreme Court decision on division of military service benefits, *Howell v Howell*. The author sees nothing in that decision which questions the strong statement in footnote 5 of *Mansell* that division of military benefits under the law of res judicata would not violate federal law.”) (citation omitted). The subsequent orders from the United States Supreme Court vacating two state court decisions for further consideration in light of *Howell* also do not shed any further light on this issue. In *Merrill v Merrill*, 238 Ariz 467, 468; 362 P3d 1034 (2015), vacated 581 US ___; 137 S Ct 2156 (2017), the original divorce judgment split only the veteran spouse’s retirement pay, and the non-veteran spouse petitioned for an award in the amount of the reduced share once the veteran spouse started receiving combat-related special compensation. In *In re Marriage of Cassinelli*, 4 Cal App 5th 1285, 1292; 210 Cal Rptr 3d 311 (2016), vacated sub nom *Cassinelli v Cassinelli*, 583 US ___; 138 S Ct 69 (2017), the non-veteran spouse had “filed a motion to modify the judgment by ordering [the veteran spouse] to pay the amount of her share of his retired pay as ‘non-modifiable spousal support.’” In other words, both cases involved a later attempt to modify a divorce judgment, not a situation like the present case, in which a provision in the original divorce judgment violated federal law but was not challenged on direct appeal and instead was challenged later in response to a motion to hold the veteran-spouse in contempt for failing to comply with that judgment.

One case exemplifies the difficulty our courts have had in applying the law in this complex area.¹⁴ In *Biondo v Biondo*, 291 Mich App 720; 809 NW2d 397 (2011), the Court of Appeals allowed the defendant to challenge enforcement of the Social Security equalization provision in his divorce judgment on federal-preemption grounds, even though it rejected his claim—similar to the one appellant is making here—that 42 USC 407 of the Social Security Act, 42 USC 301 *et seq.*, divests the state courts of subject-matter jurisdiction in divorce cases. The Court stated as follows:

In reaching this conclusion, we specifically reject James Biondo’s suggestion that the circuit court did not possess subject-matter jurisdiction to enter the terms of the parties’ consent judgment of divorce. That federal law has preempted a portion of the parties’ consent judgment of divorce in no manner deprives the circuit court of subject-matter jurisdiction in this divorce matter. The Social Security Act simply does not divest state courts of subject-matter jurisdiction in divorce cases. Rather, the Supremacy Clause preempts state laws regarding the division of marital property only to the extent they are inconsistent with 42 USC 407(a). The Michigan Supreme Court has explained this distinction as follows:

The loose practice has grown up, even in some opinions, of saying that a court had no “jurisdiction” to take certain legal action when what is actually meant is that the court had no legal “right” to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. [*Buczowski v Buczowski*, 351 Mich 216, 222; 88 NW2d 416 (1958).]

¹⁴ See Turner, § 6:2, p 4 (boldly asserting that “[t]he complexity of classifying, valuing, and dividing [retirement] plans is unmatched by any other issue in any area of modern law”).

Although the circuit court erred by ordering the social security equalization, it did not exceed its subject-matter jurisdiction in doing so. Const 1963, art 6, § 13; MCL 552.6(1). [*Biondo*, 291 Mich App at 727-728.]

Apparently not recognizing the finality implications of its finding that the trial court had subject-matter jurisdiction to enter the parties' divorce judgment, the Court held that, on remand, the circuit court could modify the property-settlement provisions of the divorce judgment on the ground that inclusion of the Social Security equalization provision was a mutual mistake. However, the court did not cite or discuss the applicability of MCR 2.612, the court rule that governs requests for relief from a final judgment, or explain why, if that rule was applicable, the one-year limitations period for requests on the ground of mistake did not apply. See MCR 2.612(C)(1)(a) and (C)(2). Nor did the Court discuss *Sheldon*, footnote 5 in *Mansell*, or the other authorities noted above holding that federal retirement benefits may be divided on a theory of *res judicata*.

IV. CONCLUSION

Contrary to defendant's sweeping assertion, it is clear that not all federal preemption deprives state courts of subject-matter jurisdiction. On remand, the Court of Appeals will have an opportunity to address whether the particular type of preemption at issue in this case is jurisdictional. The purpose of my concurrence is to properly frame the inquiry, to clarify our caselaw, and to point to some of the pertinent authorities that may aid the Court of Appeals in resolving this complex and jurisprudentially significant issue.

PEOPLE v WARREN

Docket No. 158065. Argued on application for leave to appeal November 6, 2019. Decided April 29, 2020.

Kelly Warren pleaded guilty in the Mecosta Circuit Court to two separate charges of operating a vehicle while intoxicated, third offense (OWI-3rd), MCL 257.625, in exchange for the dismissal of other criminal charges against him and of the sentence enhancement to which he was subject as a fourth-offense habitual offender, MCL 769.12(1)(b). At the plea hearing, the trial court, Peter M. Jaklevic, J., noted on the record that each charge carried with it a maximum penalty of five years' imprisonment, but the court did not inform defendant that it had the discretionary authority to sentence him to consecutive sentences under MCL 768.7b(2)(a) because he had committed the second OWI-3rd charge while the first OWI-3rd charge was pending. The trial court ultimately sentenced defendant to consecutive prison terms of 2 to 5 years, which subjected defendant to a maximum of 10 years' imprisonment. Defendant filed a timely motion to withdraw his plea on the basis of the court's failure to advise him of the possibility of consecutive sentencing. The trial court denied the motion, and the Court of Appeals denied defendant's delayed application for leave to appeal. The Supreme Court then remanded the case to the Court of Appeals for consideration as on leave granted with directions to compare *People v Johnson*, 413 Mich 487 (1982)—which held that the former court rule governing pleas, GCR 1963, 785.7, did not require the trial court to advise a defendant of potential sentence consequences such as consecutive sentencing—with *People v Blanton*, 317 Mich App 107 (2016), which held that the trial court was required to inform the defendant that he was subject to a two-year mandatory consecutive sentence for possessing a firearm during the commission of a felony (felony-firearm). 500 Mich 1056 (2017). On remand, the Court of Appeals, M. J. KELLY and CAMERON, JJ. (GLEICHER, P.J., dissenting), affirmed defendant's convictions and sentences in an unpublished per curiam opinion issued May 17, 2018 (Docket No. 333997). The majority concluded that Michigan caselaw, including *Johnson* and *Blanton*, was not dispositive of the issue and that neither the Michigan Court Rules nor due process required the court to inform defendant that it had the

discretion to impose consecutive sentences. Defendant sought leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 503 Mich 988 (2019).

In an opinion by Justice MARKMAN, joined by Chief Justice MCCORMACK and Justices BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

MCR 6.302(B)(2) requires a trial court, in cases in which such advice is relevant, to advise a defendant of its discretionary consecutive-sentencing authority and the possible consequences of that authority for the defendant's sentence, because this authority clearly affects the defendant's "maximum possible prison sentence for the offense." The trial court in this case erred when it denied defendant's motion to withdraw his plea because the court failed to apprise defendant of this authority and its possible consequences for his sentence.

1. MCR 6.302(A) provides that a trial court may not accept a plea of guilty or *nolo contendere* unless it is convinced that the plea is understanding, voluntary, and accurate. To ensure that a defendant understands the consequences of his or her plea, MCR 6.302(B)(2) requires the trial court to advise the defendant of the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law.

2. The Court of Appeals correctly concluded that no Michigan caselaw had resolved whether MCR 6.302(B)(2) requires courts to inform defendants of discretionary consecutive-sentencing authority before accepting a guilty or no-contest plea. Although *Johnson* observed that the prior version of MCR 6.302 did not require trial courts to inform defendants of potential sentence consequences such as consecutive sentencing, that statement was dictum. And while *Blanton* held that trial courts must inform a defendant pleading guilty to felony-firearm that the sentence would include a mandatory two-year term of imprisonment that would be served before the sentences for the underlying substantive offenses, which would be served consecutively to the felony-firearm sentence, this holding was based on the "mandatory minimum sentence" language of MCR 6.302(B)(2) and not the "maximum possible prison sentence" language of the rule, and therefore it was also not dispositive of the issue in this case.

3. The phrase "maximum possible prison sentence" within MCR 6.302(B)(2) is not defined by the court rules. Considering the dictionary definitions of "maximum" and "possible," MCR 6.302(B)(2) requires advising defendants of the maximum allowable prison sentence under the law, as well as under the particu-

lar circumstances of the case, whether that is the actual sentence that eventually transpires. The modifying phrase “for the offense” does not indicate that a court must only advise defendants of the maximum possible prison sentence for each separate or discrete offense because the “maximum possible prison sentence for the offense” is additionally and materially affected by the possibility of consecutive sentencing; therefore, defendants must be facilitated in fully understanding the potential consequences of the trial court’s discretionary consecutive-sentencing authority. In this case, the trial court’s authority to impose a consecutive sentence derived from MCL 768.7b, which effectively constitutes an enhanced punishment designed to deter persons from committing additional crimes while other charges are already pending by postponing the moment at which sentencing for one or more subsequent offenses will commence and thereby increasing the total duration of potential incarceration. Thus, the fact of consecutive sentencing constitutes highly relevant information that directly implicates the “maximum possible prison sentence for the offense” under MCR 6.302(B)(2). Further, MCR 1.107 provides that words used in the singular also apply to the plural, where appropriate. Accordingly, MCR 6.302(B)(2) is reasonably read as requiring trial courts to inform defendants of “the maximum possible prison sentence for the offenses.” Therefore, when a trial court advises a defendant of his or her “maximum possible prison sentence,” this must encompass not only the “maximum possible prison sentence” for each individual “offense,” but also the “maximum possible prison sentence” for the conviction of “offenses” specifically as to which the trial court possesses an authority to impose consecutive sentences. Defendant was instructed that each OWI-3rd conviction carried a five-year maximum term of imprisonment, which, if imposed concurrently, would amount to a maximum possible sentence of five years’ imprisonment. However, because of the trial court’s discretionary consecutive-sentencing authority, defendant actually faced, and received, a maximum possible sentence of 10 years’ imprisonment. This was the “maximum possible prison sentence for the offenses” under the most reasonable understanding of MCR 6.302(B)(2). Reading the word “sentence” in the plural, as well as the word “offense,” would have led to the same conclusion, because where “sentences” are imposed, the possibility of a consecutive sentence becomes a possibility affecting the defendant’s “maximum possible prison sentence” on such multiple “sentences.” The Court’s interpretation of MCR 6.302(B)(2) was also consistent with *People v Brown*, 492 Mich 684 (2012), which held that even though MCR 6.302(B) did not expressly require trial courts to advise defendants of

habitual-offender enhancements, MCR 6.302(B)(2) nonetheless required courts to advise of the maximum possible prison sentence with the habitual-offender enhancement because the enhanced maximum became the maximum possible prison sentence for the principal offense.

Reversed and remanded for further proceedings.

Justice ZAHRA, joined by Justice VIVIANO, dissenting, stated that the plain language of MCR 6.302(B) does not require trial courts to calculate a defendant's potential aggregate maximum possible prison sentence resulting from the imposition of consecutive sentences and that there was nothing in the court rule to suggest that "sentence" should be read as "aggregate sentence." While he agreed that Michigan caselaw had not resolved this issue, he noted that persuasive federal caselaw interpreting the analogous federal rule, which is broader in scope than MCR 6.302(B), held that informing a defendant of mandatory consecutive sentencing was not required. He also disagreed with the majority's application of the number canon of construction to MCR 6.302(B), noting that a consistent application would have required only that defendant be advised of the maximum possible prison sentence for each of the two offenses to which he pleaded guilty, which the trial court did. Justice ZAHRA further observed that the Supreme Court had previously considered and rejected proposals to expressly require by court rule that trial courts advise a defendant about the possibility of consecutive sentencing. He would have held that the possibility of consecutive sentences pursuant to MCL 768.7b was a collateral rather than a direct consequence of defendant's guilty pleas because the trial court had discretion whether to impose consecutive sentences and that due process therefore did not require that the trial court inform defendant that he was subject to consecutive sentencing.

CRIMINAL LAW — PLEAS — UNDERSTANDING PLEAS — POSSIBILITY OF CONSECUTIVE SENTENCES.

MCR 6.302(B)(2) requires a trial court, in cases in which such advice is relevant, to advise a defendant of its discretionary consecutive-sentencing authority and the possible consequences of that authority for the defendant's sentence before accepting a plea of guilty or *nolo contendere*.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *David Porter*, Assistant Attorney General, for the people.

North Coast Legal, PLC (by *Michael C. Naughton*)
for defendant.

Amici Curiae:

Anne Yantus for the Criminal Defense Attorneys of
Michigan.

*D. J. Hilson, Kym L. Worthy, Jason W. Williams, and
Timothy A. Baughman* for the Prosecuting Attorneys
Association of Michigan.

*Dana Nessel, Fadwa A. Hammoud, Christopher M.
Allen, and Ann M. Sherman* for the Attorney General.

MARKMAN, J. At issue is whether, prior to accepting a guilty or no-contest plea, the trial court, in cases in which such advice is relevant, is required to advise a defendant that the court possesses discretionary consecutive-sentencing authority and to apprise the defendant as to the potential consequences of that authority for his or her sentence. We conclude that the trial court is required to do so under MCR 6.302(B)(2). As a result, the trial court here erred when it denied defendant's motion to withdraw his plea because the court failed to apprise him of both this authority and its potential consequences. We therefore reverse the judgment of the Court of Appeals and remand to the trial court to allow defendant to either withdraw his guilty plea or to reaffirm this plea. See *People v Brown*, 492 Mich 684, 702; 822 NW2d 208 (2012).

I. FACTS & HISTORY

In November 2014, defendant drove while intoxicated and then did so again the following summer while on bond for the first crime. In each case, he was

charged, among other crimes, with operating a vehicle while intoxicated, third offense (OWI-3rd), MCL 257.625, and the prosecutor provided notice that defendant was subject to a sentence enhancement as a fourth-offense habitual offender, MCL 769.12(1)(b). Defendant agreed to plead guilty to one count of OWI-3rd in each case in exchange for dismissal of the remaining charges and the habitual-offender enhancement. At the plea hearing, after the prosecutor informed the trial court of the agreement, the court asked the following:

The Court: All right. And each of the charges carries with it, absent the habitual, a five year maximum charge; is that correct, folks?

[Prosecutor]: Yes.

[Defense Counsel]: Yes.

Thereafter, the court questioned defendant to ensure that his plea was understanding, voluntary, and accurate under MCR 6.302. Yet at no point did the court inform defendant that it possessed the discretionary authority to sentence him to consecutive sentences because he had committed a felony (the second OWI-3rd charge) while disposition of another felony (the first OWI-3rd charge) had been pending. MCL 768.7b(2)(a).

The trial court ultimately sentenced defendant to consecutive prison terms of 2 to 5 years. Because these sentences were to be served consecutively, defendant was subject to a maximum of 10 years' imprisonment, twice the maximum of 5 years' imprisonment had the sentences been imposed concurrently. Defendant filed a timely motion to withdraw his plea based upon the court's failure to have advised him of the possibility of consecutive sentencing. The trial court denied this motion and the Court of Appeals denied leave to appeal. This Court then remanded to the Court of

Appeals for consideration as on leave granted with directions to compare *People v Johnson*, 413 Mich 487, 490; 320 NW2d 876 (1982) (holding that the former court rule governing pleas, GCR 1963, 785.7, did not “require advice as to other potential sentence consequences such as consecutive sentencing”) with *People v Blanton*, 317 Mich App 107, 119-120; 894 NW2d 613 (2016) (holding that the court was required to inform the defendant that he was subject to a two-year mandatory consecutive sentence for possessing a firearm during the commission of a felony, or “felony-firearm”). *People v Warren*, 500 Mich 1056 (2017).

In a split decision, the Court of Appeals affirmed defendant’s convictions and sentences. *People v Warren*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 333997). The majority concluded that Michigan caselaw, including *Johnson* and *Blanton*, was not dispositive of the issue and that neither the Michigan Court Rules nor due process required the court to inform defendant that it possessed the discretion to impose consecutive sentences. *Id.* at 2-5. The dissent would have held that “a possible consecutive sentence is a fact as important as the maximum penalty for each charge, and therefore an integral component of a voluntary and understanding plea.” *Id.* at 1 (GLEICHER, J., dissenting). Defendant sought leave to appeal in this Court and we heard oral argument on the application.¹

¹ According to the Offender Tracking Information System maintained by the Michigan Department of Corrections (MDOC), defendant was paroled on January 7, 2020, after serving four years of his sentence. However, because defendant is challenging his underlying conviction, his parole does not affect our ability to decide the merits of this case and afford a remedy for any alleged error. Additionally, defendant is under the supervision of MDOC until January 2021 and any parole violation could result in the revocation of his parole, which would then subject

II. STANDARD OF REVIEW

“This Court reviews for an abuse of discretion a trial court’s ruling on a motion to withdraw a plea.” *Brown*, 492 Mich at 688. An abuse of discretion occurs when the decision falls outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). The interpretation of court rules is reviewed de novo. *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011).

III. ANALYSIS

A defendant has the “right to withdraw any plea until the court accepts it on the record.” MCR 6.310(A). Once the trial court has accepted the plea, there is no longer any absolute right to withdraw the plea. *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994). Following sentencing, a trial court may withdraw a guilty plea if “there was an error in the plea proceeding that would entitle the defendant to have the plea set aside” MCR 6.310(C)(4). In other words, “[a] defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process.” *Brown*, 492 Mich at 693. Thus, the issue here is whether the trial court’s failure to inform defendant of the possibility of consecutive sentences constitutes a sufficient defect in the plea-taking process to require judicial relief. To determine whether

him to the remainder of his term of imprisonment. “An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy.” *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). But an issue is not moot “if it will continue to affect a party in some collateral way.” *Id.* Because defendant here is challenging his conviction and remains subject to the supervision of MDOC, the instant issue is not moot, and we will decide its merits despite the fact that defendant has recently been paroled.

there is such a defect, we must first give meaning to the relevant court rule, MCR 6.302.

“The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate.” MCR 6.302(A). “[T]his requires a defendant to be informed of the consequences of his or her plea and, necessarily, the resultant sentence.” *Brown*, 492 Mich at 693 (quotation marks and citation omitted). To ensure that a defendant’s plea satisfies these requirements, the trial court, before accepting such a plea, “must place the defendant or defendants under oath and personally carry out subrules (B)–(E).” MCR 6.302(A). Specifically relevant to the instant case are the requirements under Subrule (B), which addresses understanding pleas:

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

* * *

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c[.] [MCR 6.302(B)(2).]

Defendant argues that a trial court must advise persons in his circumstances when the court possesses the discretion to impose consecutive sentences because such sentences affect the “maximum possible prison sentence.” MCR 6.302(B)(2). That is, if the trial court only advised the defendant that he or she faced a maximum penalty of five years’ imprisonment, when, in fact, he or she was facing a maximum penalty of 10 years’ imprisonment as a consequence of a consecutive

sentence, the trial court would have failed to inform the defendant of the “maximum possible prison sentence” and thus the defendant would not have fully understood the consequences of the plea.² Conversely, the prosecutor argues that the court rule does not explicitly require the trial court to inform defendants of discretionary consecutive-sentencing authority. Rather, trial courts are only required to advise a defendant of the “maximum possible prison sentence *for the offense*,” meaning that they are only required to inform defendants of the maximum sentence for each separate or discrete conviction. MCR 6.302(B)(2) (emphasis added). And in the instant case, this was done: the trial court properly advised defendant that the maximum possible prison sentence for each of his OWI-3rd convictions was five years’ imprisonment. To resolve this matter, we must undertake two related analyses: first, we must determine the extent to which prior caselaw governs the resolution of this issue and, second, if prior caselaw does not do so, we must determine in the first instance the proper understanding of MCR 6.302(B)(2).

A. CASELAW

We agree with the Court of Appeals majority that Michigan caselaw has not resolved the determinative question in this case: whether MCR 6.302(B)(2) re-

² We are cognizant that the trial court informed defendant that he faced a maximum of five years’ imprisonment on each of his OWI-3rd convictions and therefore that he *could* have assumed that he was subject to the sum total of 10 years’ imprisonment. However, we are not prepared to operate upon the assumption that defendant was properly informed here on the basis that he believed, *mistakenly*, that as a general rule his sentences would be imposed consecutively. See *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) (“In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute.”) (quotation marks and citation omitted).

quires courts to inform defendants of discretionary consecutive-sentencing authority before accepting a guilty or no-contest plea. We first address this Court's decision in *Johnson* and then the Court of Appeals' decision in *Blanton*, because we specifically directed the Court of Appeals on remand to assess these specific decisions to determine what relevance, if any, these bear to the issue at hand.

In *Johnson*, the issue concerned whether the former court rule regarding pleas, GCR 1963, 785.7, required trial courts to inform defendants of the consequences of MCL 791.233b, then known as "Proposal B." *Johnson*, 413 Mich at 488. Under this law, a defendant was "not eligible for parole until he or she has served the minimum sentence imposed by the court, undiminished by allowance for good time, special good time, or special parole." *Id.* at 488 n 1. We held that trial courts were not required to inform defendants of the consequences of Proposal B because the court rule did not expressly require trial courts to inform defendants of those consequences. *Id.* at 490. In so holding, we also observed that the prior version of MCR 6.302 had not required trial courts to inform defendants of "other potential sentence consequences such as consecutive sentencing." *Id.* However, the issue in dispute in *Johnson* did not generally involve the consequences of consecutive sentencing, but rather only the specific consequences of Proposal B; thus, its generalized statement on consecutive sentencing effectively constituted dictum because it was unnecessary to the resolution of the issue in *Johnson*. See *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011). For that reason, we do not find *Johnson* dispositive of the issue in the present case.

And in *Blanton*, the Court of Appeals held that trial courts must inform a defendant pleading guilty to

felony-firearm that “(1) he would be sentenced to a mandatory two-year term of imprisonment, (2) this term of imprisonment would be served first, and (3) the concurrent sentences for [the underlying substantive offenses] would be served consecutively to the felony-firearm sentence.” *Blanton*, 317 Mich App at 120. The rationale for this holding was that MCR 6.302(B)(2) required trial courts to advise defendants of “any mandatory minimum sentence required by law,” and that “when a defendant carries a firearm during the commission of a felony, he or she is subject to a mandatory two-year term of imprisonment to be served ‘consecutively with and preceding any term of imprisonment imposed’ for the underlying felony.” *Blanton*, 317 Mich App at 119-120 (citations and emphasis omitted). *Blanton* thus relied upon the “mandatory minimum sentence” language of MCR 6.302(B)(2) and not the “maximum possible prison sentence” language of the rule, and therefore is also not dispositive of the issue in this case, which pertains only to whether discretionary consecutive sentencing implicates the “maximum possible prison sentence for the offense.” MCR 6.302(B)(2).³

Concluding that neither *Johnson* nor *Blanton* clearly resolves the issue in dispute, we turn to MCR 6.302(B)(2) to assess what course must be followed by the trial court concerning communications to a defen-

³ We recognize that *Blanton* also asserts, “[A]lthough not explicitly required by MCR 6.302(B), it is well settled that a trial court must inform the defendant of any ‘consecutive and/or mandatory sentencing’ requirements.” *Blanton*, 317 Mich App at 119 (citation omitted). However, because the issue in *Blanton* pertained to *mandatory* consecutive sentencing for a felony-firearm conviction, we do not believe it referred clearly to the matter of whether defendants must be advised as to *discretionary* consecutive-sentencing authority. That said, *Blanton* is consistent with our ruling today that trial courts must advise defendants, when applicable, of even discretionary authority in this regard.

dant regarding its discretionary consecutive-sentencing authority and the consequences of that authority for defendant's ultimate sentence.

B. MCR 6.302(B)(2)

When interpreting a court rule, we begin, of course, with its text, reading the individual words and phrases in their context. *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018). In doing so, this Court “must give effect to every word, phrase, and clause” in the court rule. *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017). We examine first the phrase “maximum possible prison sentence” within MCR 6.302(B)(2). The court rule does not specifically define this phrase or the individual words contained within it, but this Court gives undefined terms their plain and ordinary meanings and will often consult dictionary definitions in conferring such meaning. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). “Maximum” means “an upper limit allowed (as by a legal authority) or allowable (as by the circumstances of a particular case).” *Merriam-Webster’s Collegiate Dictionary* (11th ed). And “possible” describes “something that may or may not occur.” *Id.* Therefore, MCR 6.302(B)(2) requires advising defendants of the maximum *allowable* prison sentence under the law, as well as under the particular circumstances of the case, whether that is the actual sentence that eventually transpires. This phrase is further modified by the prepositional phrase “for the offense.” MCR 6.302(B)(2). The prosecutor argues, and the dissent would conclude, that this qualifying language indicates that a court must only advise defendants of the maximum possible prison sentence for each separate or discrete offense—in this case, five years’ imprisonment for each of two OWI-3rd

convictions. Respectfully, we do not construe this language so narrowly, but in what we view to be a more reasonable fashion. We believe that the “maximum possible prison sentence for the offense” is additionally and materially affected by the possibility of consecutive sentencing and therefore that defendants must be facilitated in fully understanding the potential consequences of the trial court’s discretionary consecutive-sentencing authority. We believe so for the following reasons:

First, in addition to understanding the possible *duration* of each sentence for multiple offenses, the defendant must also understand the possibility that the sentence for an offense may not commence *until* after the defendant has served one or more underlying sentences. This comprehension is critical to a pleading individual fully understanding the “maximum possible prison sentence for the offense.” MCR 6.302(B)(2). Consecutive sentences are “served in sequence,” while concurrent sentences are “served simultaneously.” *Black’s Law Dictionary* (11th ed) (emphasis added). As a result, the fact of consecutive-sentencing authority is as integral to a fully understanding plea as the facts of the sheer duration of potential sentences for each offense viewed in splendid isolation. For when the trial court possesses such authority, the defendant’s sentences are neither viewed nor imposed in isolation, and for the defendant personally, understanding fully the consequences and implications of a plea is not some academic exercise but an intensely practical and life-altering exercise by which he or she might reasonably compare the wisdom of a guilty or no-contest plea with the merits of proceeding to trial. *Both* of these considerations—the possible duration of each sentence *and* the possibility that one or more of these sentences will not commence immediately but only after another

has been served—will in the harshest reality determine the defendant’s “maximum possible prison sentence for the offense,” and defendants are entitled to be made fully aware of this reality so that they might enter into a genuinely “understanding, voluntary, and accurate” plea.

In the instant case, the trial court’s authority to impose a consecutive sentence derives from MCL 768.7b, which states in relevant part:

(2) Beginning January 1, 1992, if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony, upon conviction of the subsequent offense or acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to the subsequent offense, the following shall apply:

(a) Unless the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense may run consecutively. [MCL 768.7b(2)(a).]

The effect of MCL 768.7b thus is to postpone the moment at which sentencing for one or more “subsequent offense[s]” will commence, and “[t]he purpose of the statute is to deter persons accused of one crime from committing others by removing the security of concurrent sentences should conviction result on any or all of the crimes so committed.” *People v Bonner*, 49 Mich App 153, 158; 211 NW2d 542 (1973). Consequently, the statute differentiates between two classes of persons: “those who have committed subsequent felonies while on bond and those who have not . . .” *Id.* And the Legislature has thereby provided “different punishments between those classes” wherein the defendant who has committed a felony while on bond is subject to a greater punishment than the defendant who has not. *Id.*

Hence, while consecutive sentencing does not *increase* the maximum duration of a sentence for any single offense, the *postponement* of one or more of the sentences effectively constitutes an enhanced punishment designed to deter persons from committing additional crimes while other charges are already pending by increasing the *total* duration of potential incarceration. In the fullest light of reality, defendant's "maximum possible prison sentence" will be determined by *both* the durations of the sentences for each offense *and* their susceptibility to consecutive sentencing. We find it critical then that a defendant, in order to fully understand the consequences of a plea, and to be fully cognizant of the "maximum possible prison sentence" on each offense, be apprised that a sentence for a subsequent offense to which he or she is pleading guilty may not proceed immediately but rather may be delayed—this as a part of a purposeful legislative design to punish the defendant with greater severity. In this manner, the fact of consecutive sentencing constitutes highly relevant information that directly implicates the "maximum possible prison sentence for the offense" under MCR 6.302(B)(2).⁴

Second, our court rules require that "[w]ords used in the singular also apply to the plural, where appropriate." MCR 1.107.⁵ Accordingly, this Court must also

⁴ This opinion should not be understood as requiring trial courts to advise defendants of precisely *when* a consecutive sentence will commence. Rather, it is sufficient that defendants be reasonably informed that possible consecutive sentences will have to be served sequentially, i.e., that such sentences will not begin until after other sentences have been served.

⁵ In a similar vein, MCL 8.3b states: "Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number."

reasonably read MCR 6.302(B)(2) as requiring trial courts to inform defendants of “the maximum possible prison sentence for the *offenses*.” We believe it is “appropriate” to consider “offense” in both the singular and the plural because it is frequently the case that a criminal defendant will be convicted of more than a single crime and it is reasonable that MCR 6.302(B)(2) would be understood as affording its myriad protections to *all* criminal defendants, not merely to those convicted of a single offense, for such a distinction would be odd (if not unprecedented) within our criminal rules and, specifically with regard to MCR 6.302(B)(2), lacking in any apparent purpose. Thus, we conclude that when a trial court advises a defendant of his or her “maximum possible prison sentence,” this must encompass not only the “maximum possible prison sentence” for each individual “offense,” but also the “maximum possible prison sentence” for the conviction of “offenses” specifically as to which the trial court possesses an authority to impose consecutive sentences.⁶

Defendant here was instructed that each OWI-3rd conviction carried a five-year maximum term of imprisonment, which, if imposed concurrently, would amount to a maximum possible sentence of five years’ imprisonment. However, because of the trial court’s discretionary consecutive-sentencing authority, defendant

⁶ See e.g., *Commonwealth v Persinger*, 532 Pa 317, 323; 615 A2d 1305 (1992) (“In order to understand the consequences of his plea it is clear that a defendant must be informed of the *maximum* punishment that might be imposed for his conduct. To hold that the term ‘maximum’ does not include the total possible aggregate sentence is clearly incorrect.”) (citation omitted); *State v Ricks*, 53 Ohio App 2d 244, 246-247; 372 NE2d 1369 (1977) (holding that in order for a defendant to understand the maximum penalty, he or she must understand “whether defendant is eligible for consecutive or concurrent sentences”).

actually faced, and received, a maximum possible sentence of 10 years' imprisonment. This was, in fact, the "maximum possible prison sentence for the *offenses*." A trial court's failure to advise a defendant of possible consecutive sentencing in the course of apprising him or her of a "maximum possible prison sentence" disregards the reality that the defendant may face a far-lengthier prison sentence—a reality that we believe is anticipated, and accommodated, by the most reasonable understanding of MCR 6.302(B)(2).

The dissent maintains that our use of this canon of interpretation is inconsistent because we read only "offense" in the plural while maintaining the singular use of the term "sentence." However, we see no such inconsistency, as certainly a defendant must not only understand the maximum possible "sentence" for each separate offense, but also that for the range of "offenses" of which he or she has been convicted, some of which may be viewed by the law as interconnected in a way that carries independent sentencing consequences. Then, and only then, can a defendant fully apprehend the true *maximum term of incarceration* that he or she faces,⁷ i.e., the term of incarceration from its starting date to its release date, i.e., the period during which by force of law a person who has breached the strictures of that law will be segregated from free society and deprived of his or her God-given liberty.⁸ That said, our

⁷ A defendant's maximum term of incarceration is, in other words, his or her "aggregate sentence," which is defined as "[t]he total sentence imposed for multiple convictions, reflecting appropriate calculations for consecutive as opposed to cumulative periods . . ." *Black's Law Dictionary* (11th ed).

⁸ The Attorney General, appearing as amicus curiae on behalf of defendant, asserted at oral argument that

no single variable of a sentence [is] more important to a criminal defendant than how much time he will serve. It's more important

application of the singular/plural canon of interpretation is not grounded on “advanc[ing] a policy goal,” as asserted by the dissent, but on the specific language of MCR 6.302(B)(2) requiring that a defendant understand the “maximum possible prison sentence for the offenses.” The dissent avers that consistency and the use of “common sense” in applying this canon would require *both* “sentence” and “offense” to be read either in the plural or the singular; in other words, that these terms must travel together. But that is not what is stated in the canon, and for good reason. Rather, the dissent’s understanding gives minimal consideration to the guidance of the canon that it should be applied “where appropriate.” MCR 1.107. We believe it is altogether “appropriate” here to read *only* “offense” in the plural under MCR 6.302(B)(2), as this optimally ensures that a defendant will come to understand the “maximum possible prison sentence” implicated by a guilty or no-contest plea. *This* purpose, in our judgment, defines the obvious and fundamental purpose served by MCR 6.302(B)(2), and there is no obvious

than knowing if you’re going to be on a sex offenders’ registry or whether . . . you are pleading to a felony or a misdemeanor, or whether or not that crime may be expungable at some period; maybe later on those things will become significant. But at the very moment that an individual is deciding whether or not to enter that plea, all they really care about is how much time am I going to do.

And despite the dissent’s assertion that the Attorney General argues only that “due process requires us to amend our court rule,” her position at oral argument was to the contrary. Although she did urge the Court to amend its rule to clarify the trial court’s consecutive-sentencing obligation, the Attorney General nonetheless adopted the position that MCR 6.302(B)(2), as it *currently* reads, required the trial court here to advise defendant of the court’s discretionary consecutive-sentencing authority, apart from any “due process” requirement, precisely because the consequences of consecutive sentencing affect “the actual term of years [a defendant] receive[s].”

rationale for limiting the purview of this rule to circumstances in which a defendant has been convicted of only a single offense or even of multiple offenses for which there is no possibility of consecutive sentencing. Thus, while professing to rely upon “common sense” in giving meaning to the court rule, the dissent not only errs in its construction of the rule, but fails to account for the most fundamentally “common sense” aspect of the plea itself—that the pleading party accurately comprehend the maximum possible prison sentence to which he or she is pleading. In sum, we do not believe that the dissent’s interpretation of the singular and plural terms of MCR 6.302(B)(2) constitutes the most reasonable understanding of its language, the best discernment of the intentions of its framers, or the most appropriate application of the singular/plural canon, and therefore it is “appropriate” that we give the meaning to the rule that we do.

Even, however, if we read “sentence” in the plural as the dissent would have us do, we reach the same conclusion. That is, if a defendant must be apprised of the “maximum possible prison *sentences* for the *offenses*,” the trial court would still be required to inform the defendant of the court’s discretionary consecutive-sentencing authority because where “sentences” are imposed, and indeed only where “sentences” are imposed, the possibility of a consecutive sentence becomes a possibility affecting the defendant’s “maximum possible prison sentence” on such multiple “sentences.” And thus to ensure the defendant’s full understanding of the plea, he or she must be apprised of the court’s discretionary consecutive-sentencing authority.⁹

⁹ The dissent asserts that our “alternative analysis” concerning the singular/plural canon, i.e., where we read both “sentence” and “offense” in the plural, “fails to consider the entire context of MCR 6.302(B).”

Our interpretation of MCR 6.302(B)(2) is also consistent with this Court’s decision in *Brown*—a decision the dissent does not address in any meaningful way. There, we held that even though MCR 6.302(B) did not expressly require trial courts to advise defendants of habitual-offender enhancements, MCR 6.302(B)(2) nonetheless required courts to advise “of the maximum possible prison sentence with habitual-offender enhancement because the enhanced maximum be-

Specifically, it asserts that the phrase “maximum possible prison sentence[s] for the offense[s]” does not stand alone and must be considered along with MCR 6.302(B)(1), a separate provision requiring trial courts to advise the defendant of “the name[s] of the offense[s] to which the defendant is pleading.” And when these provisions are viewed together through the lens of the singular/plural canon, “just as Subsection (1) requires a trial court to inform a defendant of each name of each offense, so [too] Subsection (2) requires a trial court to inform a defendant of each maximum possible sentence, not the maximum possible aggregate sentence.” However, we do not believe that (B)(1) has any particular effect on our application of the singular/plural canon to (B)(2). Even under the dissent’s (correct) understanding of the contextual relationship between (B)(1) and (B)(2)—that these provisions must be read together—we are no less persuaded that defendants should be facilitated in their fullest understanding of the implications of the trial court’s discretionary consecutive-sentencing authority. Even when reading each noun of these provisions in the plural, as the dissent would have us do, we remain persuaded that MCR 6.302(B) requires courts to advise defendants of their discretionary consecutive-sentencing authority. It truly seems of no consequence that a trial court be required to inform a defendant of the “maximum possible prison sentence[s] for the offense[s]” or where (B)(1) and (B)(2) are read together to inform a defendant of the “maximum possible prison sentence[s] for . . . the name[s] of the offense[s] to which the defendant is pleading.” In other words, our understanding of the court rule is not altered at all by consideration of (B)(1) and (B)(2) in tandem. As stated earlier, consecutive sentencing only becomes a possibility affecting a defendant’s maximum possible term of incarceration when there are *multiple* “sentences” for the named “offenses,” and thus we believe our understanding of the rule to have no less force when (B)(1) and (B)(2) are considered together.

comes the ‘maximum possible prison sentence’ for the principal offense.” *Brown*, 492 Mich at 693-694.¹⁰ We then opined:

By not telling a defendant the potential maximum sentence because of his or her habitual-offender status, “a trial court is not advising of the ‘true’ potential maximum sentence.” Today’s holding accurately reflects the intent of MCR 6.302(B)(2), which is that a defendant be informed beforehand of the maximum sentence that would follow his or her plea of guilty. [*Id.* at 694 (citation omitted).]

[A]n habitual offender supplement is not a separate offense, and thus it logically follows that it must be linked to, or considered one with, the underlying offense. As such, to comply with MCR 6.302(B)(2), a defendant must be made aware of the consequences of “the offense” including any habitual offender enhancement. [*Id.* at 694 n 35 (quotation marks and citation omitted).]

Ultimately, we are persuaded that requiring the trial court to advise a defendant of the possibility of consecutive sentencing is consistent with “the intent of MCR 6.302(B)(2), which is that a defendant be informed beforehand of the maximum sentence that would follow his or her plea of guilty.” *Id.* at 694. When the court does not so inform the defendant, it is “not advising of the ‘true’ potential maximum sentence” as it pertains to the punishment on the multiple offenses. *Id.* (quotation marks and citation omitted). Moreover, in order to comply with MCR 6.302(B)(2), “a defendant must be fully aware of the consequences” of the plea, *Brown*, 492 Mich at 694 n 35, which includes the fact that the second sentence could be served consecutively

¹⁰ “The habitual-offender statutes, MCL 769.10 *et seq.*, provide enhancement of a defendant’s sentence on the basis of prior felony convictions,” which is intended to have “a deterrent and punitive purpose.” *Brown*, 492 Mich at 689 (quotation marks and citation omitted).

to the first sentence, resulting in a longer term of incarceration. That is, as with the habitual-offender enhancement in *Brown*, consecutive sentencing does not give rise to a separate offense, but rather is, for all practical and legal purposes, “linked to,” or “considered one with,” or interconnected with, underlying “offenses,” and thus constitutes an irreducible *aspect* of sentencing for multiple “offenses” in specified circumstances—that the punishment for one or more of these “offenses” will be postponed in order to lengthen the punishment. Therefore, in accordance with our court rules, the trial court must disclose its consecutive-sentencing authority in order to ensure, as in *Brown*, that the defendant accurately understands his “true potential maximum sentence.” *Id.* at 694.¹¹

IV. CONCLUSION

We conclude that MCR 6.302(B)(2) requires the trial court, in cases in which such advice is relevant, to advise a defendant of its discretionary consecutive-sentencing authority and the possible consequences of that authority for the defendant’s sentence. This is because such authority clearly affects the defendant’s “maximum possible prison sentence for the offense.” As a result, the trial court here erred when it denied defendant’s motion to withdraw his plea because the court failed to apprise defendant of this authority and its possible consequences for his sentence. We therefore reverse the judgment of the Court of Appeals and

¹¹ Because we conclude that MCR 6.302(B)(2) requires trial courts to advise defendants of the court’s discretionary consecutive-sentencing authority and the reasonable implications of that authority, we do not address defendant’s “due process” argument. See *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001) (noting that the Court generally will not address constitutional issues if it is unnecessary to resolve a case).

remand to the trial court to allow defendant the opportunity to either withdraw his guilty plea or to reaffirm this plea.

MCCORMACK, C.J., and BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with MARKMAN, J.

ZAHRA, J. (*dissenting*). MCR 6.302(B) requires trial courts to advise a defendant of “the name of the offense to which the defendant is pleading,” MCR 6.302(B)(1), and “the maximum possible prison sentence for the offense,” MCR 6.302(B)(2). If, as in this case, a defendant pleads guilty or no contest to more than one offense, MCR 6.302(B) requires only that trial courts advise defendants of “the name[s] of the offense[s] to which the defendant is pleading” and “the maximum possible prison sentence[s] for the offense[s].” The majority holds that MCR 6.302(B) requires, in cases involving potential consecutive sentences, that trial courts “advise a defendant of its discretionary consecutive-sentencing authority and the possible consequences of that authority for the defendant’s sentence.” The construction embraced by the majority opinion is overly broad and imposes on trial courts a requirement I do not find in MCR 6.302(B). The language of MCR 6.302(B) simply does not require trial courts to calculate a defendant’s potential aggregate maximum possible prison sentence¹ resulting from the imposition of consecutive sentences. Further, this Court has at least twice previously declined to amend the court rules to expressly provide that trial courts advise defendants of a possible aggregate maximum

¹ An “aggregate sentence” is defined as “[t]he total sentence imposed for multiple convictions, reflecting appropriate calculations for consecutive as opposed to cumulative periods, reductions for time already served, and statutory limitations.” *Black’s Law Dictionary* (11th ed).

sentence resulting from the imposition of consecutive sentences. Because I do not agree with the majority's decision to read into MCR 6.302(B) that which this Court has twice declined to expressly add to our court rules, I must respectfully dissent.² I would affirm the lower courts.

I. BASIC FACTS AND PROCEEDINGS

In late 2014, defendant was caught operating a motor vehicle while intoxicated. Six months later, while free on bond awaiting trial, he was again caught operating a motor vehicle while intoxicated. In each case, the prosecution charged defendant with operating a vehicle while intoxicated, third offense,³ in addition to attendant misdemeanors related to the offense, and provided defendant notice that he was subject to sentence enhancement as a fourth-offense habitual offender.⁴ Defendant's prior criminal record is extensive, including nine felony convictions and eleven misdemeanor convictions.

Defendant agreed to plead guilty to both drunk-driving charges in exchange for the dismissal of the remaining charges and the habitual-offender enhancement. At defendant's plea hearing, the trial court informed him of the maximum sentence for each

² Because I conclude that MCR 6.302(B) provides no relief to defendant, I must also address defendant's constitutional argument: whether his due-process rights were violated by the trial court's failure to inform him of the possibility of consecutive sentences. For reasons fully developed in this dissenting opinion, I conclude that defendant's due-process rights were not violated by the trial court's failure to inform defendant of the possibility he could be sentenced consecutively under MCL 768.7b.

³ MCL 257.625.

⁴ MCL 769.12(1)(b).

drunk-driving offense (five years). Specifically, the court stated that “each of the charges carries with it, absent the habitual, . . . a five year maximum charge; is that correct, folks?” Both the prosecution and counsel for defendant agreed. After determining that defendant was voluntarily pleading guilty to the offenses, the court elicited from defendant a factual basis for the 2014 offense and accepted defendant’s plea to that offense. The court then elicited a factual basis for the 2015 offense and accepted defendant’s plea to that offense.

Before defendant’s sentencing hearing, the probation department prepared a presentence investigation report (PSIR). In it, the probation department informed the trial court that it had the discretionary authority to impose consecutive sentences because defendant committed the second offense while on bond for the first.⁵ The PSIR provided the probation agent’s “Description of the Offense” in which each offense was separately delineated. Within the PSIR, the agent included a “Sentencing Information Report” (SIR) for each offense and assessed defendant’s prior record variables and offense variables for each offense. Each SIR scored defendant’s sentencing guidelines, and each recommended a minimum sentence of 12 to 24 months’ imprisonment. The PSIR recommended that “defendant be sentenced to the Michigan Department of Corrections for a period of 24 months to 60 months for both Dockets, to run consecutively, with credit for 3 days served.”

Following the probation department’s recommendation, the trial court exercised its discretion and imposed consecutive sentences of 24 to 60 months’ impris-

⁵ See MCL 768.7b.

onment, citing defendant’s lengthy criminal history, the fact that the offense committed on bond was the very same offense for which bond had been granted, and his proclivity for alcohol-related offenses as documented in his PSIR.

Several months later, with the assistance of new counsel, defendant moved to withdraw his plea, arguing that the plea-taking process was constitutionally defective because he had not been specifically advised that the trial court had the discretionary authority to impose consecutive sentences. The trial court denied the motion, and the Court of Appeals denied the ensuing application for leave to appeal for lack of merit in the grounds presented.⁶

Defendant appealed in this Court, and in lieu of granting leave to appeal, we remanded the case for consideration as on leave granted.⁷ The Court of Appeals, in a split decision, rejected defendant’s claim that the trial court had a duty to inform him of the possibility of consecutive sentencing before accepting his plea.⁸ Defendant again applied for leave to appeal

⁶ *People v Warren*, unpublished order of the Michigan Court of Appeals, entered November 1, 2016 (Docket No. 333997).

⁷ *People v Warren*, 500 Mich 1056 (2017).

⁸ *People v Warren*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 333997), unpub op at 1. The majority held that the plain language of MCR 6.302 did not require advice about the possibility of discretionary consecutive sentencing. The majority also concluded that due process did not require the trial court to advise defendant that it had discretion to impose consecutive sentences because it was not a “direct consequence” of pleading guilty. *Id.* at 5. Judge GLEICHER dissented, contending that both MCR 6.302(B) and due process required trial courts to inform defendants about the possibility of consecutive sentences because, like habitual-offender enhancements, consecutive sentences affect a defendant’s “true potential maximum sentence.” *Id.* at 3 (GLEICHER, J., dissenting) (quotation marks and citation omitted).

in this Court, and we ordered oral argument on the application, directing the parties to file supplemental briefs addressing whether, when a defendant's plea of guilty or no contest will subject him to the court's discretion to impose consecutive sentences, the court must advise the defendant of that possibility before the court may accept the plea.⁹

II. APPLICABLE STANDARDS OF REVIEW

The interpretation of court rules presents a question of law that we review *de novo*.¹⁰ Questions of constitutional law involving waiving constitutional rights by entering a guilty plea are reviewed *de novo*.¹¹ Violations of the Michigan Rules of Court are nonconstitutional errors, and violations of due-process rights are constitutional errors, but when unpreserved, both are subject to plain-error review.¹²

III. ANALYSIS

A. THE PLAIN LANGUAGE OF MCR 6.302(B) DOES NOT CONTEMPLATE CONSECUTIVE SENTENCES

MCR 6.302(B) concerns “An Understanding Plea,” and it requires the trial court to “advise the defendant or defendants of the following and determine that each defendant understands:”

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

⁹ *People v Warren*, 503 Mich 988 (2019).

¹⁰ *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011).

¹¹ *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

¹² *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999).

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

MCR 6.302(B)(2) refers not just to any “maximum possible prison sentence,” but to “the maximum possible prison sentence for *the offense*.” Reading (B)(1) and (B)(2) together, the court must advise a defendant as to the name of each discrete offense to which a defendant is pleading, as well as to each discrete corresponding maximum possible prison sentence. There is nothing in the court rule suggesting that “sentence” should be read as “aggregate sentence.”¹³ The plain language of MCR 6.302(B) simply does not require a trial court to advise a defendant at the plea hearing of the maximum possible *aggregate* prison sentence for the offenses to which the defendant is pleading. Therefore, it cannot be said, as the majority claims, that the phrase “maximum possible prison sentence for the offense” within MCR 6.302(B)(2) is “additionally and materially affected by the possibility of consecutive sentencing” Of course the trial court, within its discretion, may offer an opinion about a maximum possible aggregate prison sentence to assist *the parties* in facilitating a plea agreement, see, e.g., *People v Cobbs*,¹⁴ but neither our caselaw nor our court rules currently require the trial court to provide *defendant* with such assistance.

I agree with the majority that “Michigan caselaw has not resolved the determinative question in this case: whether MCR 6.302(B)(2) requires courts to inform

¹³ See note 1 of this opinion. If this Court had wanted to use the term “aggregate sentence” to clarify that a defendant must be informed of the maximum possible total sentence for multiple convictions, it could have done so.

¹⁴ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

defendants of discretionary consecutive-sentencing authority before accepting a guilty or no-contest plea.”¹⁵ Nonetheless, there is persuasive federal authority interpreting the analogous federal rule, which is broader in scope than the Michigan rule.¹⁶ Specifically, FR Crim P 11(b)(1)(H) requires a defendant pleading guilty to be informed of “any maximum possible penalty.” In *United States v General*,¹⁷ the United States Court of Appeals for the Fourth Circuit held, “Rule 11 . . . does not require a district court to inform the defendant of mandatory consecutive sentencing.” Other federal cases have concluded the same.¹⁸

¹⁵ As the majority points out, *People v Johnson*, 413 Mich 487, 490; 320 NW2d 876 (1982), stated that the former court rule did not require trial courts to inform a defendant of “other potential sentence consequences such as consecutive sentencing.” I recognize, however, that this statement is dicta. Further, in my view, *Johnson* is distinguishable because it did not address a defendant’s “maximum possible prison sentence” for any particular offense, but only a lack of parole eligibility for that offense. Parole eligibility does not relate to a “maximum possible prison sentence”; indeed, a paroled prisoner has necessarily not served a “maximum possible prison sentence.” I also agree with the majority that *People v Blanton*, 317 Mich App 107, 119; 894 NW2d 613 (2016), “relied upon the ‘mandatory minimum sentence’ language of MCR 6.302(B)(2) and not the ‘maximum possible prison sentence’ language of the rule” and is thus not on point.

¹⁶ Though not binding, federal precedent may be persuasive when interpreting analogous text. See, e.g., *Tobin v Mich Civil Serv Comm*, 416 Mich 661, 671; 331 NW2d 184 (1982) (reasoning that the Michigan Freedom of Information Act, MCL 15.231 *et seq.*, was patterned after the federal law and, thus, “decisions under the federal law are often instructive and, in this instance, persuasive”); *Gumma v D & T Constr Co*, 235 Mich App 210, 223-224; 597 NW2d 207 (1999) (noting that, because the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*, and its federal counterpart are similar, “it is appropriate to examine federal case law interpreting similar issues”).

¹⁷ *United States v General*, 278 F3d 389, 395 (CA 4, 2002).

¹⁸ See *United States v Henry*, 702 F3d 377, 381 (CA 7, 2012) (“[T]he district court was not required to advise Henry that his federal sentence

The majority supports its construction of MCR 6.302(B)(2) with an interpretive court rule commonly known as the “number canon” of construction, which provides that “[w]ords used in the singular also apply to the plural, where appropriate.”¹⁹ This principle is also codified in Michigan law²⁰ and has common-law roots.²¹ But this canon of construction does not alter my understanding of this court rule.

Applying the number canon to MCR 6.302(B), the rule would read:

- (1) the name[s] of the offense[s] to which the defendant is pleading; the court is not obliged to explain the elements of the offense[s], or possible defenses;
- (2) the maximum possible prison sentence[s] for the offense[s] and any mandatory minimum sentence[s] required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c[.]

Consistent application of the number canon supports the conclusion that the trial court is not required to inform defendant of the possibility of consecutive sentences. Here, defendant pleaded guilty to two offenses and, consistent with the number canon, was advised of the maximum possible prison sentences for each of those two offenses. But the majority does not apply the number canon in a consistent manner throughout the

might be imposed to run consecutive to his undischarged state sentence.”); *United States v Ospina*, 18 F3d 1332, 1334 (CA 6, 1994) (“[T]here is no requirement in [FR Crim P 11] that the court explicitly admonish a defendant that a sentence may be imposed consecutively.”).

¹⁹ MCR 1.107. The majority refers to this rule as the “singular/plural canon.”

²⁰ MCL 8.3b.

²¹ See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 129-130.

court rule. Rather, the majority reaches its conclusion by using the number canon to make plural every term that is shown in brackets above, *except* the word “sentence” in the phrase “the maximum possible prison sentence.” But the number canon should apply to each noun in MCR 6.302(B). As stated, the canon dictates that singular nouns may be made plural “where appropriate,”²² and I see no textual reason why it is inappropriate to read “sentence” as “sentences” when applying the canon to read “offense” as “offenses.” Instead of using “common sense and everyday linguistic experience”²³ to apply the number canon, the majority’s usage drastically changes the meaning of the very object it purports to interpret. This application of the number canon introduces an entirely new concept—“the maximum possible [aggregate] prison sentence”—in order to advance a policy goal.

The majority attempts to justify its application of the number canon on the basis that

a defendant must not only understand the maximum possible “sentence” for each separate offense, but also that for the range of “offenses” of which he or she has been convicted, some of which may be viewed by the law as interconnected in a way that carries independent sentencing consequences. Then, and only then, can a defendant fully apprehend the true *maximum term of incarceration* that he or she faces

This may well be a laudable aim, but it is not a ground upon which to base the application of a canon of construction.

The majority opinion also states:

²² MCR 1.107.

²³ *Reading Law*, p 130.

Even, however, if we read “sentence” in the plural as the dissent would have us do, we reach the same conclusion. That is, if a defendant must be apprised of the “maximum possible prison *sentences* for the *offenses*,” the trial court would still be required to inform the defendant of the court’s discretionary consecutive-sentencing authority because where “sentences” are imposed, and indeed only where “sentences” are imposed, the possibility of a consecutive sentence becomes a possibility affecting the defendant’s “maximum possible prison sentence” on such multiple “sentences.” And thus to ensure the defendant’s full understanding of the plea, he or she must be apprised of the court’s discretionary consecutive-sentencing authority.

But this alternative construction of MCR 6.302 imposes on trial courts an obligation that is not expressed in the court rule: the extrapolation of a maximum possible aggregate prison sentence when a defendant pleads guilty or no contest to multiple offenses. Further, in positing its alternative analysis, the majority fails to consider the entire context of MCR 6.302(B). The phrase—as construed using the number canon—“maximum possible prison sentence[s] for the offense[s]” within MCR 6.302(B)(2) does not stand alone and, in context, must be considered along with MCR 6.302(B)(1), which, when likewise construed using the number canon, speaks to “name[s] of the offense[s].” As stated, just as Subsection (1) requires a trial court to inform a defendant of each name of each offense, so Subsection (2) requires a trial court to inform a defendant of each maximum possible sentence, not the maximum possible aggregate sentence.

I will not dispute the notion that information in regard to consecutive sentences is “critical to a pleading individual” and “integral to a fully understanding plea.” Nor do I dismiss the majority’s assertion that a “defendant’s [consecutive] sentences are neither viewed nor imposed in isolation, and for the defendant

personally, understanding fully the consequences and implications of a plea is not some academic exercise but an intensely practical and life-altering exercise by which he or she might reasonably compare the wisdom of a guilty or no-contest plea with the merits of proceeding to trial.” These concerns may justify amending the court rules to require a trial court to advise a defendant under MCR 6.302(B) of:

(2) the maximum possible prison sentence for the offense[, including, if applicable, whether the law permits or requires consecutive sentences,] and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c.

But the current language of MCR 6.302(B) does not require that a trial court advise a defendant of the possibility that the sentence for the offense may be imposed consecutively to another sentence. Defendant’s supplemental brief and the amicus briefs presented on defendant’s behalf all but concede the point. Defendant’s supplemental brief does not rely on the actual text of MCR 6.302(B) to support his interpretation. Rather, he only argues under caselaw that he was “not advised of [the] ‘true sentence’ he could receive.”²⁴ The amicus brief of the Criminal Defense Attorneys of Michigan admits that “the Michigan Rules of Court do not require a warning on consecutive sentencing during the plea hearing” Our Attorney General has taken the very unusual position of filing an amicus brief against the position of her office. In so

²⁴ In support of this argument, defendant cites *People v Brown*, 492 Mich 684, 702; 822 NW2d 208 (2012). The majority opinion does not embrace defendant’s position, concluding instead that “[o]ur interpretation of MCR 6.302(B)(2) is . . . consistent with this Court’s decision in *Brown*.”

doing, she does not argue that MCR 6.302(B) requires a trial court to extrapolate the maximum possible sentence that can be imposed when a defendant pleads guilty or no contest to multiple offenses. Instead she argues that due process requires us to amend our court rule.

Last, the language mentioned above as a suggestion to amending MCR 6.302(B) is the exact language that this Court declined to adopt in 1985.²⁵ As the prosecution highlights, this Court has twice before considered amending the court rules to expressly provide that trial courts advise defendants of the possible effect on the maximum aggregate sentence resulting from the imposition of consecutive sentences, but the Court has declined to do so. First, in the early 1970s this Court created the Supreme Court Guilty Plea Standards Committee.²⁶ The Court offered Suggested Guilty Plea Taking Guidelines as a starting point for the committee's work and suggested that the new rule require trial courts to "personally inform defendant of the maximum sentence prescribed by law and, if there is a mandatory minimum sentence, the minimum sentence prescribed by law . . . [.]"²⁷ Yet, in a footnote attached to that suggested rule, this Court drew the committee's attention to Section 1.4(c)(i) of the American Bar Association (ABA) Standards Relating to Pleas of Guilty, which provided that the trial court must inform the defendant "of the maximum possible sentence on the charge *including that possible from consecutive sentences* [.]"²⁸

²⁵ Proposed Rules of Criminal Procedure, 422A Mich 1, 113 (1985).

²⁶ *People v Williams*, 386 Mich 277, 293-295; 192 NW2d 466 (1971).

²⁷ *Id.* at 303.

²⁸ *Id.* at 303 n 9 (emphasis added).

Several months later, the committee proposed a rule that required the trial court to inform the defendant of “the maximum sentence and the mandatory minimum sentence, if any, for the offense to which the plea is offered[.]”²⁹ Missing from the committee’s proposal was the ABA’s consecutive-sentence language that the Court highlighted for the committee. The Court adopted the committee’s proposed rule without change.³⁰

Then, on November 4, 1981, the Court issued a proposed amendment to the court rules that would require that trial courts inform defendants of “the maximum possible prison sentence for the offense, including that possible from consecutive sentences[.]”³¹ This Court never adopted the proposed additional language.

In addition, as highlighted by amicus Prosecuting Attorneys Association of Michigan, a Criminal Procedure Rules Committee submitted Proposed Rules of Criminal Procedure on August 5, 1985, which were published for comment by the Court.³² The version of MCR 6.302(A)(2) drafted by the committee required that when taking a plea the trial court inform the defendant of “the mandatory minimum penalty, if any, and the maximum possible penalty for the offense, *including, if applicable, whether the law permits or requires consecutive sentences or precludes probation or*

²⁹ *In the Matter of the Amendment of GCR 1963, 785*, unpublished order of the Michigan Supreme Court, entered May 15, 1972, p 3 (publishing proposal for public comment).

³⁰ GCR 1963, 785, 389 Mich liii, lv (1973) (promulgating revised court rule).

³¹ Proposed amendment to GCR 1963, 785, unpublished order of the Michigan Supreme Court, entered November 4, 1981, p 1.

³² 422A Mich at 115.

parole.”³³ The Court, however, in adopting and modifying the committee proposals, removed the provision that a defendant pleading guilty be advised of the consecutive-sentence ramifications of the plea.³⁴ While the crux of my analysis is based on the text of the court rule, that these amendments were proposed and rejected provides further indication that the common understanding of the court rule was that it did not require defendants to be notified of the possibility of consecutive sentencing.

B. DUE PROCESS DOES NOT REQUIRE THAT TRIAL COURTS INFORM DEFENDANTS OF POTENTIAL CONSECUTIVE SENTENCES

Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law.³⁵ Due process requires that a

³³ *Id.* (emphasis added).

³⁴ Perhaps one reason the Court declined to adopt these amendments is because it may be difficult, as a practical matter, for the trial court to know at the time of the plea hearing that a statute allowing for consecutive sentencing applies to the defendant. As the prosecution explained in its brief, in some situations, such as if a second offense occurs in another county, the trial court may not be aware that consecutive sentencing is a possibility at the time the defendant pleads guilty. The growing number of statutes allowing for consecutive sentences only makes it more difficult for a trial court to know at the plea hearing whether such a statute applies. Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U Mich J L Reform 645, 681 (2014) (“Before 1990, there were thirteen consecutive sentencing statutes in Michigan. From 1990 to 2013, the Legislature added twenty-nine new consecutive sentencing provisions.”). Nevertheless, as stated, I am open to considering amending the court rules to require that defendants be informed of the possibility of consecutive sentences, but I believe that the administrative process would be a better avenue through which to flesh out these kinds of practical concerns.

³⁵ US Const, Am XIV; Const 1963, art 1, § 17.

criminal defendant pleading guilty do so (1) competently, (2) voluntarily, (3) knowingly, and (4) with the benefit of effective assistance of counsel.³⁶ This Court has previously acknowledged that “the requirements of constitutional due process . . . might not be entirely satisfied by compliance with subrules (B) through (D) [of MCR 6.302].”³⁷

Here, only the third constitutional requirement is at issue. To satisfy this requirement, a defendant must have sufficient information to ensure that his or her decision is an “intelligent choice among the alternative courses of action open to the defendant.”³⁸ The defendant must also have some understanding of the option he or she is choosing. That is, the defendant must be aware of “the true nature of the charge” against him or her³⁹ as well as “the direct consequences” of entering a guilty plea.⁴⁰

Defendant first argues that the “possibility of consecutive sentencing violates Due Process because consecutive sentencing is ‘part of the sentence itself,’ and would be a ‘direct’ rather than ‘collateral’ consequence.” Defendant relies on this Court’s decision in *People v Cole*,⁴¹ which considered whether constitutional due process requires a trial court to inform a defendant pleading guilty or no contest to first-degree

³⁶ See, e.g., *Kercheval v United States*, 274 US 220, 223; 47 S Ct 582; 71 L Ed 1009 (1927).

³⁷ *People v Cole*, 491 Mich 325, 332; 817 NW2d 497 (2012).

³⁸ *North Carolina v Alford*, 400 US 25, 31; 91 S Ct 160; 27 L Ed 2d 162 (1970).

³⁹ *Smith v O’Grady*, 312 US 329, 334; 61 S Ct 572; 85 L Ed 859 (1941).

⁴⁰ *Brady v United States*, 397 US 742, 755; 90 S Ct 146; 325 L Ed 2d 747 (1970) (quotation marks and citation omitted).

⁴¹ *Cole*, 491 Mich 325.

criminal sexual conduct (CSC-I)⁴² or second-degree criminal sexual conduct (CSC-II)⁴³ that he or she will be sentenced to mandatory lifetime electronic monitoring (LEM).⁴⁴ When *Cole* was decided, MCR 6.302(B) did not explicitly mandate that the trial court notify a defendant that he or she would be subject to mandatory LEM under MCL 750.520c(2)(b).⁴⁵ Central to *Cole*'s conclusion that due process required the trial court to inform a defendant of the LEM requirement is that the "Legislature chose to include the mandatory [LEM] requirement in the penalty sections of the CSC-I and CSC-II statutes, and that both statutes can be found in the Michigan Penal Code, which describes criminal offenses and prescribes penalties."⁴⁶ Further, the *Cole* Court noted that "both [LEM] provisions provide that 'the court *shall sentence* the defendant to [LEM] . . .'" Last, the *Cole* Court observed that the CSC-II statute provides that the sentence of [LEM] is "[i]n addition to the penalty specified in subdivision (a)," MCL 750.520c(2)(b), and the CSC-I statute provides similarly that LEM is "[i]n addition to any other penalty imposed under subdivision (a) or (b)," MCL 520b(2)(d).⁴⁷ The *Cole* Court concluded that "the Legislature intended mandatory [LEM] to be an additional punishment and part of the sentence itself when required by the CSC-I or CSC-II statutes."⁴⁸

⁴² MCL 750.520b(2)(d).

⁴³ MCL 750.520c(2)(b).

⁴⁴ *Cole*, 491 Mich at 327.

⁴⁵ See *id.* at 330 n 4.

⁴⁶ *Id.* at 335.

⁴⁷ *Id.* at 335-336.

⁴⁸ *Id.* at 336.

Cole is simply inapplicable to the instant case because the provision allowing for the imposition of a consecutive sentence, MCL 768.7b, is not part of the sentence itself. Unlike the provision at issue in *Cole*, MCL 768.7b is not found in the statute setting forth the crimes and the applicable penalty, MCL 257.625, but is found in the Code of Criminal Procedure. Further, and more substantively, MCL 768.7b is not potential punishment that relates to the offenses to which a defendant pleads guilty. MCL 768.7b is offense-neutral, and it broadly applies “if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony.” In other words, MCL 768.7b does not authorize additional punishment for conduct that gave rise to offenses; it only authorizes punishment because a defendant brazenly committed a second felony in the relatively short period of time during which a previous felony charge against that defendant was pending. In contrast, the LEM requirement considered in *Cole* was clearly intended by the Legislature to punish the defendant for the very offense to which he pleaded guilty. In this sense, a potential consecutive sentence under MCL 768.7b is a “collateral” consequence of pleading guilty to the offenses.

With that said, I will not dispute that the imposition of consecutive sentences is “a particularly severe ‘penalty.’”⁴⁹ But due process does not require that trial courts advise defendants in regard to all severe penalties.⁵⁰ Rather, this advisory responsibility lies primarily with defense counsel, whose effective assistance is

⁴⁹ *Padilla v Kentucky*, 559 US 356, 365; 130 S Ct 147; 3176 L Ed 2d 28 (2010) (citation omitted).

⁵⁰ *Id.*

guaranteed to all criminal defendants by the United States and Michigan Constitutions.⁵¹

Defendant next argues that consecutive sentencing is a direct consequence because the Legislature intended to impose punishment. Again, I will not dispute that the imposition of consecutive sentences is “a particularly severe ‘penalty.’”⁵² Nor will I dispute that the general purpose of consecutive sentencing is to “enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts.”⁵³ More specific to this case, I agree with defendant that

[t]he intended effect of § 7b can best be seen by analyzing the deterrence situation that exists before and after a felony has been charged. In general, once a criminal defendant has been charged with a felony, the level of deterrence against his commission of a second felony drops. Section 7b restores the level of deterrence to its pre-charge plateau.^[54]

The fact nonetheless remains that consecutive sentencing was merely a possibility at the plea hearing. The discretionary authority to impose consecutive sentences does not represent a definite, immediate, or automatic effect because it depends on the trial court’s later exercise of discretion.⁵⁵ Only after the

⁵¹ 5 LaFave *et al*, *Criminal Procedure* (4th ed), § 21.4(d) (noting that a common thread among the cases rejecting due-process challenges “is that defense counsel should be expected to discuss with his client the range of risks attendant his plea”).

⁵² *Padilla*, 559 US at 365 (citation omitted).

⁵³ *People v Smith*, 423 Mich 427, 445; 378 NW2d 384 (1995).

⁵⁴ *People v Williams*, 89 Mich App 633, 637; 280 NW2d 617 (1979).

⁵⁵ A solid majority of federal circuit courts agrees. See, e.g., *United States v Ocasio-Cancel*, 727 F3d 85, 90 (CA 1, 2013); *Wilson v McGinnis*, 413 F3d 196, 200 (CA 2, 2005); *Paradiso v United States*, 482 F2d 409,

court considers the PSIR and the particular circumstances of a defendant's personal and criminal history can the court fashion an individualized sentence that, in the court's discretion, may merit consecutive sentences.

This is not an unusual practice. Many of the decisions a trial court makes following a defendant's entry of a guilty plea have a substantial influence on a defendant's ultimate sentence. For instance, a court's sentencing guidelines scoring decisions later inform a defendant's ultimate sentence. Likewise, the trial court may exercise discretion by sentencing a defendant within or perhaps outside the sentencing guidelines. In my view, the possibility of consecutive sentences pursuant to MCL 768.7b is a "collateral" consequence of defendant's guilty pleas, not a "direct result" of the guilty pleas, because the trial court had discretion whether to impose consecutive sentences.

IV. CONCLUSION

The plain language of MCR 6.302(B) does not support the conclusion that trial courts must advise criminal defendants that sentences may potentially be imposed consecutively to one another. Further, I disagree with the majority's decision to add by judicial construction that which this Court has repeatedly declined to add in drafting MCR 6.302(B). Lastly, the possibility of consecutive sentences pursuant to MCL 768.7b is a "collateral" consequence of defendant's guilty pleas,

415 (CA 3, 1973); *United States v Fentress*, 792 F2d 461, 465 (CA 4, 1986); *United States v Saldana*, 505 F2d 628, 629 (CA 5, 1974); *United States v Gaskin*, 587 F Appx 290, 297-298 (CA 6, 2014); *Faulisi v Daggett*, 527 F2d 305, 309 (CA 7, 1975); *Clemmons v United States*, 721 F2d 235, 238 (CA 8, 1983); *United States v Rubalcaba*, 811 F2d 491, 494 (CA 9, 1987); *United States v Hurlich*, 293 F3d 1223, 1231 (CA 10, 2002); *United States v Humphrey*, 164 F3d 585, 587-588 (CA 11, 1999).

not a “direct result” of the guilty pleas, because the trial court had discretion whether to impose consecutive sentences. Accordingly, due process did not require that the trial court inform defendant that he was subject to consecutive sentencing. I respectfully dissent.

VIVIANO, J., concurred with ZAHRA, J.

PEOPLE v WANG

Docket No. 158013. Argued on application for leave to appeal November 7, 2019. Decided May 13, 2020.

Xun Wang was convicted following a bench trial in the Ingham Circuit Court, Rosemarie E. Aquilina, J., of two counts of Medicaid fraud under MCL 400.607 of the Medicaid False Claim Act (MFCA), 400.601 *et seq.*, and one count of unauthorized practice of a health profession under MCL 333.16294 of the Public Health Code, 333.1101 *et seq.* Defendant was from China, where she had previously earned a medical degree and completed two years of a three-year residency program. She moved to the United States in 2001, after which she earned a Ph.D. in basic medical science. In 2013, defendant began a two-month student rotation through the AmeriClerkships program working in the Livernois Family Clinic, which was owned by Dr. Murtaza Hussain. After completing her student rotation, defendant volunteered at the clinic before eventually becoming a part-time employee. Notwithstanding her education in the United States and abroad, defendant was never licensed to practice in a health profession in this country. The Michigan Department of the Attorney General's Health Care Fraud Division discovered that a high volume of narcotics prescriptions were being written at the clinic, and in 2014, the department conducted an investigation, during which Drew Macon and Lorrie Bates, special agents with the department, separately went to the clinic while posing as patients with Medicaid benefits. Defendant saw both agents when they posed as patients, identified herself as Hussain's assistant, and took written notes of their medical histories. Defendant also performed physical examinations, answered their questions, and wrote prescriptions for both agents on a prescription pad that Hussain had previously signed, including a prescription for Ambien, a Schedule 4 controlled substance. The patients' notes were entered into the clinic's computer system and were electronically signed by Hussain; the notes indicated that both defendant and Hussain had seen the agents. The Medicaid processing system reflected that claims were submitted for both agents' treatment and were paid to Hussain for a total of \$260. Defendant was charged with two counts of Medicaid fraud under

MCL 400.607 and one count of unauthorized practice of a health profession under MCL 333.16294. The trial court sentenced her to concurrent terms of 365 days in jail for each conviction, which was suspended upon the successful completion of five years' probation and the payment of \$106,454 in fines and costs. Defendant appealed. In an unpublished per curiam opinion issued on May 10, 2018 (Docket No. 336673), the Court of Appeals, METER, P.J., and GADOLA and TUKEL, JJ., affirmed defendant's convictions but vacated the trial court's imposition of fines and remanded for resentencing to allow the trial court to articulate why the amount assessed in fines was proportionate. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 503 Mich 987 (2019).

In an opinion by Justice ZAHRA, joined by Chief Justice MCCORMACK and Justices VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

Defendant was not a licensed health professional and therefore was categorically not authorized to dispense prescriptions to patients; accordingly, the lower courts did not err by determining that there was sufficient evidence to convict defendant of the unauthorized practice of a health profession under MCL 333.16294. However, the evidence presented in this case did not establish that defendant was aware or should have been aware that the patients at issue were Medicaid beneficiaries and that their treatment was substantially certain to cause the payment of a Medicaid benefit under MCL 400.607; therefore, defendant's convictions of Medicaid fraud were reversed.

1. MCL 333.16294 provides, in pertinent part, that except as provided in MCL 333.16215 (the delegation exception), an individual who practices or holds himself or herself out as practicing a health profession regulated by Article 15 of the Public Health Code without a license or registration is guilty of a felony. The practice of medicine is a "health profession" within the meaning of MCL 333.16294 because it is regulated and licensed under Article 15. The delegation exception outlined in MCL 333.16215(1) provides that a licensee who holds a license other than a health profession subfield license may delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions when the acts, tasks, or functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision. MCL 333.16215(1) further pro-

vides that a licensee shall not delegate an act, task, or function under MCL 333.16215 if the act, task, or function, under standards of acceptable and prevailing practice, requires the level of education, skill, and judgment required of the licensee. In this case, defendant argued that the delegation exception permitted her conduct. However, the delegation exception had no application because defendant engaged in the performance of functions that could not be delegated. Specifically, the delegation exception did not countenance defendant's issuance of prescriptions for controlled substances. Under MCL 333.17708(3), a prescription generally means an order by a prescriber to fill, compound, or dispense a drug or device, and MCL 333.17708(2) defines "prescriber," in pertinent part, as a licensed health professional. Defendant stipulated that she was not licensed to practice a health profession; therefore, defendant was categorically not authorized to dispense prescriptions to patients. Accordingly, the lower courts did not err by determining that there was sufficient evidence to convict defendant of the unauthorized practice of a health profession.

2. Under MCL 400.607(1), a person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the Social Welfare Act, MCL 400.1 *et seq.*, upon or against the state, knowing the claim to be false. To sustain a conviction for Medicaid fraud, the prosecution must therefore prove (1) the existence of a claim, (2) that the accused makes, presents, or causes to be made or presented to the state or its agent, (3) the claim is made under the Social Welfare Act, (4) the claim is false, and (5) the accused knows the claim is false. MCL 400.602(f) provides that "knowing" and "knowingly" mean that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a Medicaid benefit. "Knowing" and "knowingly" include acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of specific intent to defraud is not required. Additionally, intent and knowledge can be inferred from one's actions, and when knowledge is an element of an offense, it includes both actual and constructive knowledge. The actual- or constructive-knowledge element requires knowledge of both the falseness of a claim and that the claim is substantially certain to cause payment of a benefit. In this case, a defense witness who was an employee of the clinic involved in Medicaid billing testified that defendant had no involvement in the billing process. Defendant testified that she was aware that some of the patients at the clinic were Medicaid

patients but that she did not pay attention to her patients' insurance coverage. Furthermore, the prosecution presented no evidence that defendant was trained in or otherwise possessed knowledge of the clinic's billing practices. Hussain also testified that billing was not discussed with individuals who came to the clinic through the AmeriClerkships program. Therefore, the evidence in this case did not demonstrate actual or constructive knowledge that defendant's conduct was substantially certain to cause the payment of a Medicaid benefit. There was no evidence that defendant had possession of a paper chart with the patients' Medicaid status or that defendant was aware of any particular patient's insurance status. The trial court improperly imputed knowledge to defendant with regard to Medicaid billing. The critical inquiry was whether defendant had knowledge from which she was aware or should have been aware that her conduct in treating Macon and Bates was substantially certain to cause the payment of a Medicaid benefit; general knowledge that some source of insurance will be billed is simply not enough. Accordingly, the trial court's findings were speculative and not reasonably drawn inferences from the evidence that the trial court found determinative. The Court of Appeals likewise erred in its determination that defendant's general knowledge of the American healthcare system or her general knowledge that the clinic was not a free clinic provided evidence that defendant had satisfied the "knowing" element of a Medicaid fraud conviction. The evidence presented in this case did not establish that defendant was aware or should have been aware that the patients at issue, i.e., the agents, were Medicaid beneficiaries and that their treatment was substantially certain to cause the payment of a Medicaid benefit. Finally, there was no evidence presented that defendant should have familiarized herself with the insurance status of clinic patients. Therefore, the evidence did not support a finding that defendant acted in deliberate ignorance of the truth or falsity of facts or acted in reckless disregard of the truth or falsity of facts.

Defendant's conviction for the unauthorized practice of a health profession affirmed, defendant's convictions of Medicaid fraud reversed, and case remanded to the Ingham Circuit Court in accordance with the Court of Appeals' previous judgment to analyze the proportionality of the fines assessed against defendant.

Justice VIVIANO, concurring, agreed with the majority's decision to affirm defendant's conviction for unauthorized practice of a health profession and to reverse defendant's convictions for

Medicaid fraud but wrote separately to raise some concerns regarding the MFCA's criminal-liability provisions. Consideration of how the MFCA developed over time, and comparison of its provisions to a somewhat analogous federal statute, the False Claims Act, 31 USC 3729(a)(1)(B), revealed a number of problematic aspects of the MFCA. The Michigan Legislature engrafted civil-liability concepts from the federal act onto preexisting language in the MFCA without, it seems, careful thought about how and whether those concepts fit in the criminal-liability context. Justice VIVIANO therefore wrote to encourage the Legislature to consider amending the MFCA to clarify its meaning.

Justice MARKMAN, concurring in part and dissenting in part, agreed that defendant's conviction of the unlawful practice of medicine should be affirmed and that defendant did not possess actual knowledge that the agents were purporting to be Medicaid patients, but he would have affirmed defendant's convictions of Medicaid fraud in view of the definition of "knowing" set forth in MCL 400.602(f) and the appellate standard of review governing defendant's sufficiency-of-the-evidence challenge. When considering a sufficiency-of-the-evidence challenge, a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the verdict, and because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence suffices to establish the defendant's state of mind, which can be inferred from all the evidence presented. The definition of "knowing" and "knowingly" in MCL 400.602(f) mirrors the federal definition of those terms within the context of false claims against the government and includes acting in "deliberate ignorance of the truth or falsity of facts." "Deliberate ignorance" exists when the evidence indicates that the defendant, knowing or suspecting that he or she is involved in "shady dealings," takes steps to make sure that he or she does not acquire full or exact knowledge of the nature and extent of those dealings. Defendant in this case had seven years of medical training in China and studied and worked in medical-related fields since she entered the United States in 2001, including spending nine months at the Livernois Family Clinic prior to the conduct underlying her criminal conviction. Moreover, she knew of, but had not satisfied, the requirements for obtaining a license to lawfully practice medicine so as to allow billing for her services. Given her experience and her efforts to obtain a license, defendant was or should have been aware of four facts such that a reasonable trier of fact could conclude that defendant acted with deliberate ignorance of the ultimate fact that a false claim would be submitted to Medicaid as a result of

her services: (1) that it was unlawful for her to practice medicine; (2) that a bill would be generated for her services, even when Dr. Hussain was not present; (3) that it was unlawful and fraudulent to bill Medicaid for her services; and (4) that a significant percentage of the clinic's patients were Medicaid recipients, such that the clinic would bill the government for her services. From these facts, a reasonable trier of fact could conclude that defendant knew that her employment at the clinic was an integral part of some illicit scheme. Defendant then avoided three readily available means of determining whether a given patient was a Medicaid patient: (1) defendant could have asked the clinic receptionist whether a patient was a Medicaid recipient, (2) defendant could have reviewed the patients' paper charts, which contained insurance information and a photocopy of their Medicaid cards, and (3) defendant could have expressly asked the patients themselves whether they were Medicaid patients. Therefore, Justice MARKMAN would have affirmed defendant's convictions of Medicaid fraud.

FRAUD — MEDICAID FRAUD — MEDICAID FALSE CLAIM ACT — KNOWLEDGE ELEMENT.

To sustain a conviction for Medicaid fraud under the Medicaid False Claim Act, MCL 400.601 *et seq.*, the prosecution must prove (1) the existence of a claim, (2) that the accused makes, presents, or causes to be made or presented to the state or its agent, (3) the claim is made under the Social Welfare Act, MCL 400.1 *et seq.*, (4) the claim is false, and (5) the accused knows the claim is false; when reviewing the element of knowledge, the critical inquiry is whether a defendant was aware or should have been aware that his or her conduct was substantially certain to cause the payment of a Medicaid benefit; general knowledge that some source of insurance will be billed for medical treatment is insufficient.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *Brendan Maturen*, Assistant Attorney General, for the people.

Patricia A. Maceroni for defendant.

Amici Curiae:

Kerr, Russell and Weber, PLC (by *Joanne Geha Swanson*) for the Michigan State Medical Society and the American Medical Association.

ZAHRA, J. Defendant was convicted after a bench trial of two counts of Medicaid fraud under MCL 400.607 and one count of unauthorized practice of a health profession under MCL 333.16294. The Court of Appeals affirmed the convictions but vacated the imposition of fines and remanded for resentencing to allow the trial court to articulate why the amount assessed in fines was proportionate.¹ Defendant now appeals in this Court, challenging the sufficiency of the evidence. We affirm defendant's conviction of unauthorized practice of a health profession because defendant engaged in the nondelegable task of prescribing controlled substances. We reverse defendant's convictions of Medicaid fraud because the evidence presented at trial and relied upon by the trial court did not support the conclusion that defendant knew or should have known that the nature of her conduct was substantially certain to cause the payment of a Medicaid benefit.² Lastly, we remand this matter to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant is from China, where she previously earned a medical degree and completed a two-year residency. She moved to the United States in 2001, after which she earned a Ph.D. in basic medical science from Purdue University's veterinary school and began work as a medical researcher at the University of Michigan's medical school. In 2013, she began a two-month student rotation through the AmeriClerkships program working in the Livernois Family Clinic, which

¹ *People v Wang*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2018 (Docket No. 336673), p 9.

² MCL 400.607(1); MCL 400.602(f).

was owned by Dr. Murtaza Hussain. After completing her student rotation, defendant volunteered at the clinic before eventually becoming a part-time employee. Notwithstanding her education in the United States and abroad, defendant has never been licensed to practice in a health profession in this country.

The Michigan Department of the Attorney General's Health Care Fraud Division discovered that a high volume of narcotics prescriptions were being written at the clinic. In 2014, the department conducted an investigation of the clinic, during which Drew Macon and Lorrie Bates, special agents with the department, separately went to the clinic while posing as patients with Medicaid benefits.

Macon went to the clinic in August 2014, posing as a new patient. He presented a Medicaid insurance card during the check-in process. When defendant called Macon into a patient room, she weighed him, took his blood pressure, and obtained information regarding the reason for his visit and his medical history. Macon informed defendant that he had attention deficit disorder and asthma, and Macon requested prescriptions for vitamin D, an inhaler, Klonopin,³ and Adderall.⁴ Defendant left the room for approximately eight minutes. When she returned, she stated that Macon would need to forward his out-of-state medical records to the office to receive Adderall and gave Macon a release form and instructions. Defendant then gave Macon prescriptions for vitamin D, Klonopin, and the inhaler. The signature on the prescriptions was Hussain's.

³ Klonopin is the trade name of clonazepam, a Schedule 4 controlled substance. See MCL 333.7218(1)(a).

⁴ Adderall is an amphetamine, a Schedule 1 controlled substance. See MCL 333.7212(1)(c).

In December 2014, Bates went to the clinic, also posing as a new patient. A medical technician accompanied Bates into an exam room and noted Bates's complaints of headaches and insomnia. The medical technician took Bates's blood pressure, medical history, and made some written notes on a piece of paper attached to a clipboard. Taking the clipboard, the medical technician left after informing Bates that the doctor would be in shortly. Defendant, wearing a stethoscope and a long, white lab coat, was the next person to enter the exam room. Defendant stated that she was Hussain's assistant and asked about the reason for Bates's visit. When Bates responded that she was having difficulty sleeping and combating headaches, defendant obtained further information about these complaints. Defendant also took written notes of Bates's medical history. Defendant then asked Bates if she had taken medication for the headaches and stated that medication could be provided to help. Bates declined a Pap smear, and at that point, defendant left the room for approximately six minutes. When defendant returned, she inquired as to Bates's pharmacy preference. Bates responded, and defendant typed something into her cellular phone before informing Bates that a prescription had been sent to a pharmacy. A physical examination was then performed, in which defendant shined a flashlight into Bates's eyes and had Bates alternate standing and sitting down. When Bates asked whether defendant was a doctor, defendant responded, "No, I'm just his assistant. He's not here today." At this point, defendant gave some details about the headache medication that had just been prescribed. Defendant asked if there was "anything else," and Bates called attention to her insomnia, to which defendant replied with recommendations of taking melatonin, drinking milk before going to sleep, and

spending time relaxing. Defendant added that if these techniques were unsuccessful, Bates could use a low dose of a “controlled medication.” Defendant produced a prescription pad, which had been previously signed by Hussain, and wrote a prescription for Ambien.⁵ Before the interaction concluded, Bates asked how long defendant had been a doctor. Defendant responded that she had been a doctor for “one year.” Lastly, defendant offered Bates advice regarding “sleep hygiene.”

Both agents’ patient progress notes were entered into the clinic’s computer system and were electronically signed by Hussain. The notes indicated that both defendant and Hussain had seen the agents. The Medicaid processing system reflected that claims were submitted for both agents’ treatment and were paid to Hussain for a total of \$260.

A search warrant was executed at the clinic. There, agents found prescription pads that were presigned by Hussain. Defendant was not present during the search, and so Bates went to defendant’s home. There, defendant agreed to speak with agents. She stated that she was not a doctor and that she only worked under Hussain’s guidance. She added that if she saw a patient when Hussain was not in the office, she would contact him via phone so that he could make final decisions.

Defendant was charged with two counts of Medicaid fraud under MCL 400.607 and one count of unauthorized practice of a health profession under MCL 333.16294. Defendant waived her right to a trial by jury, and a bench trial followed. The parties stipulated

⁵ Ambien, which is a brand name for Zolpidem, is a Schedule 4 controlled substance. Mich Admin Code, R 338.3123(1)(hhh); *Bloomfield Twp v Kane*, 302 Mich App 170, 184; 839 NW2d 505 (2013).

that defendant had no license to practice in a health profession in 2014 or 2015 and that Hussain was not present at the clinic when Macon and Bates visited. Defendant was found guilty of all charges. In January 2017, the trial court sentenced her to concurrent terms of 365 days in jail for each conviction, which was suspended upon the successful completion of five years' probation and the payment of \$106,454 in fines and costs.

In her appeal of right, defendant challenged the sufficiency of the evidence supporting her convictions as well as the proportionality of her fines. In an unpublished per curiam opinion, the Court of Appeals affirmed her convictions but vacated the trial court's imposition of fines and remanded for resentencing to allow the trial court to articulate why the amount assessed in fines was proportionate.⁶ Defendant now seeks leave to appeal in this Court, and on March 27, 2019, this Court entered an order directing oral argument on the application and requiring the parties to address:

(1) whether the statutory exception in MCL 333.16294 is an element of the offense for which the prosecutor has the burden of proof, see *People v Rios*, 386 Mich 172[; 191 NW2d 297] (1971); but see *People v Langlois*, 325 Mich App 236[; 924 NW2d 904] (2018);^[7] (2) if the statutory exception is an element of the offense, whether the Court of Appeals erred in holding that the evidence was sufficient to sustain the defendant's conviction under MCL 333.16294 and specifically, whether the Court of Appeals erred in concluding that the defendant's actions

⁶ *Wang*, unpub op at 9.

⁷ We need not address this question now because defendant engaged in the performance of tasks that simply could not be delegated *at all*. Thus, whether the delegation exception is an element of the unauthorized practice of a health profession has no bearing on our opinion.

were consistent with the practice of medicine and therefore could not be delegated to her under MCL 333.16215; and (3) if the statutory exception is not an element of the offense, whether defense counsel was ineffective for failing to raise a delegation defense and bring the relevant statutory provisions to the trial court's attention. In addition, the appellant shall address whether the evidence was sufficient to sustain the defendant's convictions under MCL 400.607(1), and specifically whether the evidence was sufficient to show that the defendant was in possession of facts under which she was aware or should have been aware that her conduct was substantially certain to cause the payment of a Medicaid benefit. See MCL 400.602(f).^[8]

II. ANALYSIS

A. STANDARD OF REVIEW

Defendant opted for a bench trial, waiving her right to a trial by jury. Bench trials stand in sharp contrast to jury trials. A jury is required to consider all the evidence and to render a unanimous verdict, without the need for explanation.⁹ In a bench trial, however, the trial court is obligated to “find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record.”¹⁰ Because of this, reviewing courts are provided greater insight into the specific evidence found by the trial court to support verdicts in bench trials.

Defendant contends that the evidence presented at trial was insufficient to sustain her convictions.

⁸ *People v Wang*, 503 Mich 987, 987 (2019).

⁹ See MCR 6.410(B).

¹⁰ MCR 6.403. See also *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992).

Challenges to the sufficiency of the evidence are reviewed de novo.¹¹ “In evaluating defendant’s claim regarding the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt.”¹² The prosecution submits that defendant’s convictions are largely supported by circumstantial evidence. “Circumstantial . . . evidence is evidence of a fact, or a chain of facts or circumstances, that, by indirection or inference, carries conviction to the mind and logically or reasonably establishes the fact to be proved.”¹³ Circumstantial evidence may sustain criminal convictions, but “the circumstantial proof must facilitate reasonable inferences of causation, not mere speculation.”¹⁴

B. UNAUTHORIZED PRACTICE OF A HEALTH PROFESSION

Under MCL 333.16294, “[e]xcept as provided in section 16215 [known as the delegation exception], an individual who practices or holds himself or herself out as practicing a health profession regulated by this article without a license or registration . . . is guilty of a felony.”¹⁵ The practice of medicine is a “health profession” within the meaning of MCL 333.16294 because it is regulated and licensed under the Public-Health Code.¹⁶ The delegation exception outlined in MCL 333.16215(1) provides that

¹¹ *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

¹² *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

¹³ 4 Michigan Pleading & Practice (2d ed), § 36:313, pp 69-70 (citations omitted).

¹⁴ *Id.* at 70.

¹⁵ Emphasis added.

¹⁶ MCL 333.1101 *et seq.* The “practice of medicine” is defined as “the

a licensee who holds a license other than a health profession subfield license may delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions where the acts, tasks, or functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision. A licensee shall not delegate an act, task, or function under this section if the act, task, or function, under standards of acceptable and prevailing practice, requires the level of education, skill, and judgment required of the licensee under this article.

Defendant argues that the delegation exception permitted her conduct in this case. But the delegation exception has no application here because defendant engaged in the performance of functions that could not be delegated. Specifically, the delegation exception does not countenance defendant's issuance of prescriptions for controlled substances.

Simply stated, defendant's act of prescribing Ambien, a Schedule 4 controlled substance,¹⁷ to Bates was a nondelegable action as a matter of law. Michigan statutory authority, while sometimes difficult to parse, supports this conclusion. A "prescription" in this state generally "means an order *by a prescriber* to fill, compound, or dispense a drug or device"¹⁸ A prescriber, critically, means

diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts." MCL 333.17001(1)(j).

¹⁷ Mich Admin Code, R 338.3123(1)(hhh); *Bloomfield Twp*, 302 Mich App at 184.

¹⁸ MCL 333.17708(3) (emphasis added).

a licensed dentist, a licensed doctor of medicine, a licensed doctor of osteopathic medicine and surgery, a licensed doctor of podiatric medicine and surgery, a licensed physician's assistant, a licensed optometrist . . . , an advanced practice registered nurse . . . , a licensed veterinarian, or another licensed health professional acting under the delegation and using, recording, or otherwise indicating the name of the delegating licensed doctor of medicine or licensed doctor of osteopathic medicine and surgery.^[19]

Defendant stipulated that she was not licensed to practice a health profession in 2014 or 2015.²⁰ Thus, under Michigan law, defendant was categorically not authorized to dispense prescriptions to patients. When she prescribed Ambien to treat Bates's reported difficulty sleeping, she attempted to perform a task that "requires the level of education, skill, and judgment required of" a licensed physician.²¹ Such tasks are nondelegable, and the lower courts therefore did not err by determining that there was sufficient evidence to convict defendant of the unauthorized practice of a health profession.²²

C. MEDICAID FRAUD

Defendant next claims that the evidence was insufficient "to show that the defendant was in possession of facts under which she was aware or should have been

¹⁹ MCL 333.17708(2).

²⁰ Although defendant introduced herself to Bates as Hussain's "assistant," defendant takes care to note, in her supplemental brief, that she did not say that she was a "physician assistant," which is among the types of professionals that, if licensed, may qualify as a "prescriber" under MCL 333.17708(2).

²¹ See MCL 333.16215(1); MCL 333.17708(2).

²² See MCL 333.16215(1). Defendant also raised the issue of ineffective assistance of trial counsel for failure to call the delegation exception to the trial court's attention. Of course, because defendant could not prevail under the delegation exception, trial counsel cannot have been

aware that her conduct was substantially certain to cause the payment of a Medicaid benefit.”²³ The Medicaid False Claim Act²⁴ provides that “[a] person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the social welfare act, 1939 PA 280, MCL 400.1 to 400.119b, upon or against the state, *knowing* the claim to be false.”²⁵ To sustain a conviction for Medicaid fraud, the prosecution must therefore prove:

- (1) the existence of a claim, (2) that the accused makes, presents, or causes to be made or presented to the state or its agent, (3) the claim is made under the Social Welfare Act . . . , (4) the claim is false . . . , and (5) the accused knows the claim is false^[26]

ineffective for failing to call it to the trial court’s attention. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (“Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.”).

²³ *Wang*, 503 Mich at 987.

²⁴ MCL 400.601 *et seq.*

²⁵ MCL 400.607(1) (emphasis added).

²⁶ *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997), citing *In re Wayne Co Prosecutor*, 121 Mich App 798, 801-802; 329 NW2d 510 (1982). Notably, the fourth and fifth elements of Medicaid fraud as outlined by *Orzame* initially required that a claim be “false, *fictitious*, or *fraudulent*,” and . . . [that] the accused knows the claim is false, *fictitious*, or *fraudulent*.” *Orzame*, 224 Mich App at 558 (emphasis added). The emphasized language stems from the original version of MCL 400.607 as enacted in 1977. See 1977 PA 72, effective July 27, 1977; *People v American Med Ctrs of Mich, Ltd*, 118 Mich App 135, 144; 324 NW2d 782 (1982). That language was removed, however, when MCL 400.607 was amended in 1984. See 1984 PA 333, effective December 26, 1984; *Orzame*, 224 Mich App at 558. Even now, after a second amendment to the statute, see 2008 PA 421, effective January 6, 2009, all that the statute requires is that a claim be “false” and that the defendant have knowledge of that falsity, without a distinction for claims that are “fictitious” or “fraudulent,” as opposed to “false.” Nevertheless, Michigan courts continue to refer to the “fictitious, or fraudulent” language, which has not been a part of MCL 400.607(1) for over

MCL 400.602(f) provides:

“Knowing” and “knowingly” means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a medicaid benefit. Knowing or knowingly includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of specific intent to defraud is not required.

With regard to the knowledge element of MCL 400.607(1) and MCL 400.602(f), the Court of Appeals has explained:

“Intent and knowledge can be inferred from one’s actions and, when knowledge is an element of an offense, it includes both actual and constructive knowledge.” *People v American Medical Centers of Michigan, Limited*, 118 Mich App 135, 154; 324 NW2d 782 (1982). Therefore, it is not problematic that these statutes define “knowing” to include “should be aware.” Contrary to defendants’ contention, this actual or constructive knowledge element does not relate solely to knowledge that a claim is filed. The knowledge element relates to both “the nature of his or her conduct *and* that his or her conduct is substantially certain to cause the payment of a [Medicaid or] health care benefit.” . . . Accordingly, the actual or constructive knowledge element of these offenses appropriately requires knowledge of both the falseness of a claim and that the claim is substantially certain to cause payment of a benefit.²⁷

30 years. See, e.g., *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008), quoting *Orzame*, 224 Mich App at 558; *Wang*, unpub op at 7. We take this opportunity to clarify that MCL 400.607(1) now requires, as the fourth and fifth elements of a viable Medicaid fraud conviction, sufficient evidence that the claim at issue was false as defined under the Medicaid False Claim Act, MCL 400.602(d), and that the defendant possessed the requisite knowledge of that falsity. The Legislature has indicated that there is no longer a distinction for claims that are “fictitious” or “fraudulent.”

²⁷ *People v Perez-DeLeon*, 224 Mich App 43, 48-49; 568 NW2d 324 (1997).

Defense witness Darius Baty was an employee of the clinic who was involved in Medicaid billing. He testified that a patient's insurance status was known to the front desk staff, the clinical manager, and the billing staff and that a copy of a patient's Medicaid card would be included in the paper chart and could be seen if one "flipped through the paper chart." He further testified that "a good 50 percent" of the clinic's patients were Medicaid patients. Importantly, Baty added that *defendant had no involvement in the billing process*.²⁸

Defendant testified that she was aware that some of the patients at the clinic were Medicaid patients, but she "never paid attention for their insurance . . ." Defendant explained, "I have this piece of paper,^[29] there's no Medicaid card on it." Defendant said that she thought that insurance information was included in the clinic's electronic medical record system but that she never looked at the medical insurance and did not know how it would be billed. Macon testified that he did not know whether defendant had any knowledge of Medicaid procedures or Medicaid billing and, significantly, the prosecution presented no evidence that defendant was trained in or otherwise possessed knowledge of the clinic's billing practices. To the contrary, defendant testified that she was never trained in billing procedures. Further, Macon could not recall seeing at any time during the investigation any documents pertaining to Medicaid procedures or billing

²⁸ Unsurprisingly, Baty conceded that everyone, including defendant, who had contact with a patient "knew that a bill was going to be generated and sent to somebody so that the clinic could be paid for that patient visit . . ."

²⁹ Defendant appears to refer to a piece of paper on which she took notes during interactions with patients. The other side of this paper contained billing codes, but defendant testified that she was unfamiliar with this side of the form.

that were signed by defendant. Bates likewise did not identify anyone who claimed that defendant was involved in the Medicaid process at all.

Hussain stated that billing was not discussed with individuals who came to the clinic through Ameri-Clerkships. Indeed, during the 22 years in which Hussain owned the clinic, he never trained foreign doctors like defendant in billing. Hussain explained that he was not required to train individuals like defendant in billing, and so it was “never” done. Even when defendant became a paid employee—as opposed to a clerk or volunteer—she was not expected to be involved in Medicaid billing at all, and nothing presented at trial suggests that defendant was knowledgeable or in any way involved in the billing practices of her employer.

The evidence presented in this case simply does not demonstrate actual or constructive knowledge that defendant’s “conduct [was] substantially certain to cause the payment of a medicaid benefit.”³⁰ As to actual knowledge, the prosecution relies on evidence that clinic patients’ charts contained their Medicaid status and copies of their cards. Nevertheless, there is no evidence that defendant had possession of the paper chart, much less that she flipped through it to find the Medicaid information. Significantly, the trial court found defendant to be credible and that she possessed a “truthful nature.” Defendant’s recitation of the evidence is consistent with the other evidence offered at trial—the video in particular—which appears to show that defendant had single sheets of paper on the clipboard with her in the examination room, not a multipage chart. Moreover, defendant testified that

³⁰ See MCL 400.602(f).

she was not aware of any particular patient's insurance status. When reviewing the sufficiency of the evidence, appellate courts must not interfere with the fact-finder's role of deciding credibility.³¹

Notwithstanding the trial court's finding that defendant was truthful and credible, the court nonetheless imputed knowledge to defendant with regard to Medicaid billing. The trial court on two occasions declared that "ignorance of the law" is not an excuse. But the critical question is not whether defendant knew the law. Instead, it is whether reasonable inferences can be drawn from the circumstantial evidence to conclude that defendant knew or should have known that a false claim would be submitted to the state under the Social Welfare Act. On this point the trial court found:

There is evidence that at least half of the money—and it doesn't matter if it's half or any other portion, but I believe the testimony is or was that Livernois Family Medical Services received about half of their income from Medicaid.

This is insufficient evidence to sustain defendant's convictions. Even assuming that this statistic is accurate and that defendant was aware of it, a high percentage of Medicaid patients at the clinic does not establish that defendant had knowledge under which she was aware or should have been aware that her conduct *in treating Macon and Bates* was substantially certain to cause the payment of a Medicaid benefit.³²

The trial court also placed great emphasis on the fact that defendant knew that the clinic would be billing an insurance company for medical care:

³¹ *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992).

³² See MCL 400.602(f).

[T]he form that defendant used, this encounter form, Exhibit B, is not the full form, the other side is the billing form, so defendant clearly knew that there was billing going on to insurance. That there are multiple forms of insurance. This was not her only job. She had multiple experiences. She testified to that. And she clearly knew that her paycheck was derived from insurance, that insurance was going to be billed, that that's what her paycheck was coming from, at least in part—at least in part from Medicaid.

It is unremarkable that any person employed in the healthcare industry would know that a variety of insurance companies will be billed for services rendered. It is equally unremarkable that such person may infer that his or her employment is funded in part by the revenue generated by insurance billing. But such inferred knowledge does not sustain a claim for Medicaid fraud. Again, the critical inquiry is whether defendant had knowledge from which she was aware or should have been aware that her conduct *in treating Macon and Bates* was substantially certain to cause the payment of a Medicaid benefit. General knowledge that some source of insurance will be billed is simply not enough. The trial court's findings are speculative and not reasonably drawn inferences from the evidence that the trial court found determinative.

Likewise, the Court of Appeals erred in its determination that defendant's general knowledge of the American healthcare system—as a student, employee, and patient—or her general knowledge that the clinic was not a free clinic and that she was a paid employee provided evidence that defendant had satisfied the “knowing” element of a Medicaid fraud conviction. Defendant was charged with two counts of Medicaid fraud *related to claims for two specific individuals*. She cannot be held liable on the basis of the Medicaid

status of other individuals treated at the clinic in its day-to-day operation.³³ Even viewed in the light most favorable to the prosecution, the evidence presented does not appear to establish that defendant was aware or should have been aware that the patients at issue were Medicaid beneficiaries and that their treatment was substantially certain to cause the payment of a Medicaid benefit.

Finally, we also conclude that there was no evidence presented that defendant should have familiarized herself with the insurance status of clinic patients. Thus, the evidence did not support a finding that defendant acted “in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts.”³⁴ Although the prosecution’s expert testified that defendant could be expected to be aware of the American healthcare model, the expert did not testify that defendant should have obtained the patients’ Medicaid status before, during, or after her encounter with them. Because defendant was never trained to examine or alter billing information, and because her employer did not expect her to become familiar with this process, it cannot be said that the ignorance of Medicaid billing procedures was “deliberate” or due to “reckless disregard of the truth or falsity of facts.”³⁵ From the evidence presented, it appears

³³ See *People v Schilling*, 110 Mich 412, 414; 68 NW 233 (1896) (a defendant cannot be convicted for crimes other than those charged in the complaint); MCL 768.32(1) (a defendant may be found guilty of an offense upon which an indictment was based or of an inferior offense to the one charged).

³⁴ MCL 400.602(f).

³⁵ In his partial dissent, Justice MARKMAN relies on federal caselaw to support his belief that defendant acted in deliberate ignorance of whether claims under the Social Welfare Act were false. But these cases require, for a finding of deliberate ignorance in the context of federal

that defendant was not expected to know or become aware of a patient’s insurance status in the course of her duties at the clinic. We therefore hold that defendant’s failure to become generally versed in billing procedures did not establish criminal culpability in this case.³⁶

healthcare fraud, that the defendant be made aware of a high probability of illegal conduct and take active steps to avoid learning of it. See *United States v Delgado*, 668 F3d 219, 227 (CA 5, 2012); *United States v Lennartz*, 948 F2d 363, 369 (CA 7, 1991); *United States v Nazon*, 940 F2d 255, 259-260 (CA 7, 1991); *United States v Walter-Eze*, 869 F3d 891, 909-910 (CA 9, 2017). The same appears to be true in other contexts requiring an assessment of deliberate ignorance under federal law. See, e.g., *United States v Lara-Velasquez*, 919 F2d 946, 952-953 (CA 5, 1990); *United States v Nicholson*, 677 F2d 706, 710-711 (CA 9, 1982); *United States v Heredia (Amended Opinion)*, 483 F3d 913, 917 (CA 9, 2007). Because the evidence did not establish that defendant was required to participate in the billing process, trained in billing procedures, or lawfully required to make herself aware of individual patients’ insurance information, there is no indication that defendant actively sought to remain ignorant of information she knew to be likely to reveal illegal conduct. To hold otherwise would, in our view, impose a daunting standard not only on licensed healthcare professionals but also on those seeking to become licensed healthcare professionals while working under the lawful supervision of licensed doctors.

Justice MARKMAN also opines that “[w]hen defendant performed her services, the only fact unknown to [her] was whether a private insurance company or the state of Michigan would be the victim of a false claim for her unlicensed services.” But Justice MARKMAN points to no evidence in support of the notion that defendant knew, at any point, that the services she provided were not lawful (whether by function of the delegation exception under MCL 333.16215(1) or otherwise). This, of course, does not shield her from her conviction for the unauthorized practice of a health profession. *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 215; 575 NW2d 95 (1997), citing *Cheek v United States*, 498 US 192, 199; 111 S Ct 604; 112 L Ed 2d 617 (1991) (ignorance of the law is no defense from a criminal prosecution). Even so, that we affirm defendant’s conviction for the unauthorized practice of a health profession does not inherently equate with a determination that she *knew* of some “‘shady dealings’ that were certain to result in the generation of false bills.”

³⁶ Justice MARKMAN offers three means by which defendant might have made herself aware of Macon’s and Bates’s Medicaid status: (1) she

III. CONCLUSION

For the reasons outlined in this opinion, we affirm the conviction for the unauthorized practice of a health profession but reverse the convictions for Medicaid fraud. The case shall be remanded to the Ingham Circuit Court in accordance with the Court of Appeals' previous judgment to analyze the proportionality of the fines assessed against defendant. We do not retain jurisdiction.

MCCORMACK, C.J., and VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with ZAHRA, J.

VIVIANO, J. (*concurring*). I agree with the majority's decision to affirm defendant's conviction for unauthorized practice of a health profession under MCL 333.16294 and to reverse defendant's convictions for Medicaid fraud under MCL 400.607 of the Medicaid False Claim Act (MFCA). I write separately to raise some concerns regarding the latter statute. For defendant's conduct to fall within the fraud provisions of the MFCA, the prosecution must prove that it was "knowing,"¹ which the act defines as meaning, among

could have asked the clinic receptionist about the agents' Medicaid status, (2) she could have reviewed their paper charts, and (3) she could have asked Macon and Bates themselves whether they were Medicaid recipients. Nevertheless, the evidence in this case did not establish that defendant should have inquired as to patients' insurance status with the clinic receptionist or with the patients themselves. Thus, the mere fact that defendant *could have* asked is irrelevant. Justice MARKMAN's point about the Medicaid information in each patients' chart is well-taken, but it does not acknowledge that the evidence in this case *did not show that defendant was ever in possession of paper charts when providing care for Macon and Bates*. Additionally, the evidence did not show that, if defendant had those charts, she would have been required to flip through the charts to examine each patients' Medicaid information.

¹ MCL 400.607(1).

other things, that the defendant possesses “facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a medicaid benefit.”² As the majority explains, the evidence was insufficient to show that defendant knew or should have known a Medicaid payment was substantially certain to result from her conduct. At most, in my view, the record demonstrates that defendant, by recording her treatment notes and entering them into the clinic’s computer system, made false records that were material to a false claim. That evidence would appear to be sufficient to establish *civil* liability under a provision in a somewhat analogous federal statute, the False Claims Act (Federal Act), 31 USC 3729(a)(1)(B). However, the MFCA—under which defendant was *criminally* prosecuted—contains no provision prohibiting the making or use of a false record that is “material to a false or fraudulent claim.” Thus, the majority properly reverses defendant’s Medicaid fraud convictions.

Given the scope of the parties’ arguments and the evidence in the record, the result in this case is relatively clear. But in analyzing the criminal-liability provisions of the MFCA, a number of problematic aspects of the statute have become evident to me. Although they need not be resolved to dispose of this case, I write to highlight these problems and encourage the Legislature to address them in order to clarify the statute’s meaning.

The problems with the MFCA result, in large part, from how the statutory language developed over time. When the MFCA was enacted in 1977 PA 72, the

² MCL 400.602(f).

substantive criminal offense in MCL 400.607(1) was nearly identical to the current version. It required the defendant to have submitted a claim “knowing” it to be false.³ “Knowing” and “knowingly,” in turn, were defined to mean “that a person is aware of the nature of his conduct and that his conduct is substantially certain to cause the intended result.”⁴ The Legislature made minor changes to MCL 400.607 in 1984 PA 333, but that act significantly amended the definition of “knowing” and “knowingly” in MCL 400.602. After the 1984 amendment, the full definition read:

“Knowing” and “knowingly” means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a medicaid benefit. Knowing or knowingly does not include conduct which is an error or mistake unless the person’s course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present.^[5]

Under the first sentence of this section, which remains in the current version, courts have held that either actual knowledge (“is aware”) or constructive knowledge (“should be aware”) suffices.⁶ Courts have

³ It stated:

A person shall not make or present or cause to be made or presented to an employee or officer of the state a claim under Act No. 280 of the Public Acts of 1939, as amended, upon or against the state, knowing the claim to be false, fictitious, or fraudulent. [MCL 400.607(1), as enacted by 1977 PA 72.]

⁴ MCL 400.602(c), as enacted by 1977 PA 72.

⁵ MCL 400.602(f), as amended by 1984 PA 333.

⁶ *People v Perez-DeLeon*, 224 Mich App 43, 48-49; 568 NW2d 324 (1997), citing *People v American Med Ctrs of Mich, Ltd*, 118 Mich App 135, 154; 324 NW2d 782 (1982); see also *People v Kanaan*, 278 Mich App 594, 603; 751 NW2d 57 (2008) (“[A]ctual knowledge that a Medicaid

also interpreted the section as requiring knowledge that the claim would cause payment of benefits.⁷ When read in conjunction with MCL 400.607(1), “the actual or constructive knowledge element . . . requires knowledge of both the falseness of a claim and that the claim is substantially certain to cause payment of a benefit.”⁸

Understanding the next round of amendments to the MFCA requires some background about the Federal Act and how it compares to the MFCA. Under the Federal Act, private parties can bring qui tam actions on behalf of the government for civil penalties and damages, which the party and the government split.⁹

claim is false is not required to support a conviction. Rather, a conviction can be sustained on the basis of evidence showing that a defendant should have been aware that the nature of his or her conduct constituted a false claim for Medicaid benefits, akin to constructive knowledge.”)

⁷ *Perez-DeLeon*, 224 Mich App at 49.

⁸ *Id.*

⁹ 31 USC 3730. A qui tam action is one “brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.” *Black’s Law Dictionary* (10th ed).

The Federal Act had a criminal penalty, codified in 18 USC 287, that was derived from the original Federal Act passed in 1863. See *United States v Bornstein*, 423 US 303, 305 n 1; 96 S Ct 523; 46 L Ed 2d 514 (1976) (describing the history of 18 USC 287). Section 287 criminalizes making or presenting a claim knowing the claim to be false, fictitious, or fraudulent. In 1986, when Congress amended the Federal Act to define “knowing,” it also amended 18 USC 287 to provide criminal penalties for making the same false claims as described in 31 USC 3729. PL 99-562, § 7; 100 Stat 3153, amending 18 USC 287. Federal courts now generally refer to 18 USC 287 as the “criminal provisions” of the Federal Act. See, e.g., *United States v Glaub*, 910 F3d 1334, 1336 (CA 10, 2018). In addition to 18 USC 287, a number of other federal statutes provide criminal penalties for healthcare fraud or related offenses. See, e.g., 18 USC 1035 (prohibiting knowingly falsifying a material fact or making a materially false statement in connection with the delivery of or payment for healthcare benefits); 18 USC 1347 (prohibiting knowingly executing or attempting to execute a scheme to defraud a healthcare benefit program or to obtain money or property owned by a healthcare benefit

The MFCA, by contrast, originally relied on criminal penalties and a civil penalty (plus damages) in actions brought by the government.¹⁰ Not until 2005 did the MFCA allow for qui tam actions akin to those in the Federal Act.¹¹

Another difference is that the Federal Act contains a broader liability provision in 31 USC 3729(a)(1)(B), which prohibits “knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim[.]” “Material” is defined as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”¹² As noted above, the MFCA does not contain a similar provision.

Like MCL 400.607(1), many of the provisions in the Federal Act contain a scienter requirement under which the defendant must act “knowingly.”¹³ The Federal Act left this term undefined prior to 1986, leading many courts to require specific intent to defraud the government or actual knowledge of falsity, while others held that the knowledge element was satisfied by extreme carelessness.¹⁴ To bring some order to the subject, Congress enacted a definition of “knowing” and “knowingly,” which still stands today.¹⁵ Under this new definition, no specific intent to defraud is required

program by means of false pretenses, in connection with the delivery of or payment for healthcare benefits).

¹⁰ 1977 PA 72.

¹¹ 2005 PA 337; see MCL 400.610a.

¹² 31 USC 3729(b)(4).

¹³ See, e.g., 31 USC 3729(a)(1)(A), (B), (F), and (G).

¹⁴ See Boese, *Civil False Claims and Qui Tam Actions* (4th ed, 2019 update), § 2.06 (explaining the history and caselaw).

¹⁵ PL 99-562, § 2, 100 Stat 3153, amending 31 USC 3729(b).

and knowledge can be proven in three different ways: by showing that a person “has actual knowledge of the information,” “acts in deliberate ignorance of the truth or falsity of the information,” or “acts in reckless disregard of the truth or falsity of the information[.]”¹⁶

Thus, compared to the more open-ended “constructive knowledge” standard in MCL 400.602(f), the Federal Act contains two specifically defined forms of constructive or imputed knowledge. The MFCA’s constructive-knowledge standard represents a potentially broader concept, embracing “[k]nowledge that one using reasonable care or diligence should have . . .”¹⁷ By contrast, “reckless disregard” as used in the Federal Act has been described as a “constructive knowledge standard” requiring “aggravated gross negligence, gross negligence-plus, or conduct that runs an unjustifiable risk of harm.”¹⁸ And “deliberate ignorance”—again in the context of the Federal Act—has been thought to suggest “willful blindness.”¹⁹

Our definition of “knowing” and “knowingly” became much more opaque when the MFCA was amended in an apparent effort to qualify for financial incentives crafted by Congress in the Deficit Reduction Act of 2005.²⁰ Under that act, if a state has a false-claims act

¹⁶ 31 USC 3729(b)(1).

¹⁷ *Black’s Law Dictionary* (10th ed), p 1004; see also *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197; 694 NW2d 544 (2005) (defining constructive knowledge “as ‘[k]nowledge that one using reasonable care or diligence should have’”), quoting *Black’s Law Dictionary* (8th ed) (alteration in original).

¹⁸ See Boese, § 2.06.

¹⁹ *Id.* (“[T]he [Federal Act]’s ‘deliberate ignorance’ standard of intent and ‘willful blindness’ are virtually identical concepts.”).

²⁰ See generally Office of Inspector General, Dep’t of Health & Human Servs, *Publication of OIG’s Guidelines for Evaluating State False Claims Acts*, 71 Fed Reg 48552 (August 21, 2006).

that “establishes liability . . . for false or fraudulent claims described in” the Federal Act, then the state can keep 10% more of the recoveries under its own false-claims act—the additional funds coming from the share of the recovery to which the federal government would have been entitled.²¹ In other words, a state could receive 10% more from shared false-claims judgments if its false-claims act is as broad as the Federal Act. The Deficit Reduction Act charged the Inspector General of the Department of Health and Human Services with determining whether the state statute qualified.²² The Inspector General set out various standards it would use in this determination, including whether the state law had provisions analogous both to the federal definition of “knowing” and “knowingly” and also to the provision creating liability for false records set forth in 31 USC 3729(a)(1)(B).²³

In 2008, in an apparent effort to satisfy the federal civil-liability standard and thereby qualify for the additional reimbursement share, our Legislature amended the intent requirement in MCL 400.602(f).²⁴ But instead of adopting the Federal Act’s coherent

²¹ 42 USC 1396h.

²² 42 USC 1396h(b).

²³ *OIG Guidelines*, 71 Fed Reg at 48553.

²⁴ 2008 PA 421; House Legislative Analysis, SB 1622 (December 11, 2008), pp 1-2 (recommending that the House of Representatives revise the definition of “knowing” and “knowingly” in MCL 400.602(f) to include “deliberate ignorance” and “reckless disregard,” as defined in the Federal Act, so that the state of Michigan would be eligible for additional federal funding). According to the legislative analysis, Michigan had already “missed out” on the extra funds because federal officials had concluded that the MFCA failed to comply with the Federal Act. *Id.* at 1. The bases for rejecting the MFCA were that it lacked a provision creating liability for false records used to decrease or avoid paying obligations to the government and that it did not allow civil penalties for each false claim. *OIG Evaluates 10 State False Claims Acts Under DRA*;

tripartite structure—i.e., actual knowledge, deliberate ignorance, and reckless disregard—the Legislature simply patched the latter two forms of constructive knowledge onto our existing statute (along with the disclaimer that specific intent need not be shown) and struck the language concerning errors.²⁵ These changes, however, failed to satisfy the Inspector General that the MFCA contained the same breadth of civil liability as the Federal Act.²⁶ While few details were

Three Statutes Meet Requirements for Incentive Allowing Increased Share of Fraud Recoveries, 15 No. 12 FDA Enforcement Manual Newsletter 7 (2007).

Noting the legislative history here is not the same as using it to interpret the statute. If anything, the legislative analysis shows the perils of relying on these types of materials: it expressed a view of the Legislature's purpose that does not appear to be reflected in the statutory text, at least according to the Inspector General. This disjunction between the text and the legislative history is why we examine what the statute says rather than what the legislators intended it to say as evidenced by extrinsic documents. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 375 (“[T]he use of legislative history poses a major theoretical problem: It assumes that what we are looking for is the intent of the legislature rather than the meaning of the statutory text. That puts things backwards. To be ‘a government of laws, not of men’ is to be governed by what the laws say, and not by what the people who drafted the laws intended.”); Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv J L & Pub Pol’y 59, 61 (1988) (“Original meaning is derived from words and structure What any member of Congress thought his words would do is irrelevant. We do not care about his mental processes.”).

²⁵ 2008 PA 421.

²⁶ Letter from Office of Inspector General to Attorney General Mike Cox (March 21, 2011), available at <<https://oig.hhs.gov/fraud/docs/falseclaimsact/Michigan.pdf>> [<https://perma.cc/V56Y-BB57>]. Michigan received supplemental letters, one in 2011 and another in 2016, offering additional reasons why the MFCA was not certified. See Letter from Office of Inspector General to Attorney General Bill Schuette (December 28, 2016), available at <<https://oig.hhs.gov/fraud/docs/falseclaimsact/Michigan-supplement2.pdf>> [<https://perma.cc/RWL4-WXBM>] (explaining that the MFCA did not provide for the same increased civil penalties as the Federal Act); Letter from Office of Inspector General to

given in the Inspector General’s 2011 official letter notifying the Michigan Attorney General that the state was ineligible for the additional reimbursement share under the Deficit Reduction Act, it did cite the Federal Act’s broad definition of “material” as contrasting with the MFCA.²⁷

In sum, civil-liability concepts from the Federal Act have been engrafted onto preexisting language in the MFCA without, it seems, careful thought about how and whether those concepts fit in the criminal-liability context. To make matters worse, the MFCA’s old language already created a number of interpretive puzzles. The combined product is even more difficult to parse.

First, the initial sentence of MCL 400.602(f), defining “knowing” and “knowingly,” is incomplete. It refers to knowledge of the “nature of [an individual’s] conduct” without clearly expressing what the “nature” of the “conduct” relates to. Only by reading it together with MCL 400.607(1)—when that offense is at issue—can the terms in the first sentence be linked to the falsity of the claim, i.e., knowledge that the claim is false.²⁸ Certainly it seems that the Legislature intended such a reading. But incorporating the full definition of “knowing” into MCL 400.607(1)—“knowing the claim to be false”—makes the statute difficult to comprehend, to say the least.²⁹ As one example, the critical element here—

Attorney General Bill Schuette (August 31, 2011), available at <<https://oig.hhs.gov/fraud/docs/falseclaimsact/Michigan-supplement.pdf>> [<https://perma.cc/H7EG-HMDL>] (noting differences in the statutes of limitations).

²⁷ Letter from Office of Inspector General to Attorney General Mike Cox (March 21, 2011).

²⁸ See *Perez-DeLeon*, 224 Mich App at 49.

²⁹ Consider substituting in just a portion of the term’s definition: “A person shall not make or present or cause to be made or presented to an

certainty about the Medicaid payment—becomes an element of the offense despite lacking any clear grammatical or logical connection to the phrasing of MCL 400.607(1).

Second, a related question is whether the first sentence of MCL 400.602(f) encompasses the full breadth of the actual- and constructive-knowledge standards. The phrasing—“is aware” or “should be aware”—suggests that it does. But again, these phrases refer to awareness regarding the “nature” of the individual’s “conduct,” not specifically the falsity of the individual’s Medicaid claim. In this respect, the Federal Act’s clarity in establishing three ways to demonstrate knowledge contrasts with the MFCA’s less direct language. Moreover, if the first sentence covers constructive knowledge—what the individual should have known in the exercise of reasonable diligence—then it is not apparent what meaning is added by the second sentence introducing “reckless disregard” and “deliberate ignorance.” Those two standards would already seem to fall within the broader concept of constructive knowledge in the first sentence.

Third, in defining “reckless disregard” and “deliberate ignorance,” it is unclear what role is played by the existence of both criminal and civil provisions in the MFCA, as compared to the civil provisions in the Federal Act. If “reckless disregard” bears a meaning similar to that in the Federal Act, and thus focuses on disregard of a substantial or unjustified risk, how does

employee or officer of this state a claim under the social welfare act . . . [a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a medicaid benefit] the claim to be false.” MCL 400.602(f); MCL 400.607(1). That the definition was not written to fit the syntax of the sentence is one of the more obvious problems with the definition.

this meaning work with the phrase “substantial certainty”?³⁰ Does “reckless disregard” mean reckless disregard of a substantial and unjustified risk that a defendant’s conduct will result in payment of a false claim, or does it mean reckless disregard (i.e., disregard of a substantial risk) of a substantial certainty that the conduct will result in payment of a false claim? If the latter, what sort of probabilistic assessment would be required, diluted by two layers of “substantial” risks or certainties? For that matter, what degree of certainty is signified by the phrase “substantial certainty”?

Fourth, with regard to MCL 400.607(1), what does it mean to “cause” a false claim to be made or presented? Does this term incorporate a common-law definition of causation?³¹ And if “cause” is modified by “knowing,” how does the definition of “knowing” in MCL 400.602(f), which already contains its own causal requirement linked to actual payment, fit into MCL 400.607(1)? Compounding this issue is the definition of “deceptive,” which also contains language concerning causation. That term comes into play through the definition of “false,” which “means wholly or partially untrue or deceptive.”³² “Deceptive,” in turn, “means making a claim or causing a claim to be made under the social welfare act” containing statements or omissions that mislead the government into thinking “the represented or suggested state of affair[s] to be other than it actually is.”³³ Thus, in the context of

³⁰ See Boese, § 2.06.

³¹ Cf. *Ray v Swager*, 501 Mich 52, 63-69; 903 NW2d 366 (2017) (holding that the Legislature used “proximate cause” as a legal term of art, borrowing its lengthy background in the caselaw).

³² MCL 400.602(d).

³³ MCL 400.602(c).

MCL 400.607(1), three potentially different causal requirements might apply at the same time. In this respect, a comparison to 31 USC 3729(a)(1)(B) demonstrates the issues with our statute. That provision of the Federal Act includes nearly identical phrasing—“causes to be made or used”—but does not again refer to causation in the definitions of other pertinent terms. Instead, 31 USC 3729(a)(1)(B) employs the term “material,” which, as noted before, “means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”³⁴

These are hard interpretive questions that could arise in future MFCA cases and may lead to a vagueness challenge or rule-of-lenity argument. I offer no view on them here, except to say that they are best resolved by the Legislature. For these reasons, I concur in the judgment and encourage the lawmaking branch to consider amending the statute to clarify its meaning.

MARKMAN, J. (*concurring in part and dissenting in part*). I concur with the majority to affirm defendant’s conviction of the unlawful practice of medicine. I further concur with its conclusion that defendant here did not possess actual knowledge that Special Agents Macon and Bates were purporting to be Medicaid patients. Where I respectfully depart from my colleagues concerns whether there was sufficient evidence to allow a reasonable trier of fact to conclude that defendant here acted in “deliberate ignorance” of the special agents’ putative Medicaid status in providing unlicensed services for which no bill could lawfully be generated. In view of the distinctive definition of “knowing” set forth in MCL 400.602(f) and the appellate

³⁴ 31 USC 3729(b)(4).

standard of review governing defendant's sufficiency-of-the-evidence challenge, I would affirm defendant's convictions under the Medicaid False Claim Act (MFCA), MCL 400.601 *et seq.*

I. BACKGROUND

I adopt the majority's recitation of the factual and procedural history of this case. As defendant's experience within the healthcare field is relevant to the knowledge element of her convictions under the MFCA, I briefly summarize that experience.

Before moving to the United States in 2001, defendant completed a five-year medical-school program in China as well as two of three years of a residency program in internal medicine. Defendant then entered the United States to pursue studies at Purdue University, earning a Ph.D. in Basic Medical Science. Upon completing her studies, defendant worked as a medical researcher at the University of Michigan Medical School and then at William Beaumont Hospital. In 2013, through the AmeriClerkships program, defendant rotated through four primary-care clinics. Thereafter, AmeriClerkships placed defendant at the Livernois Family Medical Clinic (LFMC), run by Dr. Murtaza Hussain. Defendant then rotated through all five clinics as an unpaid volunteer, doing so to gain experience and additional personal references in support of her applications to United States medical-residency programs. During her two-month rotation at LFMC, defendant performed the functions of a medical student on an outpatient rotation, including taking patient histories and performing initial physical examinations. Defendant performed these basic tasks while Dr. Hussain was present in the clinic.

In early 2014, defendant failed to obtain a United States residency placement. She did, however, continue to work at LFMC, first as a volunteer and then as a part-time and paid employee. When Special Agent Macon purported to be an LFMC patient, defendant had spent a total of nine months at the clinic, was working there 10 to 15 hours a week, and was earning between \$20 and \$30 an hour. Defendant saw 10 to 15 patients a day when Dr. Hussain was absent from the clinic. Finally, defendant saw patients even while Dr. Hussain was vacationing abroad.

II. STANDARD OF REVIEW

The standard of review for evaluating sufficiency-of-the-evidence challenges following jury trials and bench trials are one and the same. *People v Petrella*, 424 Mich 221, 268-269; 380 NW2d 11 (1985). Thus, the fact that defendant’s convictions arise from a bench trial does not alter the basic legal framework governing our review of her sufficiency-of-the-evidence challenge. *Id.*

When considering a sufficiency-of-the-evidence challenge, “this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt.” *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). “[I]mportantly, the standard of review is deferential: a reviewing court is *required* to draw all reasonable inferences and make credibility choices in support of the . . . verdict.” *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018) (brackets, quotation marks, and citation omitted). “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.”

People v Hardiman, 466 Mich 417, 428; 646 NW2d 158 (2002). “The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *Oros*, 502 Mich at 239 (quotation marks and citation omitted). “[B]ecause it can be difficult to prove a defendant’s state of mind on issues such as knowledge and intent, *minimal circumstantial evidence will suffice* to establish the defendant’s state of mind, which can be inferred from all the evidence presented.” *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008) (emphasis added).

III. DISCUSSION

Under the MFCA, “[a] person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the social welfare act . . . upon or against the state, knowing the claim to be false.” MCL 400.607(1). In order to sustain a conviction under MCL 400.607(1), the prosecutor must prove five elements:

“(1) the existence of a claim, (2) that the accused makes, presents, or causes to be made or presented to the state or its agent, (3) the claim is made under the Social Welfare Act . . . , (4) the claim is false . . . , and (5) the accused knows the claim is false . . .” [*Kanaan*, 278 Mich App at 619, quoting *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997).]

Defendant’s sufficiency-of-the-evidence challenge centers on whether the prosecutor established the fifth element—knowledge that the claim is “false.” This element pertains to “both the nature of [defendant’s] conduct and that [defendant’s] conduct is substantially certain to cause the payment of a [false Medicaid or]

health care benefit.” *People v Perez-DeLeon*, 224 Mich App 43, 49; 568 NW2d 324 (1997) (emphasis and quotation marks omitted). The MFCA provides the following specific definition for “knowing” and “knowingly”:

[A] person is in possession of facts under which he or she is aware or *should be aware* of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a medicaid benefit. Knowing or knowingly includes acting in *deliberate ignorance of the truth or falsity of facts* or acting in reckless disregard of the truth or falsity of facts. Proof of specific intent to defraud is not required. [MCL 400.602(f) (emphasis added).]

In my judgment, the highlighted aspects of this definition emphasize that an individual may not disregard readily ascertainable facts that would otherwise cause that individual, in light of other facts of which he or she is aware, or should be aware, to recognize that a claim made upon the government under the Social Welfare Act is false.¹ To be sure, the MFCA does not define “deliberate ignorance.” See MCL 400.602. However, the definitions of “knowing” and “knowingly” are modeled after and mirror the federal definitions of those terms within the context of false claims against the government. Compare, e.g., MCL 400.602(f) with 31 USC 3729(b)(1).² And, under federal law, a finding of “deliberate ignorance” is appropriate when (1) the

¹ I emphasize “government” because the victims of defendant’s actions were not only the patients at LFMC who had every reason to believe they were receiving care from a licensed medical professional, see note 5 *infra*, but also the taxpayers of this state.

² The federal statute, 31 USC 3729(b)(1), states:

- (1) the terms “knowing” and knowingly—
- (A) mean that a person, with respect to information—
- (i) has actual knowledge of the information;

defendant claims a lack of guilty knowledge; (2) “the defendant was subjectively aware of a high probability of the existence of the illegal conduct”; and (3) “the defendant purposely contrived to avoid learning of the illegal conduct.” *United States v Delgado*, 668 F3d 219, 227-228 (CA 5, 2012) (quotation marks and citation omitted); see also *United States v Walter-Eze*, 869 F3d 891, 910 (CA 9, 2017) (describing “deliberate ignorance” as existing “where the defendant remained willfully ignorant of the nature of his activity after the circumstances would ‘have put any reasonable person on notice that there was a “high probability” that the conduct was illegal’ ”), quoting *United States v Nicholson*, 677 F2d 706, 710 (CA 9, 1982) (brackets omitted). A defendant acts with “deliberate ignorance” when the defendant has a reasonable basis to suspect that her actions run afoul of the law but does not know the precise nature of the criminal conduct. *United States v Lara-Velasquez*, 919 F2d 946, 952-953 (CA 5, 1990) (finding sufficient evidence to establish that the defendant acted with deliberate ignorance when he had reason to suspect he was transporting illicit cargo but avoided inspecting the vehicle he drove). Equating “deliberate ignorance” to “conscious avoidance” has also gained widespread approval in the federal circuit courts. *United States v Nazon*, 940 F2d 255, 259 (CA 7, 1991). A defendant acts with “deliberate ignorance” when she intentionally takes “actions to avoid confirming suspicions of criminality.” *United States v Heredia*, 483 F3d 913,

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud[.]

917 (CA 9, 2007). The Seventh Circuit has arguably summed up “deliberate ignorance” in a manner most relevant to this case, stating that “[d]eliberate ignorance exists when the evidence indicates that the defendant, knowing or suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings.” *United States v Lennartz*, 948 F2d 363, 369 (CA 7, 1991) (quotation marks and citation omitted).

Given that defendant was, or should have been, aware of the following four facts, a reasonable trier of fact could conclude that defendant acted with “deliberate ignorance” of the ultimate fact that a false claim would be submitted to *Medicaid* as a result of her services. First, based on defendant’s experience in the healthcare field and her efforts to obtain a residency placement and an accompanying medical license, defendant was aware, or should have been aware, that it was unlawful for her to practice medicine. This is particularly true given that defendant provided medical services even while Dr. Hussain was more than 5000 miles away in Greece.³ Second, as acknowledged by the majority, Darius Baty, an employee in LFMC’s billing department, testified that everyone at LFMC “knew that a bill was going to be generated [for each

³ The majority asserts that I have not identified any “evidence in support of the notion that defendant knew, at any point, that the services she provided were not lawful” But as the above discussion reflects, her experience in the medical field in combination with her unsuccessful efforts to obtain a medical license provided a trier of fact with a reasonable basis to conclude that she was cognizant that she could not practice medicine and write prescriptions while Dr. Hussain was not at LFMC. This is particularly true given that this Court must view the evidence in the light most favorable to the prosecutor and given that defendant’s criminal state of mind is subject to the specific standards of MCL 400.602(f).

patient visit] and sent to somebody so that the clinic could be paid for that patient visit . . .” And defendant’s knowledge of this specific point is lent further support by the fact that she was receiving compensation for her work at LFMC. For when defendant was the sole person seeing a patient—as was the case, for example, with Special Agent Bates—and LFMC was paying her, it follows that defendant knew that LFMC would prepare and submit a bill for the visit. **Third**, based on her considerable history in the healthcare field, defendant was aware, or should have been aware, that a bill could not be sent to Medicaid or any insurance company for services rendered by an individual who lacked any type of professional medical license and thus could not lawfully practice in the field.⁴ **Fourth**, defendant was aware, or should have been aware, that a high percentage of the patients specifically seeking treatment at LFMC were Medicaid

⁴ The majority states that “[b]ecause the evidence did not establish that defendant was required to participate in the billing process, trained in billing procedures, or lawfully required to make herself aware of individual patients’ insurance information, there is no indication that defendant actively sought to remain ignorant of information she knew to be likely to reveal illegal conduct.” One need not, however, partake in the billing process or be trained in billing procedures to know that it is fraudulent to bill for services that the majority, in upholding defendant’s unlawful-practice-of-medicine conviction, correctly concludes defendant could not legally perform. When defendant performed her services, the only fact unknown to defendant was whether a private insurance company or the state of Michigan would be the victim of a false claim for her unlicensed services. Thus, by knowing that she could not practice medicine and that a bill would be generated for her services, defendant knew or should have known that she was engaged in “shady dealings” that were certain to result in the generation of false bills. This is perhaps made most apparent by her decision to treat patients even while Dr. Hussain was vacationing in Greece. And as discussed in point four *infra*, defendant knew or should have known that there was a high probability that the state of Michigan specifically would be the victim.

beneficiaries. From her nine months of experience at LFMC, she possessed at least a basic understanding of the clinic's patient population. Indeed, defendant acknowledged during cross-examination that she was cognizant that at least some of the patients at LFMC were Medicaid patients. Furthermore, Baty quantified the percentage of patient visits resulting in bills to Medicaid, estimating that "a good 50 percent" of LFMC's patients were Medicaid recipients.

To summarize, a reasonable trier of fact could have concluded that defendant was aware, or should have been aware: (1) that it was unlawful for her to practice medicine; (2) that a bill would be generated for her services, even when Dr. Hussain was not present; (3) that it was unlawful and fraudulent to bill Medicaid for her services; and (4) that a significant percentage of LFMC patients were Medicaid recipients, such that LFMC would bill the government for her services. From these facts, a reasonable trier of fact could conclude that defendant knew that her employment at LFMC was an integral part of an illicit scheme. Further, such a reasonable trier of fact could also conclude that defendant knew that on the occasions on which Special Agents Macon and Bates visited, there was approximately—arguably at least—a one-in-two chance that her "treatment" of any given patient would cause LFMC to submit a false claim to Medicaid. Put another way, because defendant testified that she saw 10 to 15 patients on days when Dr. Hussain was not present at LFMC, her services on those days caused, on average, the submission of five to eight false bills to Medicaid.⁵

⁵ Quantified differently, if 50% of LFMC patients were Medicaid recipients and Wang saw 10 patients on a day when Dr. Hussain was not at LFMC, there was a greater than 99.9% chance that her work at LFMC on that day would have resulted in the clinic sending a false Medicaid bill to the government.

Despite this high probability and volume of false bills to Medicaid resulting from defendant's "treatment" of patients, defendant avoided *three* readily available means of determining whether a given patient, such as Special Agents Macon or Bates, was a Medicaid patient. First, she could have asked the clinic receptionist, who was cognizant of a given patient's insurance information, whether a patient was a Medicaid recipient. Second, she could have reviewed their paper charts, which contained insurance information, including a photocopy of their Medicaid cards. Third, she could have expressly inquired whether they were Medicaid recipients. Rather than determining whether a patient was or was not a Medicaid recipient, defendant simply closed her eyes to this information, all the while knowing that bills would be generated and submitted to the government for the unlawful services that she had provided.⁶ In my judgment, the four facts of which defendant was aware, or should have been aware, combined with her avoidance of readily ascertainable information regarding a patient's Medicaid status, amount to "deliberate

⁶ Apart from the requirement placed upon defendant by the MFCA, knowing a patient's insurance status, particularly when treating a patient of limited financial means who is on Medicaid, is relevant to devising a treatment plan and selecting a prescription-medication regimen. See Schneider & Hall, *The Patient Life: Can Consumers Direct Health Care?*, 35 Am J L & Med 7, 33-34 & nn 130, 132 (2009) (discussing studies showing that doctors "routinely consider [an] insured patient's out-of-pocket costs in some clinical situations, especially when prescribing drugs" and observing that knowing a patient's insurance status and financial limitations influenced treatment plans and what specific medications doctors prescribed). Thus, defendant's decision to avoid learning of a patient's Medicaid status not only caused a false claim to be submitted to Medicaid but also arguably impacted the specific care received by patients at LFMC. For this latter reason, I respectfully disagree with the majority that because defendant was not herself involved in billing procedures, she had no particular need or reason to learn of a patient's insurance status.

ignorance” of the ultimate fact that her “treatment” of the special agents would cause the submission of false claims to Medicaid.⁷

IV. CONCLUSION

Defendant was aware that a large percentage of patients at LFMC were Medicaid patients such that her actions would cause the submission of false bills to Medicaid but acted with “deliberate ignorance” of the readily ascertainable fact that Special Agents Macon and Bates were Medicaid patients and thus that false governmental claims were being generated under the Social Welfare Act. Therefore, I respectfully dissent from the portion of the majority’s opinion vacating defendant’s convictions under the MFCA.

⁷ The majority contends that while defendant could have asked about a patient’s insurance status, nothing shows that defendant either possessed a patient’s paper chart or would have looked through the paper chart to determine a patient’s insurance status had she possessed one. But it is not a question of what defendant did or would have done. Rather it is a question of what the law required of her in light of the facts that she knew or should have known. Because defendant knowingly involved herself in “shady dealings” that were certain to result in some type of false billing, a trier of fact could rely on the “deliberate ignorance” standard for establishing knowledge and return a guilty verdict by reasonably inferring that defendant intentionally avoided learning a given patient’s insurance status and, in turn, that her treatment of that patient would result in Medicaid fraud. Certainly, as evidenced from the three ways by which defendant could have learned a patient’s Medicaid status, the information was readily accessible. But, of course, had defendant taken the few moments necessary to learn a patient’s Medicaid status and then declined to provide services to the patient, there is a reasonable question whether she would have been able to maintain her employment at LFMC, and it is not inappropriate that this also be considered by the trier of fact.

HONIGMAN MILLER SCHWARTZ AND COHN LLP v
CITY OF DETROIT

Docket No. 157522. Argued October 2, 2019 (Calendar No. 2). Decided May 18, 2020.

Honigman Miller Schwartz and Cohn LLP filed a petition in the Tax Tribunal, challenging the income tax assessments issued by the city of Detroit for the tax years 2010 through 2014. Petitioner argued that under MCL 141.623 of the Uniform City Income Tax Ordinance (UCITO), MCL 141.601 *et seq.*, payment for services performed by attorneys working in the city on behalf of clients located outside the city constituted out-of-city revenue for the purpose of calculating income taxes, not in-city revenue as asserted by respondent. In other words, petitioner argued that MCL 141.623 encompassed only revenue derived from services delivered to clients located within the city, and respondent argued that the figure calculated under MCL 141.623 should have included revenue for all services performed within the city without regard to either the client's location or the place of delivery. The tribunal granted partial summary disposition in favor of respondent, reasoning that the relevant consideration for calculating gross revenue under MCL 141.623 was where the work was performed, not where the client received the services. The Court of Appeals, MURPHY, P.J., and SAWYER and BECKERING, JJ., reversed the tribunal, concluding that under MCL 141.623, the relevant consideration for determining the percentage of gross revenue from services rendered in the city was where the service itself was delivered to the client, not where the attorney performed the service; in reaching that result, the Court attributed different meanings to the term "rendered" in MCL 141.623 and the term "performed" in MCL 141.622, reasoning that because the Legislature used different words within the same act, it intended the terms to have distinct meanings. 322 Mich App 667 (2018). The Supreme Court granted respondent's application for leave to appeal. 503 Mich 909 (2018).

In an opinion by Justice MARKMAN, joined by Justices ZAHRA, BERNSTEIN, and CAVANAGH, the Supreme Court *held*:

The term “rendered” in MCL 141.623 means to do a service for another. In employing that term, the Legislature adopted an origin test, rather than a market-based approach for calculating revenue from services under MCL 141.623. When determining the percentage of gross revenue from services rendered in the city under MCL 141.623, that figure encompasses all legal services performed within the city regardless of where those services are delivered. Thus, when calculating the percentage of gross revenue from services rendered in the city, the focus is on where the service was performed, not on where it was delivered.

1. For purposes of interpreting the UCITO, it is useful to consider the analogous context of the sale of services in multistate-business taxation. Historically, business taxation laws in Michigan implemented an origin test by assigning services to the state in which they were performed. Because of the growth of the economy’s service sector, this treatment has evolved in Michigan toward market-based sourcing rules for services and other intangibles; in that regard, the Michigan Business Tax Act, 2007 PA 36, and the corporate income tax act, 2011 PA 38, required that the sale of services and other intangibles be calculated on the basis of where the recipient received the benefit, either in state or out of state.

2. MCL 141.618 of the UCITO requires a business to determine the percentage of its net profit that is derived from business activities within the city. To arrive at that number, MCL 141.624 requires a business to calculate taxable net profit from business activity within a city—the business allocation percentage—by calculating the property factor under MCL 141.621, the payroll factor under MCL 141.622, and the revenue factor under MCL 141.623, after which the figures are added together and divided by three. In calculating the payroll factor, MCL 141.622 requires that the taxpayer ascertain the percentage which the total compensation paid to employees for work done or for services *performed* within the city is of the total compensation paid to all the taxpayer’s employees within and without the city during the period covered by the return. In calculating the revenue factor, MCL 141.623 requires the taxpayer to ascertain the percentage which the gross revenue of the taxpayer derived from sales made and services *rendered* in the city is of the total gross revenue from sales and services wherever made or rendered during the period covered by the return. With regard to MCL 141.623(1), the phrase “sales made in the city” means all sales where the goods, merchandise, or property is received in the city by the purchaser, or a person or firm designated by the purchaser. Thus,

with respect to the delivery of goods in the city, the place at which the delivery has been completed is considered as the place at which the goods are received by the purchaser, and the Legislature provides examples illustrating when revenue from the delivery of goods is considered in-city or out-of-city; the provision is therefore a market-based sourcing rule that focuses on where the goods were delivered. In contrast, the Legislature adopted an origin test for “services rendered” under the revenue factor. Given the dictionary definition of the term “render”—that is, to do a service for another—the revenue factor focuses on where the services are done or carried out, not on where the services are delivered. Had the Legislature intended to treat services similarly to the sale of goods, it would have plainly expressed that intention and could have seen fit to also provide guidance illustrating how services are “delivered” and when the delivery of services should be considered in-city or out-of-city. Moreover, because the phrase “services rendered in the city” and slight variations of that phrase appear in many provisions of the UCITO, it is clear when apportioning a business’s net profits that the focus is on where the profit-earning activity takes place. Reading the revenue factor in context alongside the payroll and property factors, as well as with the UCITO’s broader provisions that employ the phrase “services rendered,” the apportionment of gross revenue under the revenue factor must be determined on the basis of the location at which the business activity, including legal services, takes place. Thus, “services rendered” under the revenue factor encompasses revenue for all services done or carried out within the city, even when those services are performed for out-of-city clients.

3. When the Legislature uses different words, it generally intends those words to have different meanings. This maxim of jurisprudence is a general rule and may not apply in every situation, particularly when its use would not give meaning to the entire statutory scheme or the overall context of provisions within the statutory scheme; therefore, competing rules of interpretation must be balanced and harmonized to fully discern what the Legislature intended. With regard to the UCITO, although the Legislature used the term “performed” in MCL 141.622 and the term “rendered” in MCL 141.623, the terms have similar meanings within those provisions. In that regard, “performed” in MCL 141.622 means “to carry out,” which connotes a similar meaning to “rendered” in MCL 141.623, meaning, in context, “to do a service for another.” As a result, the Legislature intended both revenue for “services rendered in the city” and compensation for “services performed within the city” to be calculated similarly

—specifically on the basis of where the service has been done or carried out. However, the terms do not have identical meanings; they are similarly defined, but each has a distinctive connotation given its distinctive context and placement within the act. Specifically, within the UCITO, the term “performed” relates to an employee’s compensation for services carried out for an employer, while the term “rendered” relates to earnings, such as net profits, derived from services done on behalf of clients. Thus, MCL 141.622 connects the employee’s performance of services to his or her compensation from the employer, while MCL 141.623 connects the taxpayer’s revenue to the process by which the business or firm provides services for others, in particular, to its clients. Although the terms are distinct, the Legislature intended them to have an essentially common meaning and to focus the UCITO’s analysis on where a service has been done or carried out and not on where it was finally delivered. The contextual distinction explains why the Legislature employed different terms to describe how to calculate which services are taxable, as well as why the terms are not interchangeable throughout the act.

4. Accordingly, although the terms “rendered” and “performed” generally have similar meanings and are effectively equivalent in their relative purposes within the act, the consistent-usage canon did not apply in this case because the distinctive contexts in which the terms appear account for the Legislature’s use of different words despite their similar meanings. The Court of Appeals erred by determining that under MCL 141.623, revenue for services rendered in the city is calculated on the basis of where the services were delivered instead of where the services were performed; instead, the tribunal correctly concluded that petitioner must calculate gross revenue under MCL 141.623 on the basis of where the services are performed, not on where the client that received those services was located.

Court of Appeals judgment reversed and the case remanded to the tribunal for further proceedings.

Justice VIVIANO, joined by Chief Justice MCCORMACK and Justice CLEMENT, concurring, agreed with the result reached by the majority but wrote separately to express his disagreement with the majority’s analysis in Part III(D) of the opinion in which it sought to differentiate between the term “render” in MCL 141.623 and the term “perform” in MCL 141.622. The issue in this case was whether the phrase “services rendered” in MCL 141.623 includes work “performed” in the city of Detroit for clients outside the city even though MCL 141.622 contains the phrase “services performed.” Before the majority’s discussion in Part III(D) of the

terms' supposed distinctive connotations, the majority's textual, contextual, and historical bases for its interpretations plainly indicate that "services rendered" means "services performed." This portion of the opinion was sufficient to determine that "rendered" refers to the place the service was performed, not where it was delivered, and the majority should not have attempted to distinguish between those two terms in Part III(D) just to avoid the presumption of consistent usage. The majority's analysis, which created a new exception to the consistent-usage presumption, was unpersuasive. Provisions of the UCITO contradict the majority's contention that "performed" is consistently used—in contradistinction to "rendered"—in referring to compensation for services performed by an employee. In addition, the majority failed to explain how its distinction illuminated the semantic content of the terms; because the majority did not mention the connotations it discussed in Part III(D) of the opinion in the critical parts of the opinion defining the terms, the contextual analysis is not part of those meanings when considering the presumption of consistent usage and deciding whether the definitions are the same for purposes of that canon. Moreover, the majority's contextual analysis in that part of the opinion left the terms semantically unchanged; thus, it failed to demonstrate that the different terms have different meanings, making the canon inapplicable. The majority's analysis assumed that if different terms occur in different contexts, albeit in close proximity in the same act, there is no general presumption against giving them the same meaning. That is not how the canon works. Instead, the canon itself provided the answer in this case because it is simply a presumption that has long been recognized as an imperfect tool for determining textual meaning. Drafters often use different words to denote the same concept. The presumption thus readily yields when a fair reading of the text requires. The majority's analysis in Part III(D) did not demonstrate that the terms are semantically distinct; rather, that portion of the opinion simply demonstrated, if anything, that the Legislature may have employed the different terms for stylistic variety. Justice VIVIANO would have concluded that the meaning of the term "rendered" in MCL 141.623 clearly meant "performed" and that the common-usage canon gave way to textual and contextual evidence.

TAXATION — UNIFORM CITY INCOME TAX ORDINANCE — REVENUE FACTOR — CALCULATION OF REVENUE FACTOR — SERVICES RENDERED TO CLIENTS LOCATED OUTSIDE THE CITY — WORDS AND PHRASES — "RENDERED."

Under MCL 141.624 of the Uniform City Income Tax Ordinance, MCL 141.601 *et seq.*, a business must calculate the net profit that

is derived from business activity within a city—the business allocation percentage—by calculating the property factor under MCL 141.621, the payroll factor under MCL 141.622, and the revenue factor under MCL 141.623, after which the figures must be added together and divided by three; under MCL 141.623, a taxpayer must ascertain the percentage which the gross revenue of the taxpayer derived from sales made and services rendered in the city is of the total gross revenue from sales and services wherever made or rendered during the period covered by the return; the term “rendered” means to do a service for another, and it encompasses all legal services performed within the city regardless of where those services are delivered; when calculating the percentage of gross revenue from services rendered in the city, the focus is on where the services were performed, not on where the service was delivered to a client.

Honigman LLP (by *Leonard M. Niehoff, Lynn A. Gandhi, and Robert M. Riley*) for Honigman Miller Schwartz & Cohn LLP.

Lawrence T. Garcia and Charles N. Raimi for the city of Detroit.

Amici Curiae:

Elliot J. Gruszka, Assistant City Attorney, and *Foster Swift Collins & Smith PC* (by *Michael D. Homier*), for the city of Grand Rapids.

MARKMAN, J. The issue here is whether the phrase “services rendered in the city” in MCL 141.623 of the Uniform City Income Tax Ordinance (UCITO), MCL 141.601 *et seq.*, encompasses legal services performed within the city—in this case, the city of Detroit—but delivered to clients situated outside the city.¹ The Michigan Tax Tribunal (the Tribunal) concluded that under § 23 of the UCITO, MCL 141.623, “services

¹ The UCITO is contained within Chapter 2 of the City Income Tax Act, MCL 141.501 *et seq.* 1964 PA 284.

rendered in the city” encompasses all legal services *performed* within the city regardless of where those services are delivered. However, the Court of Appeals reversed the Tribunal and concluded that the pertinent consideration under § 23 is where the services are *delivered* to the client. On application, this Court now resolves this disagreement by identifying what we view as the proper understanding of § 23. Needless to say, nothing herein should be understood as communicating our perspectives concerning the wisdom, the merits, or the prudence of this provision. Because we conclude that § 23 encompasses all legal services performed, i.e., done or carried out within the city without regard to where those services are delivered, we reverse the judgment of the Court of Appeals and remand to the Tribunal for entry of an order granting partial summary disposition in favor of respondent, the city of Detroit.

I. FACTS & HISTORY

Petitioner, Honigman Miller Schwartz and Cohn LLP (Honigman), is a law firm that operates offices within and outside Detroit.² Each year, Honigman, as an unincorporated business whose “entire net profit . . . is not derived from business activities exclusively within the city,” MCL 141.618, apportions its net profit using a three-factor formula known as the “business allocation percentage method,” MCL 141.620. This formula incorporates a “property factor,” the numerator of which includes the value of tangible personal and real property “situated within the city,” MCL 141.621; a “payroll factor,” the numerator of which includes total compensation paid to employees for

² Honigman changed its name, effective January 1, 2019, to Honigman LLP.

“services performed within the city,” MCL 141.622; and a “revenue factor,” the numerator of which includes revenue derived from “services rendered in the city,” MCL 141.623. From 2010 through 2014, Honigman calculated its revenue factor for services rendered in the city as approximately 11% of its gross revenue, excluding from this calculation revenues that resulted from services—e.g., legal research, document creation and preparation, and the arguing of motions—performed within the city but “delivered” to clients outside the city. However, the city determined that the proper amount under the revenue factor should have been calculated at approximately 50% of Honigman’s gross revenues, taking more fully into account revenue for services performed within Detroit on behalf of out-of-city clients. The city thus imposed an additional tax assessment of approximately \$1.1 million dollars, which became final in 2016.

Honigman subsequently filed a petition in the Tribunal, and both parties sought partial summary disposition under MCR 2.116(C)(10). The Tribunal granted the city’s motion and denied Honigman’s motion, concluding that § 23 is “ambiguous” and that the better interpretation of “services rendered in the city” requires that the revenue factor be determined using revenues generated where the services are performed and not where they are delivered.³ The Tribunal discussed why the statute would employ the term “per-

³ We note the confusing nature of this aspect of the Tribunal’s ruling. It is well settled that “ambiguities in the language of a tax statute are to be resolved in favor of the taxpayer.” *Mich Bell Tel Co v Dep’t of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994); cf. *Denton v Dep’t of Treasury*, 317 Mich App 303, 310; 894 NW2d 694 (2016) (stating, however, that tax *exemptions* are to be “strictly construed” against the taxpayer). The Tribunal here concluded that the statute was “ambiguous” but nonetheless resolved this dispute in favor of the city. We believe

formed” under one provision of the UCITO and “rendered” under another, stating:

Reading [the UCITO] in context, the Tribunal finds that the difference reflects nothing more than the syntax of the English language. The term “performed” is used in MCL 141.622 because that section pertains to compensation paid to employees, and services are typically “performed” for an employer, while in terms of generating revenue, they are “rendered” to a client. Further, the definitions and comparisons offered by [Honigman] are not on point. [Honigman] cites definitions provided by Black’s Law Dictionary and Merriam-Webster Online Dictionary that imply an act of delivery, e.g., “to transmit or deliver” and “to give.” [Honigman] notes that these definitions align with the concept of “goods received,” which focuses on where goods are destined. As noted by [the city], however, [Honigman’s] legal professionals sell their services—they do not generate “gross revenue” from “sales.” And unlike goods, merchandise, and property, services are intangible, and they cannot be “delivered” in the same manner as tangible items. [The city] aptly notes that “A lawyer’s time and advice is his stock in trade.” It does not logically follow, therefore, that the determination of where services are rendered must also be based on where the recipient of the services is located. In addition to the definition provided by [Honigman], the Merriam-Webster Online Dictionary also defines the term “render” as “to do (a service) for another.” In turn, the term “do” is defined as “perform, execute.” As such, the Tribunal finds that the term is synonymous with perform.

The parties reached agreement regarding the remaining issues, and a final appealable order was entered.

Honigman subsequently argued in the Court of Appeals that the two terms bear distinctive meanings—that § 23 is not “ambiguous” because it focuses on

the Tribunal erred by characterizing § 23 as “ambiguous,” but that it did not err in its understanding of § 23.

the delivery of services and that, even if it *was* ambiguous, it should be construed in Honigman’s favor as the taxpayer. The Court began its analysis by addressing the statute’s use of the terms “performed” and “rendered”:

We begin by observing that the Legislature used two different terms in drafting the payroll factor under § 22 and the sales factor under § 23. The payroll factor refers to “services performed,” and § 23 refers to “services rendered.” We agree with [Honigman] that these phrases must be given two different meanings because when

the Legislature uses different words, the words are generally intended to connote different meanings. Simply put, “the use of different terms within similar statutes generally implies that different meanings were intended.” If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word.

Therefore, because § 22 refers to where the work is done or performed, the Legislature likely intended that the § 23 phrase “services rendered” have a different meaning.

[*Honigman Miller Schwartz and Cohn LLP v Detroit*, 322 Mich App 667, 671-672; 915 NW2d 383 (2018) (citations omitted).]

The Court also adopted Honigman’s proposed definition of “render”:

[T]he relevant definition of “render” is “to transmit to another: DELIVER.” This is in contrast to the Tribunal’s opinion, which looked to an online definition of “render”: “‘to do (a service) for another.’”⁴ The [Tribunal’s] opinion

⁴ The Tribunal’s definition of “render” is found in *Merriam-Webster’s Collegiate Dictionary* (11th ed), and it is therefore not just an “online definition.” Rather, the definitions of “render” relied on by both the Tribunal and Court of Appeals can be found in this dictionary, and these definitions have not changed since the statute’s enactment in 1964. See *Webster’s Seventh New Collegiate Dictionary* (7th ed).

then equated “do” with “perform” to reach the conclusion that “render” is “synonymous with perform.” We find this conclusion to be dubious and unnecessarily convoluted. Why would the Legislature use the word “render” to mean “perform” by way of the verb “to do,” when it would have been much simpler and clearer to simply reuse the § 22 word “perform”? This neatly illustrates the principle that the Legislature employs different words when it intends different meanings. [*Id.* at 674.]

Concluding that “the relevant consideration in § 23 is where the service is delivered to the client, not where the attorney performs the service,” the Court of Appeals reversed the Tribunal and remanded for further proceedings. *Id.* This Court then ordered and heard oral argument concerning whether the Court of Appeals erred in its interpretation of the phrase “services rendered in the city.” *Honigman Miller Schwartz and Cohn LLP v Detroit*, 503 Mich 909 (2018).

II. STANDARD OF REVIEW

“If the facts are not disputed and fraud is not alleged, our review is limited to whether the Tax Tribunal made an error of law or adopted a wrong principle.” *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527-528; 817 NW2d 548 (2012). We review de novo a decision on a motion for summary disposition under MCR 2.116(C)(10). *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). Moreover, this case presents a significant question of statutory interpretation, which is also reviewed de novo. *Mich Props, LLC*, 491 Mich at 528. Accordingly, we are required to examine the provisions of the UCITO. See *Danse Corp v Madison Hts*, 466 Mich 175, 181-182; 644 NW2d 721 (2002). “Where the statutory language is unambiguous, the plain meaning reflects the Legislature’s intent and the statute must be applied as writ-

ten.” *Id.* at 182, citing *Tryc v Mich Veterans’ Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). Each word and phrase in a statute “must be assigned such meanings as are in harmony with the whole of the statute, construed in light of history and common sense.” *Sweatt v Dep’t of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003) (opinion by MARKMAN, J.) (quotation marks and citation omitted). “An administrative agency’s interpretation of a statute that it is obligated to execute is entitled to ‘respectful consideration,’ but it cannot ‘conflict with the plain meaning of the statute.’” *Hegadorn v Dep’t of Human Servs Dir*, 503 Mich 231, 244; 931 NW2d 571 (2019), quoting *In re Rovas Complaint Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008).

III. ANALYSIS

A. UNIFORM CITY INCOME TAX ORDINANCE

This dispute involves the proper interpretation of the UCITO, which has been adopted by Detroit under Detroit Ordinances, § 18-10-1 *et seq.*⁵ The provisions of the UCITO, including MCL 141.618, establish the framework within which Honigman must apportion its net profit.

Section 18 addresses the taxation of a business’s “net profit” for business activities that are not “exclusively” conducted within the city:

When the entire net profit of a business subject to the tax is not derived from business activities exclusively

⁵ Detroit adopted the UCITO by way of its authority as a home-rule city. See Detroit Charter, art 1, § 1-101. We recognize that Detroit has incorporated these tax provisions into its code of ordinances, but for ease of reference, we refer only to the identical provisions under MCL 141.601 *et seq.*

within the city, the portion of the entire net profit, earned as a result of work done, services rendered or other business activity conducted in the city, shall be determined under either [MCL 141.619], [MCL 141.620 to MCL 141.624], or [MCL 141.625]. [MCL 141.618.]

There is no dispute that Honigman’s city taxes are determined under MCL 141.620 to MCL 141.624. Those provisions set forth the three-factor formula, known as the “business allocation percentage method,” for calculating the taxable “net profit of a business.”

Section 20 introduces the three-factor formula as follows:

The business allocation percentage method shall be used if such taxpayer is not granted approval to use the separate accounting method of allocation. The entire net profits of such taxpayer earned as a result of work done, services rendered or other business activity conducted in the city shall be ascertained by determining the total “in-city” percentages of property, payroll and sales. “In-city” percentages of property, payrolls and sales, separately computed, shall be determined in accordance with [MCL 141.621 to MCL 141.624]. [MCL 141.620.]

This formula thus identifies three discrete factors—the property factor, the payroll factor, and the revenue factor—that must each be ascertained and then averaged to arrive at the “business allocation percentage.” MCL 141.621 to MCL 141.624.

The first of these, the property factor, states, in relevant part:

First, the taxpayer shall ascertain the percentage which the average net book value, of the tangible personal property owned and the real property, including leasehold improvements, owned or used by it in the business and situated within the city during the taxable period, is of the average net book value of all of such property, including

leasehold improvements, owned or used by the taxpayer in the business during the same period wherever situated. [MCL 141.621.]

The payroll factor next states:

Second, the taxpayer shall ascertain the percentage which the total compensation paid to employees for work done or for *services performed within the city* is of the total compensation paid to all the taxpayer's employees within and without the city during the period covered by the return. For allocation purposes, compensation shall be computed on the cash or accrual basis in accordance with the method used in computing the entire net income of the taxpayer.^[6]

If an employee performs services within and without the city, the following examples are not all inclusive but may serve as a guide for determining the amount to be treated as compensation for services performed within the city:

(a) In the case of an employee compensated on a time basis, the proportion of the total amount received by him which his working time within the city is of his total working time.

(b) In the case of an employee compensated directly on the volume of business secured by him, such as a salesman on a commission basis, the amount received by him for business attributable to his efforts in the city.

(c) In the case of an employee compensated on other results achieved, the proportion of the total compensation received which the value of his services within the city bears to the value of all his services. [MCL 141.622 (emphasis added).]

⁶ "Compensation" is defined as "salary, pay or emolument given as compensation or wages for work done or services rendered, in cash or in kind, and includes but is not limited to the following: salaries, wages, bonuses, commissions, fees, tips, incentive payments, severance pay, vacation pay and sick pay." MCL 141.604(2).

Finally, the revenue factor states, in relevant part:

Third, the taxpayer shall ascertain the percentage which the gross revenue of the taxpayer derived from sales made and *services rendered in the city* is of the total gross revenue from sales and services wherever made or rendered during the period covered by the return. [MCL 141.623 (emphasis added).]

Concerning “sales made in the city,” the revenue factor affords further guidance for calculating revenues involving the delivery of goods:

(1) For the purposes of this section, “sales made in the city” means all sales where the goods, merchandise or property is received in the city by the purchaser, or a person or firm designated by him. In the case of delivery of goods in the city to a common or private carrier or by other means of transportation, the place at which the delivery has been completed is considered as the place at which the goods are received by the purchaser.

The following examples are not all inclusive but may serve as a guide for determining sales made in the city:

(a) Sales to a customer in the city with shipments to a destination within the city from a location in the city or an out-of-city location are considered sales made in the city.

(b) Sales to a customer in the city with shipments to a destination within the city directly from the taxpayer’s in-city supplier or out-of-city supplier are considered sales made in the city.

(c) Sales to a customer in the city with shipments directly to the customer at his regularly maintained and established out-of-city location are considered out-of-city sales.

(d) Sales to an out-of-city customer with shipments or deliveries to the customer’s location within the city are considered sales made in the city.

(e) Sales to an out-of-city customer with shipments to an out-of-city destination are considered out-of-city sales. [MCL 141.623(1).]

The parties agree on the method of calculation for the property and payroll factors, but they dispute how to calculate the percentage of revenue from “services rendered in the city” under the revenue factor.⁷ From 2010 to 2014, Honigman calculated the numerator of the revenue factor under § 23 as encompassing only revenue derived from services delivered to clients located within Detroit, but the city asserts that Honigman should have included within this numerator revenue for all services performed within Detroit without regard to either the client’s location or the place of delivery. Before we interpret the pertinent statute to ascertain how Honigman must calculate revenue from “services rendered” under the revenue factor, there is value in briefly reviewing the history of our state’s tax treatment of revenue from the sale of services.

B. SALE OF SERVICES

In an analogous context of our state’s business taxation laws, “the Legislature has always required a multistate taxpayer with business income or activity both within and without the state to apportion its tax base.” *Int’l Business Machines Corp v Dep’t of Treasury*, 496 Mich 642, 650; 852 NW2d 865 (2014) (*IBM Corp*) (opinion by VIVIANO, J.).⁸ As with the UCITO, which was adopted in 1964, our early business-income tax

⁷ For purposes of the UCITO, we conclude that “performed” under the payroll factor means “to carry out an action . . .,” *Merriam-Webster’s Collegiate Dictionary* (11th ed), and accordingly, as the parties do not dispute, that compensation for “services performed within the city” is calculated on the basis of the location at which the employee has carried out the service for compensation.

⁸ Although our business taxation laws concern the apportionment of income between Michigan and other states, reviewing their apportionment provisions is useful because these show the historical development of formula-based apportionment rules for receipts from services in

laws did not provide a detailed explanation of how receipts from the sale of services should be apportioned.⁹ At least by 1955, however, when the Legislature first adopted a multifactor apportionment formula, it was clear that our state followed “the traditional rule of assigning services to the state in which they are performed.”¹⁰ See MCL 205.553(b)(1)(C)(2) and (3), as amended by 1955 PA 282 (apportioning receipts from services by dividing the taxpayer’s gross receipts from “[s]ervices performed within this state” by the total amount of the taxpayer’s gross receipts from “services performed . . . both within and without the state”).¹¹

However, that changed in 1965 when the Legislature incorporated language from the Uniform Division of Income for Tax Purposes Act (UDITPA) into our income tax statute. MCL 205.553(c)(3)(b), as amended

Michigan and offer insight as to the apportionment of in-city and out-of-city income under the UCITO.

⁹ See MCL 205.553(2), as adopted in 1953 PA 150; MCL 205.553(b)(1), as amended by 1954 PA 17; and MCL 205.553(b)(1)(C), as amended by 1955 PA 282. The last of these acts is noteworthy because it appears to be the first time the Legislature adopted a multifactor formula to determine the adjusted receipts of a taxpayer to be deemed attributable to Michigan. See MCL 205.553(b), as amended by 1955 PA 282.

¹⁰ See 1 Hellerstein, Hellerstein & Swain, *State Taxation* (3d ed), ¶ 9.18[3][a], p 9-372. See also 1964 HR Rep No 1480, p 188 (“Among those States which provide specific rules for the assignment of particular types of receipts, other than those from the sale of tangible personalty, there is considerable uniformity in their attribution provisions. Receipts from services are assigned to the State where the service is performed.”).

¹¹ Because these were enacted in an era when significantly fewer services were remotely consumed (see *infra* note 16 and accompanying text), the prior versions of the statute likely would have been viewed the same way even though these employed the phrase at issue here, “services rendered.” See MCL 205.553(2), as adopted in 1953 PA 150 (apportioning receipts from “the rendition of services” by multiplying the total adjusted gross receipts “by a fraction the numerator of which is gross receipts from services rendered in Michigan and the denominator gross receipts from services rendered everywhere”); MCL 205.553(b)(1), as amended by 1954 PA 17 (same).

by 1965 PA 186, specified that revenue from the sale of services should be included in the sales factor if:

(i) The income-producing activity is performed in this state; or

(ii) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.^[12]

The Legislature maintained this language when it repealed our initial income tax statute and replaced it with the Income Tax Act of 1967. See MCL 206.123, as adopted in 1967 PA 281.¹³ And it employed similar

¹² This provision is almost identical to art IV, § 17 of the UDITPA. In the same public act, our Legislature adopted a destination test for the sale of tangible personal property by incorporating language from art IV, § 16 of the UDITPA into our income tax statute. See MCL 205.553(c)(3)(a), as amended by 1965 PA 186. Notably, during the debate over whether to adopt a destination or an origin test as the fundamental rule of attribution for sales of tangible personal property in the UDITPA,

[w]hile acknowledging that an origin test would have been the preferred choice of the manufacturing states, the National Conference of Commissioners on Uniform State Laws “was of the opinion that [a sales factor with an origin test] would merely duplicate the property and payroll factors which emphasize the activity of the manufacturing state.” [Hellerstein, *Construing the Uniform Division of Income for Tax Purposes Act: Reflections on the Illinois Supreme Court’s Reading of the “Throwback” Rule*, 45 U Chi L Rev 768, 773-774 (1978) (second alteration in original).]

Furthermore, as Professor Hellerstein noted, “the adoption of the destination test [was] so widespread as to render academic any question of its acceptability.” *Id.* at 774. But despite that criticism, the Uniform Law Commissioners adopted an origin test for the sale of services. See *id.* at 772 (noting that with respect to the sale of services, “UDITPA attributes receipts to the state in which ‘the income-producing activity is performed’ or, if it is performed in more than one state, to the state in which a ‘greater proportion of the income-producing activity is performed . . . based on costs of performance’”). And our Legislature followed suit, incorporating this language into our income tax statute in 1965.

¹³ Michigan formally adopted the UDITPA and joined the Multistate Tax Compact in 1969. See 1969 PA 343. The Legislature later reversed

language several years later in 1975 in adopting the Single Business Tax Act (SBTA).¹⁴

In recent years, a different trend—toward “market-based sourcing” rules—has emerged.¹⁵ This trend has been fueled by the growth of the service sector of the economy and the development of new technologies that allow for more services to be provided remotely.¹⁶

course after this Court’s decision in *IBM Corp*, 496 Mich 642. See 2014 PA 282.

¹⁴ See MCL 208.53, as adopted by 1975 PA 228:

Sales, other than sales of tangible personal property, are in this state if:

(a) The business activity is performed in this state.

(b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.

(c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

¹⁵ See Schadewald, *Apportioning Income from Sales of Services: The Rules Have Changed*, *The CPA J* (Oct 2016), available at <<https://www.cpajournal.com/2016/10/01/apportioning-income-from-sales-of-services/>> (accessed March 18, 2020) (“In 2000, only a handful of states . . . used market-based sourcing rules for sales of services,” but “[i]n recent years, many states have replaced the cost of performance rule with market-based sourcing rules for sales of services.”). See also Hellerstein, Hellerstein & Swain, ¶ 9.18[3], at 9-368 (“Before the widespread adoption of UDITPA and similar statutes that attributed sales of services based on a catch-all ‘income-producing activity’/‘cost of performance’ test for attributing receipts from all sales other than sales of tangible personal property, and the more recent and equally widespread replacement of the UDITPA approach with a ‘market-state’ approach to attribution of receipts from the sale of services, states typically included receipts from services in the numerator of the receipts factor to the extent that the services were performed in the state.”) (citations omitted).

¹⁶ In an influential article pointing out the weaknesses in UDITPA’s treatment of services, Professor Swain explained that “when UDITPA was first promulgated in 1957, it was much more reasonable to assume that customer location would correlate with the place of the perfor-

Michigan followed the trend toward market-based sourcing in 2007 when our Legislature adopted the Michigan Business Tax Act (MBTA), 2007 PA 36, shortly after repealing the SBTA. See 2006 PA 325. Under the MBTA's approach, revenue from the sale of services is attributed to the specific market in which the benefit of the services is received.¹⁷ And the Legislature preserved this language in adopting a new corporate income tax in 2011. See MCL 206.665(2)(a), as adopted in 2011 PA 38.¹⁸ Although the UDITPA has not been amended, in 2015, the Multistate Tax Com-

mance. Thus, place of performance may have been an acceptable proxy for the market state." Swain, *Reforming the State Corporate Income Tax: A Market State Approach to the Sourcing of Service Receipts*, 83 Tul L Rev 285, 300 (2008). However, in light of the growth of remotely consumed services, this was no longer the case:

A product of its day, UDITPA was written against the backdrop of an economy dominated by mercantile and manufacturing enterprises The U.S. economy, however, has changed dramatically since that time. Production has shifted steadily from goods to services and intangibles, and the forces of globalization, spurred by the revolution in communications technology, now allow many more goods and services to be supplied remotely. This puts tremendous pressure on division of income rules that were developed in another era. [*Id.* at 287.]

¹⁷ Under MCL 208.1305(2):

Sales from the performance of services are in this state and attributable to this state as follows:

(a) Except as otherwise provided in this section, all receipts from the performance of services are included in the numerator of the apportionment factor if the recipient of the services receives all of the benefit of the services in this state. If the recipient of the services receives some of the benefit of the services in this state, the receipts are included in the numerator of the apportionment factor in proportion to the extent that the recipient receives benefit of the services in this state.

¹⁸ Under MCL 206.665(2):

Sales from the performance of services are in this state and attributable to this state as follows:

mission revised Article IV of the Multistate Tax Compact to encompass market-based sourcing for the sale of services and other intangibles.¹⁹ In other words, the

(a) Except as otherwise provided in this section, all receipts from the performance of services are included in the numerator of the apportionment factor if the recipient of the services receives all of the benefit of the services in this state. If the recipient of the services receives some of the benefit of the services in this state, the receipts are included in the numerator of the apportionment factor in proportion to the extent that the recipient receives benefit of the services in this state.

¹⁹ See Model Multistate Tax Compact (as revised by the Multistate Tax Commission, July 29, 2015), art 4, § 17 (“Receipts, other than receipts described in Section 16, are in this State if the taxpayer’s market for the sales is in this state. The taxpayer’s market for sales is in this state: . . . (3) in the case of sale of a service, if and to the extent the service is delivered to a location in this state[.]”) (paragraph structure omitted). Changing to market-based sourcing for the sale of services and other intangibles was intended to mirror the destination principle used for assigning the receipts of tangible personal property. See Pomp, Report of the Hearing Officer: Multistate Tax Compact Article IV [UDITPA] Proposed Amendments (October 25, 2013), p 57, available at <http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Pomp%20final%20final3.pdf> (accessed March 19, 2020). In his report, Professor Richard Pomp noted that “[t]he destination principle . . . is hard to mimic in the case of services,” and that “[s]ervices (and intangible property) present different—and more difficult considerations.” *Id.* at 62. He outlined a number of problems that could arise depending on how the concept of “delivery” is defined:

[S]uppose an architectural firm performs its design services in State A, for a corporate client based in State B, involving a project in State C. The firm sends drawings to the corporate contact as an e-mail attachment. Where does delivery take place if the client downloads the attachment while on a plane, at home, or at a hotel? What if the architectural firm makes the drawings available at its web site, located on a server in State D, which is accessed by the client while in State E? In which state did delivery take place and how would the firm know?

What if the drawings are delivered in hard copy to the client’s office in State B, or handed to the client when she visits the firm in State A? Does it matter that the project is in State C? For a rule on delivery to be workable it cannot require information unknown to the provider. A sound rule must also not be easily manipulated.

language of each of these provisions requires that the sale of services and other intangibles be calculated on the basis of *where* the recipient receives the benefit, either in state or out of state. And this approach reflects an evolution of tax policy from an origin-based approach to a market-based sourcing approach. In light of this brief historical context underlying the sale of services in the realm of multistate-business taxation, we turn again to the UCITO, in particular its calculation of the revenue factor.

C. “RENDERED” IN CONTEXT

To resolve this dispute, we must consider the definitions of relevant statutory terms and central to this is the definition of “rendered.” In particular, the revenue factor requires the calculation of “gross revenue of the taxpayer derived from sales made and services *rendered* in the city[.]” MCL 141.623 (emphasis added). The statute does not define “rendered,” but this Court generally gives undefined terms their plain and ordi-

A sound definition of “delivery” should not allow the firm’s receipts (its fees) to be assigned to a state under tenuous, fortuitous, or serendipitous circumstances, having little to do with any reasonable policy considerations underlying how income should be apportioned. Moreover, any rule for assigning sales should not be easily susceptible to manipulation by the taxpayer.

If the scenarios above can result in assigning the service fee to different states, the place of delivery could become elective. Digital services could be delivered to low-tax jurisdictions and retransmitted. To be sure, this same possibility exists under the destination principle in Act Art. IV.16, (especially with boats and planes) but in the case of services, there are fewer transaction costs and constraints on the place of delivery, which facilitates tax planning. It is tempting to use the customer’s billing address as an acceptable proxy for “delivery,” at least in the case of individuals who have less opportunity to change it in cooperation with the service provider and the regulations should address this possibility. [*Id.* at 63-64.]

nary meanings and may certainly, and properly, consult dictionary definitions in giving such meaning. *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). The parties strongly disagree as to how we should define “rendered.” Honigman argues that this Court should affirm that “render” means “to transmit to another: DELIVER.”²⁰ *Merriam-Webster's Collegiate Dictionary* (11th ed). Applying this definition, Honigman asserts that “services rendered in the city” under the revenue factor encompasses only services that are actually *delivered* to a client located in Detroit. In contrast, the city argues that “render” means “to do (a service) for another,” *id.*, encompassing all services done within the city.²¹ And the difference between these respective interpretations lies in their contrary verbal understandings—“deliver” versus “to do”—which, not surprisingly, lead to markedly disparate tax consequences.²²

²⁰ It is not altogether clear which rule Honigman is urging us to adopt. According to its brief, Honigman allocates its revenue based upon the client's billing address. (Presumably, although it is unclear from the record, this would include all such receipts, regardless of whether the work was performed by Honigman's attorneys in Detroit or elsewhere.) Moreover, Honigman's Director of Financial Services has stated in a sworn affidavit that to prepare its income tax return, “Honigman's accounting system compiled a summary of revenue by client. All revenue from clients located within the city was treated as in-city revenue.” The percentage of revenue from Detroit clients represented roughly 11% of the total revenue for all clients. However, Honigman urges us to affirm the Court of Appeals, which held that the relevant consideration is the delivery location, i.e., “where the service is delivered to the client.” *Honigman*, 322 Mich App at 675. But these understandings represent distinctive approaches to market-based sourcing. See Schadewald, *supra* note 15.

²¹ This approach effectively aligns with the origin test, i.e., where the service was performed or completed.

²² The Tribunal concluded that because the revenue factor is capable of being understood in distinctive ways and, as a result, its proper

Both parties' arguments appear to articulate plausible interpretations of the statute. However, in order to determine the most reasonable meaning of statutory language, such language cannot be read in isolation or in a manner disregarding context; this Court will not extract words and phrases from within their context or otherwise defeat their import as drawn from such context. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). A statute should be interpreted in light of the overall statutory scheme, and "[a]lthough a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context." *Sweatt*, 468 Mich at 179-180. And in this case, where "rendered" is read in context, we believe that the city's definition constitutes the more appropriate understanding and that the Court of Appeals erred by reversing the Tribunal. The term "render," in our judgment, most precisely means "to do (a service) for another," *Merriam-Webster's Collegiate Dictionary* (11th ed), and thus the revenue factor does not focus upon where the services are delivered but where they are done or carried out.²³ To reach this conclusion, it is

understanding is not altogether certain, the statute is "ambiguous" and "judicial construction" is necessary. Under this rationale, however, most statutes, in particular those that culminate in litigation, could be characterized as ambiguous. However, it is entirely commonplace that a statutory term or provision is susceptible to multiple not-unreasonable definitions. "[A]mbiguity is a finding of last resort" and it should "be reached only after all other conventional means of interpretation have been applied and found wanting." *Kendzierski v Macomb Co*, 503 Mich 296, 311; 931 NW2d 604 (2019), quoting *Mayor of the City of Lansing v Pub Serv Comm*, 470 Mich 154, 165 & n 6; 680 NW2d 840 (2004) (quotation marks omitted). After assessing the disputed language in context, we believe that MCL 141.623 is unambiguous.

²³ We recognize the similarity between the definitions we give to "rendered" and "performed"—"rendered" means "to do (a service) for another" while "performed" means "to carry out an action . . ."

necessary that we view “rendered” in context and analyze, respectively: (1) the revenue factor to determine how it treats “services rendered” and (2) the language within broader provisions of the relevant tax framework to assess which definition of “render,” among several that might be viewed in isolation as “reasonable,” most closely harmonizes with the overall statute.

1. REVENUE FACTOR

We look first to § 23, the revenue factor, because it contains the pertinent language in dispute, encompassing revenue earned for both “sales made and services rendered in the city”²⁴ Specifically, § 23 provides that “the taxpayer shall ascertain the percentage which the gross revenue of the taxpayer derived from *sales made* and *services rendered* in the city is of the total gross revenue from sales and services wherever made or rendered during the period covered by the return.” MCL 141.623 (emphasis added). “When interpreting a statute, we must ‘consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme.’” *Sweatt*, 468 Mich at 179 (some quotation marks and citation omitted). And the entirety of the revenue factor’s consideration of “services rendered” is contained in this single sentence. In contrast, the Legislature affords considerable additional guidance regarding “sales made,” more clearly specifying what is meant by “sales made in the city” as it pertains to the

Merriam-Webster’s Collegiate Dictionary (11th ed). We also recognize that these terms commonly refer to the location at which the service is done or carried out.

²⁴ See *Danse Corp*, 466 Mich at 181-182 (“We are required to examine the plain language of the involved statutes.”).

“delivery” of goods: “In the case of delivery of goods in the city to a common or private carrier or by other means of transportation, the place *at which the delivery has been completed* is considered as the place at which the goods are received by the purchaser.” MCL 141.623(1) (emphasis added). The Legislature then sets forth five nonexhaustive examples to give further illustration, e.g., “[s]ales to an out-of-city customer with shipments or deliveries to the customer’s location within the city are considered sales made in the city,” MCL 141.623(1)(d), but “[s]ales to an out-of-city customer with shipments to an out-of-city destination are considered out-of-city sales,” MCL 141.623(1)(e).

The Court of Appeals concluded that because gross revenue from the sale of goods is predicated on where those goods are *delivered*, gross revenue from “services rendered” should *also* be predicated on such delivery on the basis that goods and services are both accounted for under the revenue factor. *Honigman*, 322 Mich App at 671-673. However, “words in a statute should not be construed in [a] void, but should be read together to harmonize [their] meaning, giving effect to the act as a whole.” *Gen Motors Corp v Erves (On Rehearing)*, 399 Mich 241, 255; 249 NW2d 41 (1976) (opinion by COLEMAN, J.). And in the instant regard, the guidance afforded by the Legislature was specifically for the purpose of determining “sales made in the city,” which pertains to the delivery of goods, not services. MCL 141.623(1). Respectfully, we do not believe the Court of Appeals was correct in relying upon the guidance of the Legislature in connection with “sales made” to conclude that “services rendered,” focused upon the delivery of services, must be understood in the same manner. Rather, we conclude that even *though* revenue from “sales made in the city” is focused upon where the

goods are delivered, revenue from “services rendered in the city” is *instead* focused upon where the services are done or carried out.

Indeed, if the Legislature had intended to treat services in a similar manner to the sale of goods, it might well have seen fit to provide similar, if not identical, guidance and similar, if not identical, examples by which to illustrate how such services are delivered and when the delivery of services should be considered in-city versus out-of-city, while clarifying difficult or counterintuitive situations that might occur in relation to where services are being “delivered” to clients.²⁵ Instead, the Legislature made clear that the calculation of sales made in the city looks to the place at which the delivery has been completed and § 23 then provides illustrations that “may serve as a guide for determining sales made in the city[.]” MCL 141.623(1). Thus, for the sale of goods, this provision expressly adopted a market-based sourcing rule that focuses upon the delivery location of the shipment.²⁶ But the

²⁵ At oral argument, this Court presented the attorneys with a number of factual scenarios involving the “delivery” of services in an effort to better understand just how one “delivers” an intangible service to another. For example, how does one “deliver” services that relate to no tangible object at all, such as the repair of a dishwasher? Or what if the service is being delivered to a client with principal locations both inside and outside of the city? Or is the taxpayer allowed to select which among a client’s locations a service is to be delivered? And what if the client is an out-of-state insurance company and the law firm is charged with the representation of the client’s insured who is located inside or outside of the city, or in both? These questions are indicative that the delivery of services is not in all instances an intuitive concept or one easily understood absent statutory guidance. See *Pomp* at 63-64, *supra* note 19.

²⁶ This has always been the dominant approach for sales of tangible personal property, see *Construing the Uniform Division of Income for Tax Purposes Act*, 45 U Chi L Rev at 774, n 38 (noting that by 1978, “[t]he destination test of attribution of receipts from sales of tangible personal property [was] used in whole or in part in 42 of the 45

Legislature did not define “services rendered in the city” in a similar fashion or otherwise provide a market-based sourcing standard for the sales of services as it did later when it adopted the MBTA in 2007 or restored the state corporate income tax in 2011.²⁷ Had the Legislature intended to ground the calculation of “services rendered in the city” upon where the service was delivered, it could have expressed this intention in plain terms, or even in similar terms to those it used with regard to the sale of goods and then provided similar examples that would “serve as a guide for determining services rendered in the city,” MCL 141.623(1). Yet the Legislature did none of this. And contrary to Honigman’s premise, there is simply no textual evidence or other reason to believe that the Legislature intended “sales made in the city,” and the additional guidance afforded to “sales made,” to be understood indistinguishably with the sale of services.²⁸ “Services rendered in the city,” in our judgment, most naturally communicates the venue at which services have been done or carried out, not the venue at

jurisdictions (44 states and the District of Columbia) that employ a sales or receipts factor in their apportionment formulas”).

²⁷ See MCL 208.1305(2)(a); MCL 206.665(2)(a).

²⁸ Indeed, the Legislature understood well how to afford guidance concerning the calculation of the three factors under the business allocation percentage method. Under the payroll factor, the Legislature supplies “examples” that “serve as a guide for determining the amount to be treated as compensation for services performed within the city[.]” MCL 141.622. Specifically, these examples address how to calculate the payroll factor based upon specific forms of compensation for the performance of services, i.e., compensation for the amount of time worked, the volume of business secured, or “other results achieved.” Thus, the Legislature knew precisely how to supply guidance where necessary, as it had done under the payroll factor. If the Legislature intended to equate the sale of services with the delivery of that service, it could have made this clear and afforded the guidance necessary to calculate revenue based upon the delivery of services.

which services are delivered, and we are not persuaded, absent further guidance from the Legislature, that the treatment of the delivery of goods under the revenue factor communicates that “services rendered” is the equivalent of “services delivered.” Where “rendered” means simply “to do (a service) for another,” *Merriam-Webster’s Collegiate Dictionary* (11th ed), the calculation of revenue from services rendered in the city is straightforward; the law inquires where those services were *done* and not where they were *delivered*.²⁹ Accordingly, we agree with the Tribunal that under § 23, “rendered” means “to do (a service) for

²⁹ Honigman never adequately explains, in our judgment, why, even if this Court agreed that the Legislature adopted a market-based sourcing rule for the sale of services, we should hold that it selected the billing location of the customer, i.e., the option employed in practice by Honigman, as opposed to the location at which the services are delivered, i.e., the rule adopted by the Court of Appeals, or the location at which the benefit of the services is received, i.e., the rule adopted by the Legislature in the MBTA and in our restored corporate income tax. As Professor Pomp explained in his report to the Multistate Tax Commission, if a taxing jurisdiction adopts a delivery rule for the sale of services, much still depends upon the precise definition of “delivery” that is selected. See *supra* note 19. Therefore, even assuming that the Legislature adopted a delivery rule, the statute contains no textual clues that would assist us in determining which specific market-based sourcing rule it selected. Furthermore, even assuming that the additional guidance supplied in the statute for the sale of tangible personal property was intended also to serve as guidance, no textual clues in that subsection have been identified that would lead to the conclusion that the Legislature intended to adopt a market-based sourcing rule based upon the customer’s billing address as opposed either to a rule based upon the location at which the services are delivered or the location at which the benefit of the services is received (options that appear more reflective of the rule adopted by the Legislature for the sale of tangible personal property). Finally, it is worth noting that the particular market-based sourcing rule apparently advocated by Honigman—one in which sales of services are sourced based upon the customer’s billing address—has never, to the best of our knowledge, been expressly adopted in any Michigan taxing statute.

another,” *id.*, and the calculation of the revenue factor is based upon where the service has been performed, i.e., done or carried out, not where the service was ultimately delivered.

2. TAX FRAMEWORK

We next turn to a review of the UCITO’s overall framework to determine which definition of “render” best harmonizes with the statute as a whole. To be sure, language in a statute “must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense.” *Sweatt*, 468 Mich at 179 (quotation marks and citation omitted). In doing so, we also look beyond the revenue factor to other provisions of the statute that are relevant for the purpose of giving meaning to the term “rendered.” In particular, the phrase “services rendered in the city,” and slight variations of this phrase, appear numerous in provisions that pertain to the apportionment of the net profits of a business, and we believe the Legislature’s use of this language is further indicative of an intention to calculate revenue from “services rendered,” based upon where the service is done or carried out.

This phrasing first appears in MCL 141.612(b), which provides that for resident individuals the tax at issue applies to “a distributive share of the net profits of a resident owner of an unincorporated business, profession, enterprise, undertaking or other activity, as a result of work done, *services rendered* and other business activities *wherever conducted*.”³⁰ (Emphasis

³⁰ A “resident” is defined as “an individual domiciled in the city.” MCL 141.609(1).

added.) In other words, for resident individuals, the tax applies to pass-through income regardless of where the revenue-producing business activity occurs. As it applies, however, to nonresident individuals and corporations, the UCITO is less agnostic about the situs of the revenue-producing income activity. In that regard, the act provides that the tax only applies to net profits resulting from “work done, *services rendered*, and other business activities conducted *in the city*.” MCL 141.613(b) (emphasis added). And for “a corporation doing business in the city,” the tax similarly applies only to “such part of the taxable net profits as is earned by the corporation as a result of work done, *services rendered* and other business activities conducted *in the city . . .*” MCL 141.614 (emphasis added). In other words, for these categories of taxpayers, the tax only applies where the profit-earning business activity takes place in the city.

Similar phrasing appears in MCL 141.618, which provides the road map for determining which portion of the net profit of a business, such as that of Honigman, is attributable to the city. It provides that “the portion of the entire net profit, earned as a result of work done, *services rendered* or other business activity conducted *in the city*” (emphasis added), shall be determined by the separate accounting method, MCL 141.619; the business allocation percentage method, MCL 141.620 through MCL 141.624; or an alternative method of accounting approved by the administrator, MCL 141.625. And the phrase appears yet again in MCL 141.620, the provision setting forth, *inter alia*, how the business allocation percentage method is calculated: “The entire net profits of such taxpayer earned as a result of work done, *services rendered* or other business activity conducted *in the city* shall be ascertained by determining the total ‘in-city’ percentages of property,

payroll and sales.” (Emphasis added.) Together, §§ 18 and 20 establish the framework upon which city taxes are to be calculated under the business allocation percentage method where the net profits of a business derive from activities conducted both inside and outside of the city. Stated otherwise, only that portion of net profits from business activities conducted within the city is subject to the city tax.

An assessment of these provisions makes reasonably clear that the general inquiry relating to the apportionment of the net profits of a business focuses upon *where* the profit-earning business activity takes place. And that is also the specific inquiry dictated by the first two apportionment factors. In calculating the property factor, it must be determined which properties are “situated within the city.” MCL 141.621. And in calculating the payroll factor, it must also be determined which services were “performed within the city.” MCL 141.622. Each of these factors—concerning a taxpayer’s capital investment and labor costs—are clearly focused upon the location of the profit-earning business activity.

Returning again to the revenue factor, we believe that the phrase “services rendered in the city” is also focused upon the location of the profit-earning business activity, which in the instant case is comprised of the legal work performed, i.e., done or carried out, by Honigman attorneys. In other words, where the revenue factor is read in context alongside the other two apportionment factors, in addition to other broader provisions of the UCITO that employ the same phrase “services rendered,” we are convinced that the apportionment of revenue under this factor is also determined on the basis of the location at which the business activity—in this case, the legal work—has taken place. Accordingly, “services rendered” under the revenue fac-

tor encompasses revenue for all services performed, i.e., done or carried out within the city, even when those services were performed for out-of-city clients. And in this way, the Legislature has effectively adopted an “origin test” for services under the revenue factor.³¹

D. “PERFORMED” & “RENDERED” IN CONTEXT

We recognize that the Legislature’s use of the distinctive terms “performed” and “rendered” within the

³¹ Honigman argues against the Court’s conclusion that the Legislature adopted an “origin test” for the sale of services on the basis that it would result in duplication of the payroll factor. This critique is not new—as noted earlier, the Uniform Law Commissioners offered a similar one during discussions leading to the adoption of the UDITPA in 1957. See *Construing the Uniform Division of Income for Tax Purposes Act*, 45 U Chi L Rev at 773-774 (noting that the commissioners were “of the opinion that [a sales factor with an origin test] would merely duplicate the property and payroll factors which emphasize the activity of the manufacturing state”) (quotation marks and citation omitted; alteration in original). But as already noted, that criticism did not preclude the UDITPA drafters or our Legislature from expressly adopting such a test for the sale of services. See *supra* note 13. While creating an apportionment scheme free entirely of overlapping factors may conceivably be a preferable or a more logical taxing approach, “[p]erfect solutions are seldom to be found in tax policy questions; in most cases, adequate solutions are the best that can be devised.” Lynn, *The Uniform Division of Income for Tax Purposes Act*, 19 Ohio St L J 41, 53 (1958). In recent decades, the goal of a uniform apportionment methodology has increasingly given way to policy concerns about economic development and, as a result, states have been moving away from an equally weighted three-factor apportionment formula toward a more heavily weighted receipts factor. See Hellerstein, *Lessons of US Subnational Experience for EU CCCTB Initiative*, A Common Consolidated Corporate Tax Base for Europe (Schön, Schreiber & Spengel eds), p 153 (“Today roughly three-quarters of the states with corporate income taxes place at least half the weight on receipts and close to a dozen have moved or are in the process of moving towards a formula based entirely on receipts.”). Since this critique has not thus far prevented the adoption of an “origin test” for the sale of services within other taxing statutes, it would be unwarranted for us to conclude that this consideration

same tax statute might reasonably suggest, as the Court of Appeals concluded, that the Legislature intended these terms to have distinctive meanings—specifically, that “perform” signifies “to carry out an action” and “render” signifies “to deliver.” After all, “[w]hen the Legislature uses different words, the words are *generally* intended to connote different meanings.” *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass’n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009) (emphasis added).³² And this

precludes such a reading of the UCITO. In any event, we are not aware of any rule of interpretation (and none here has been offered) that disfavors an otherwise reasonable interpretation of a taxing statute that yields to some degree overlapping apportionment factors. Indeed, the argument in this regard is not an argument of interpretation at all but an argument of policy, better directed to the Legislature.

³² There are, however, a variety of exceptions to this general rule, for the “general rule” is perhaps better described as a default “presumption.” Most relevantly, this Court will not attribute distinctive meanings to distinctive terms where, in viewing these terms in context, the coherence of the statutory provision as a whole would be undermined. A statute must be read in its entirety and words must be assigned meanings that are in harmony with the whole of the statute. *Sweatt*, 468 Mich at 179. More specific exceptions may also pertain in circumstances (a) in which two words necessarily have the same commonly understood meaning, see, e.g., *People v Thompson*, 477 Mich 146, 153-154; 730 NW2d 708 (2007) (concluding that “keep” is synonymous with “maintain,” and “that these two terms are separated by the word ‘or’ does not give [this Court] the authority to give these two terms distinctive meanings when they are commonly understood to have the same meaning”); (b) in which different words constitute synonyms used to convey varying degrees of the same conduct, see, e.g., *People v Greene*, 255 Mich App 426, 440; 661 NW2d 616 (2003) (finding that “impede” and “prevent” are synonyms presenting “only degrees of difference in the same conduct”); (c) in which words located within a listing have related meanings, see, e.g., *Rovas*, 482 Mich at 114-115 (defining “mislead,” “deceive,” and “false” in a similar fashion by applying *noscitur a sociis*, which is “the principle that words grouped in a list should be given related meaning”), quoting *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005); or (d) in which a legislative body has sought in a thesaurus-like manner to list as many similar terms as

Court is well aware that it should avoid, when reasonably possible, the adoption of essentially synonymous definitions of distinctive terms without the most careful consideration of how those terms will come to be understood within a statutory scheme. However, this maxim of jurisprudence is a “general rule” and “may not apply in every situation.” *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 184 n 10; 931 NW2d 539 (2019) (emphasis omitted). And in the final analysis, we believe the Court of Appeals’ reliance upon this single rule of interpretation constitutes a failure to give meaning to the statute in its entirety and in its overall context. That is, despite the Legislature’s use of the distinctive terms “performed” and “rendered,” we believe these terms should be understood as having *similar* meanings within the statute. “Performed” as employed in § 22 means “to carry out” and connotes a similar meaning as “rendered” in § 23, meaning, in context, “to do (a service) for another.” *Merriam-Webster’s Collegiate Dictionary* (11th ed). Thus, we believe the Legislature intended that both revenue for “services rendered in the city” and compensation for “services performed within the city” be calculated in a *similar* manner—each predicated upon where the service has been done or carried out. The Court of Appeals rejected the same conclusion as it dutifully grappled with the meanings of these terms—“Why would the Legislature use the word ‘render’ to mean ‘perform’ by way of the verb ‘to do,’ when it would have been much simpler and clearer to simply reuse the § 22 word ‘perform’?” *Honigman*, 322 Mich App at 674.

To be clear, we do not conclude the two terms possess identical meanings, just as we do not conclude they

possible in an effort to ensure that no semantic gaps are left regarding some intended element of statutory breadth or coverage.

possess entirely distinctive meanings. Rather, we conclude the terms are *similarly* defined—in which each looks in common to *where* a service has been done or carried out—but nonetheless each is to be given a *distinctive* connotation from the distinctive context in which each is situated within the statute. That is, review of the UCITO evidences that the Legislature consistently uses “performed” in provisions referring to the actions of an employee in relation to his or her compensation and that the Legislature consistently uses “rendered” in provisions referring to the completion of professional services for another—in particular, on behalf of a client—and thus that pertain to business or firm earnings, such as profits and revenues.

This contextual distinction is perhaps best illustrated by the confluence of §§ 22 and 23. Section 22 pertains to “the total *compensation* paid to employees for work done or for *services performed* within the city . . .” MCL 141.622 (emphasis added). This language connects the employee’s performance of services to his or her compensation from the employer. However, § 23 pertains to the “gross *revenue of the taxpayer* derived from sales made and *services rendered* in the city . . .” MCL 141.623 (emphasis added). This language does not pertain to the employee’s performance of services but instead connects the taxpayer’s revenue to the process by which the business or firm provides services for others, in particular, to its clients.³³ And

³³ This contextual distinction is further illustrated in considering the definition of “compensation” under MCL 141.604(2) in conjunction with the payroll factor. Compensation is defined as “salary, pay or emolument given as compensation or wages for work done or services *rendered* . . .” MCL 141.604(2) (emphasis added). When incorporating the definition of “compensation” into the payroll factor, it is clear that this factor is calculated based upon the “compensation or wages for work done or services rendered,” *id.*, that is “paid to employees for work done or for

despite the distinctive contexts in which these terms are used, both compensation for “services performed within the city” under § 22 and revenue derived from “services rendered in the city” under § 23 are calculated in a similar manner, based upon where the services have been done or carried out.³⁴

And thus in response to the Court of Appeals, it is *this* contextual distinction that underlies the Legislature’s rationale of employing separate terms throughout the statute even where these terms are intended to have an essentially *common* meaning and focusing the UCITO’s analysis upon where a service has been performed or carried out, not where it has been finally delivered. And it is this same contextual distinction that allows this Court ultimately to set aside the usual interpretive presumptions arising from the Legislature’s use of two such closely related terms as “performed” and “rendered.” Our recognition of the textual relationship of these terms as they appear within the UCITO is not a matter of mere academic or philological scholarship but rather explains precisely why a jurisprudential proposition of great pedigree and logic—one

services performed within the city,” MCL 141.622. Again, the Legislature’s use of “rendered” pertains to services done for another, while the use of “performed,” although it pertains to those same services, does so in the specific context in which those services have been carried out on behalf of, and in exchange for, an employee’s compensation from his or her employer.

³⁴ While these two provisions provide the most pertinent example, our review of the UCITO reveals that many of its provisions evidence this same distinction in which the Legislature has clearly employed “services performed” and “services rendered” in the same contextual manner. “Rendered” is consistently used in referring to the taxpayer’s earnings for services done for another, as evidenced by MCL 141.623; MCL 141.618; MCL 141.620; MCL 141.612; MCL 141.614; and “performed” is consistently used in referring to compensation for services performed by an employee, as evidenced by MCL 141.622; MCL 141.651(b); MCL 141.654; MCL 141.657(2)(b).

understandably given credence by both the Court of Appeals and Honigman, a law firm of great distinction—should be held inapplicable in the present case, despite the fact that this same proposition was most likely applied to cases decided last month and will most likely be applied to cases decided next month. The inapplicability of this proposition in the instant case is merely illustrative that there are sometimes competing interpretative propositions that must be balanced and harmonized in order for the Legislature’s genuine intentions to be faithfully discerned. We are confident that we have done what is proper in applying principles of textual interpretation to this dispute and in reaching an understanding of the statute that is in closest accord with the intentions of the lawmaking branch of our government. As a result, we are not persuaded by the Court of Appeals that the use of distinctive terms within the UCITO necessarily communicates, as that Court believed, a legislative intention thereby to communicate distinctive meanings to the critical terms in this case, “perform” and “render.”

And to further respond to the Court of Appeals, it is this same contextual distinction that also explains why the Legislature did not intend these two terms to have *identical* meanings. The distinctive contexts in which these terms appear not only explain *why* the Legislature has employed separate terms to describe a common legal approach to determining which services are taxable, and which are not, but *why* the distinctive connotations of these terms must be respected and maintained and why “performed” and “rendered” cannot be viewed as simply interchangeable throughout the statute—the terms have distinctive connotations, or “suggestive significance[s],” *Webster’s New Collegiate Dictionary* (1960), in which at least for purposes of the present statute, “performed”

relates only to an employee's compensation for services carried out for an employer and "rendered" relates only to earnings, such as net profits, derived from services done on behalf of clients.

IV. CONCLUSION

We conclude that upon close review of the UCITO, it is reasonably clear that "rendered" means, as set forth by the city of Detroit, "to do (a service) for another," and not, as set forth by Honigman, "to transmit to another: DELIVER." *Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, the Legislature adopted an "origin test," rather than a destination or market-based test, for the calculation of revenue from "services" under the revenue factor. Section 23 encompasses all legal services performed, i.e., done or carried out, within the city without regard to where those services are delivered. In so holding, we acknowledge that the terms "performed" and "rendered" generally have similar meanings and are effectively equivalent in their relative purposes within the statute. However, the distinctive contexts in which these terms appear accounts for the use of different words despite their similar meanings. In all, it is the interpretation of the city, rather than that of Honigman, in our judgment, that sets forth the most reasonable understanding of the revenue factor and that is most harmonious with the statutory framework as a whole. Accordingly, the Court of Appeals erred when it held that the determinative consideration under § 23 is where, in the end, the services are delivered to the client. Therefore, we reverse the judgment of that Court and remand to the Tribunal for further proceedings.

ZAHRA, BERNSTEIN, and CAVANAGH, JJ., concurred with MARKMAN, J.

VIVIANO, J. (*concurring*). I concur in the majority's holding that MCL 141.623 encompasses all legal services done or carried out in the city. And I agree with much of the analysis leading to that holding, in particular the historical discussion and comparative analysis of the Uniform City Income Tax Ordinance (UCITO), MCL 141.601 *et seq.*, and Michigan's analogous state-taxation statutes. I part ways, however, with the majority over Part III(D) of the opinion, which confusingly endeavors to create ever-so-slight daylight between the terms "render" and "perform," characterizing them as "similar" but not the same. I write to explain why this effort fails, why it is unnecessary, and why it undermines the majority's conclusion that, as used in the UCITO, these terms mean the same thing.

It is helpful, at the outset, to keep in mind what this Court is called upon to decide in the case. The issue is whether the phrase "services rendered" in § 23 of the UCITO, MCL 141.623, includes work "performed" in the city of Detroit for clients outside the city, despite the fact that § 22 of the UCITO, MCL 141.622, expressly employs the phrase "services performed." Courts usually adhere to the presumption of consistent usage, which holds that different words have different meanings.¹ The Michigan Tax Tribunal concluded that the presumption did not apply here because the "difference [in wording] reflects nothing more than the syntax of the English language." The Court of Appeals disagreed, hewing to the general consistent-usage presumption and differentiating the definitions of "rendered" and "performed" by interpreting the former as focusing on where services were delivered to a client.²

¹ See notes 8 and 9 of this opinion and the accompanying text.

² *Honigman Miller Schwartz and Cohn LLP v Detroit*, 322 Mich App 667, 673-675; 915 NW2d 383 (2018).

Through most of its opinion, including at the end, the majority seems to conclude that the terms have the same meaning. It defines “performed” to mean “to carry out an action”³ “Render,” according to the majority, means “to do (a service) for another[.]”⁴ Given these definitions, the majority concludes that “services rendered,” in the context of § 23, “encompasses revenue for all services performed, i.e., done or carried out within the city[.]”⁵ To this point in the opinion—before the discussion of the terms’ supposed distinctive connotations—the majority ably explains the textual, contextual, and historical bases for its interpretations.⁶ And it is this analysis that provides the holding and relevant interpretations, which are repeated in the introduction, body, and conclusion of the majority opinion. It is hard to imagine a plainer way of saying that “services rendered” means “services performed.” At times, the majority acknowledges that the definitions it lands on—ones with which I largely agree—mean essentially the same thing.⁷ And because

³ *Ante* at 299 n 7, quoting *Merriam-Webster’s Collegiate Dictionary* (11th ed).

⁴ *Ante* at 307, quoting *Merriam-Webster’s Collegiate Dictionary* (11th ed); see also *ante* at 322.

⁵ *Ante* at 315-316; see also *ante* at 290 (“[W]e conclude that § 23 encompasses all legal services performed, i.e., done or carried out within the city without regard to where those services are delivered”); *ante* at 322 (“Section 23 encompasses all legal services performed, i.e., done or carried out, within the city without regard to where those services are delivered.”).

⁶ See *ante* at 295-316.

⁷ See *ante* at 322; see also *ante* at 318 (“[W]e believe these terms should be understood as having *similar* meanings within the statute.”). However, the majority has inconsistently adopted a definition for the intransitive form of “perform” while adopting a definition for the transitive form of “render.” Although it is not clear, it appears both terms are used transitively in the statute. Using the same dictionary,

this is enough to decide that “rendered” refers to the place of performance, not to the place of delivery or benefit, the majority’s interpretive task should be complete.

For the majority, however, it is not. Instead, it labors on, in search of a meaningful distinction between the two terms. Why? Not because the distinction it discerns directly affects the outcome; by the time it reaches this portion of its contextual analysis, the majority has already adopted the crucial definitions that dispose of the case. Rather, the majority spins its interpretive wheels to avoid the presumption of consistent usage. As noted, under that interpretive principle, words are “presumed to bear the same meaning throughout a text” and “a material variation in terms suggests a variation in meaning.”⁸ It is a canon this Court applies when appropriate.⁹

I would adopt the definition of the transitive form of both words and interpret “perform” to mean “CARRY OUT, DO[.]” *Merriam-Webster’s Collegiate Dictionary* (11th ed). It is also worth noting that while courts should ordinarily use a dictionary contemporaneous with the statute’s enactment, see *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 563 n 58; 886 NW2d 113 (2016) (“In ascertaining the meaning of a term, a court may determine the meaning at the time the statute was enacted by consulting dictionaries from that time.”), I agree with the majority that the definitions from that period are not meaningfully different from the ones the majority employs in its opinion. See *Webster’s New World Dictionary of the American Language* (1960) (defining “perform” as, among other things, “to carry out”; defining “render” as “to do (a service, etc.)”).

⁸ Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, (St. Paul: Thomson/West, 2012), § 25; see also 2A Sutherland, *Statutes and Statutory Construction*, § 46:6, p 261 (“Different words used in the same, or a similar, statute are assigned different meanings whenever possible.”).

⁹ See, e.g., *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass’n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009) (“When the Legislature uses different words, the words are generally intended to connote different meanings.”).

The majority labels this “a jurisprudential proposition of great pedigree and logic,” but then escapes its grasp by inventing a brand new exception to the canon that it claims is satisfied by the contextual distinction it has identified.¹⁰ “Rendered,” the majority explains, is used in contexts describing labor on behalf of another “that pertain[s] to business or firm earnings, such as profits and revenues.”¹¹ By contrast, “performed” appears in the statute when the services relate to an individual’s compensation.¹²

I am unpersuaded for several reasons. To begin, the majority’s position cannot be reconciled with numerous provisions in the UCITO. Take, for example, MCL 141.604(2), which defines “compensation” as “salary, pay or emolument given as compensation or wages for work done or services rendered”¹³ Even more

¹⁰ *Ante* at 320; see also *ante* at 320 (“And it is this . . . contextual distinction that allows this Court ultimately to set aside the usual interpretive presumptions arising from the Legislature’s use of two such closely related terms as ‘performed’ and ‘rendered.’”).

¹¹ *Ante* at 319; see also *ante* at 320 n 34 (“‘Rendered’ is consistently used in referring to the taxpayer’s earnings for services done for another, . . . and ‘performed’ is consistently used in referring to compensation for services performed by an employee”).

¹² See *ante* at 319.

¹³ The majority mentions MCL 141.604(2) briefly and only as a prop for its interpretation of § 22, the payroll factor. It states, “When incorporating the definition of ‘compensation’ into the payroll factor, it is clear that this factor is calculated based upon the ‘compensation or wages for work done or services rendered,’ [MCL 141.604(2)], that is ‘paid to employees for work done or for services performed within the city,’ MCL 141.622.” *Ante* at 319-320 n 33. Without more, the majority proclaims that this simple substitution proves its point. But I do not see how. Incorporating the full definition of “compensation” into § 22 would create a redundancy at best and be nonsensical at worst: “the taxpayer shall ascertain the percentage which the total [‘salary, pay or emolument given as compensation or wages for work done or services rendered’] paid to employees for work done or for services per-

directly, nonresident individuals can be taxed under MCL 141.613(a) “[o]n a salary, bonus, wage, commission, and other compensation for services rendered as an employee for work done or services performed in the city.” In a similar manner, MCL 141.665 connects compensation with the term “rendered” by providing tax credits for city residents who “received . . . compensation for work done or services performed or rendered” outside the city and who paid taxes to another municipality on that income. These provisions contradict the majority’s contention that “‘performed’ is consistently used”—in contradistinction to “rendered”—“in referring to compensation for services performed by an employee[.]”¹⁴

More importantly, the majority never gets around to explaining how the distinction sheds light on the semantic content of the terms. Do the connotations have any bearing on what the words actually mean? As noted above, context undoubtedly can shed light on a word’s meaning.¹⁵ But here, the connotations are not even mentioned in the critical passages of the majority opinion that determine the terms’ meanings, and so they are not part of the meanings the majority must compare when considering the presumption of consistent usage, i.e., in deciding whether the definitions are the same for purposes of that canon. Rather, the majority settles on equivalent definitions for the two different terms, then explains how those terms (bear-

formed . . .” MCL 141.622, inserting the MCL 141.604(2) definition of “compensation.” All this shows, to my mind, is that the terms “performed” and “rendered” are interchangeable.

¹⁴ *Ante* at 320 n 34.

¹⁵ See *King v Burwell*, 576 US 473, 500-501; 135 S Ct 2480; 192 L Ed 2d 483 (2015) (Scalia, J., dissenting) (“Context always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.”).

ing the same meaning) appear in different contexts, all without varying its interpretation of those terms. As a result, this part of the majority's contextual analysis does not have a bearing on the linguistic meaning of the relevant phrases, and it is therefore not part of any legitimate interpretive effort to uncover statutory meaning.¹⁶

The majority fails to translate its "*distinctive connotations*" into a meaningful interpretation because, even under the majority's telling, the distinction is diaphanous at best.¹⁷ Stated most simply, the majority's interpretation is that employees "perform" services for compensation from their employer but "render" services on behalf of their employer to its clients. In other words, the statute somehow treats as distinct the same work done for the same employers by the same employees. The majority itself acknowledges that the services "performed" under MCL 141.622 are the very same services "rendered" under MCL 141.623.¹⁸ There is no suggestion in the majority opinion that the distinction has any practical significance, such as by distinguishing who or what can be taxed. Indeed, both

¹⁶ See Hutton, *Word Meaning and Legal Interpretation* (New York: Palgrave Macmillan, 2014), p 17 ("In reaching an interpretation, we reach a contextually relevant determination of what the word (phrase, text . . .) meant."); *Reading Law*, § 1, p 53 ("Any meaning derived from signs involves interpretation . . . Interpretation or construction is 'the ascertainment of the thought or meaning of the author of, or of the parties to, a legal document, as expressed therein, according to the rules of language and subject to the rules of law.'") (citation omitted); Sutherland, § 45:3, p 22 ("Every occasion to determine whether, and how, a statute applies in a particular situation is by definition an occasion to interpret it . . ."); Cooley, *Constitutional Limitations* (5th ed), p *38 (explaining that the purpose of interpretation is to "find[] out the true sense of any form of words").

¹⁷ See *ante* at 318-319.

¹⁸ See *ante* at 320 n 33.

§ 22 and § 23 relate to taxation of business income, not, for example, taxation of the employee's income from "compensation." Thus, even assuming the distinction exists, it offers little insight into how the statute operates.

Because this portion of the contextual analysis leaves the terms' semantic content unchanged, the majority has not pointed to a relevant distinction for purposes of the consistent-usage canon. It has not, in other words, shown that the different terms have different meanings, such that the canon is inapplicable. The majority's efforts instead amount to a demonstration that different terms with the same meaning have (supposedly) been used in different contexts, followed by the conclusion that the consistent-usage presumption can therefore be "set aside."¹⁹ The unstated assumption lurking behind this argument is that if different terms pop up in different contexts—albeit, in close proximity in the same statute—there is no general presumption against giving them the same meaning. I have not come across any such version of the canon. The canon speaks of different terms generally having different meanings—it does not say different terms *used in the same context* generally have different meanings, or that different terms in *different contexts* can have the same meaning. In essence, then, the majority ignores the real canon and creates a straw-canon that does not apply to these circumstances.

¹⁹ *Ante* at 320. Presumably, by "set aside" the majority means to say that the canon does not apply because the terms are distinct enough that they fall outside the canon's scope. Why else spend pages purporting to uncover a distinction that would otherwise have no bearing on the case? Nothing suggests the majority means that the terms are equivalent but the canon is inapplicable for some other reason.

And to what end? The canon itself provides the solution. Semantic canons are not absolute rules.²⁰ They are useful because they capture how language is generally used.²¹ But when the ordinary meaning of the text runs contrary to a canon, we must follow the text.²² The presumption of consistent usage, in particular, is just that: a presumption.²³ It has long been recognized as an imperfect tool for arriving at a text's meaning.²⁴ “[M]ore than most other canons, this one

²⁰ See *Reading Law*, § 3, p 59 (“No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.”).

²¹ See, e.g., Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (Chicago: University of Chicago Press, 2015), p 186 (noting that canons are justified to the extent they “represent[] the way that language is normally used”); *Reading Law*, § 3, p 59 (“Principles of interpretation are guides to solving the puzzle of textual meaning . . .”).

²² See *People v Pinkney*, 501 Mich 259, 285 n 63; 912 NW2d 535 (2018) (“[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”), quoting *Connecticut Nat’l Bank v Germain*, 503 US 249, 253-254; 112 S Ct 1146; 117 L Ed 2d 391 (1992).

²³ See, e.g., *Kirtsaeng v John Wiley & Sons, Inc*, 568 US 519, 540; 133 S Ct 1351; 185 L Ed 2d 392 (2013) (“We are not aware, however, of any canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing.”).

²⁴ See, e.g., Black, *Handbook on the Construction and Interpretation of the Laws* (1911), §§ 53-54, p 145 (“But the presumption . . . is not controlling; and where it appears that, by giving it effect, an unreasonable result will follow, and the manifest object of the statute be defeated, the courts will disregard the presumption . . .”); Bishop, *Commentaries on the Law of Statutory Crimes* (1883), § 95a, p 86 (“In a sort of general way it is sometimes worth considering, that, if a particular word occurs repeatedly in a statute, or in different statutes on the same subject, the meaning may, *prima facie*, be deemed identical in all the places. . . . The presumption is in no form held to be

assumes a perfection of drafting that, as an empirical matter, is not often achieved.”²⁵ Drafters “often (out of a misplaced pursuit of stylistic elegance) use different words to denote the same concept.”²⁶ The presumption

conclusive, and the fact is sometimes very palpably otherwise. Even the same word in a single sentence creating an offence has been adjudged to have different meanings in different parts of the sentence.” (citations omitted); 1 Story, *Commentaries on the Constitution of the United States* (4th ed), § 454, p 335 (“[I]t is by no means a correct rule of interpretation to construe the same word in the same sense wherever it occurs in the same instrument. It does not follow, either logically or grammatically, that because a word is found in one connection in the Constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs.”); Smith, *Commentaries on Statute and Constitutional Law* (1848), § 485, p 631 (“If an expression which is susceptible of different meanings occurs more than once in the same statute, it may not have the same signification in every instance in which it may be used, as it may be governed by the subject matter in its immediate context”); Lieber, *Legal and Political Hermeneutics* (Boston: Charles C Little & James Brown, 1839), p 119 (“What we have said before includes the rule, that we are by no means bound to take an ambiguous word in that meaning, in which it may occur in another passage of the same text; for words, as is well known, have different meanings in different contexts.”); de Vattel, *The Law of Nations* (1787), bk II, § 281, p 379 (“If any one of those expressions that have many different significations, are found more than once in the same piece, we cannot make it a law, to take it every where in the same signification.”); Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv L Rev 2118, 2162 (2016) (“Similarly, if two different terms are normally synonyms, requiring them to be interpreted differently makes little sense. . . . When judges hew too closely to this presumption, they may ditch the best reading of a statute and instead improperly invent one of their own.”), reviewing Katzmann, *Judging Statutes* (New York: Oxford University Press, 2014).

²⁵ *Reading Law*, § 25, p 170.

²⁶ *Id.*; see also Office of the Legislative Counsel, US House of Representatives, *House Legislative Counsel’s Manual on Drafting Style* (Nov 1995), § 102(d)(4), p 3 (“If you have found the right word, don’t be afraid to use it again and again. In other words, don’t show your pedantry by an ostentatious parade of synonyms. Your English teacher may be disappointed, but the courts and others who are straining to find your meaning will bless you.”).

thus “‘readily yields’” when a fair reading of the text requires.²⁷ As the majority recognizes, we have not been wedded to the presumption and instead have concluded in numerous cases that it did not accurately reflect the statute’s meaning.²⁸

Here, I conclude that the presumption must yield. The majority opinion, prior to Part III(D), explains why “performed” and “rendered” share a common meaning as used in § 22 and § 23. What the majority’s contextual analysis shows, if anything, is not that the terms bear some ineffable semantic distinction but, rather, that they may have been used for stylistic variety.²⁹ As the meaning of “rendered” in § 23 is clear, I would not obscure that meaning out of misguided obeisance to an interpretive presumption that, by its own terms, often gives way to relevant context.

For these reasons, I respectfully concur.

MCCORMACK, C.J., and CLEMENT, J., concurred with VIVIANO, J.

²⁷ *Utility Air Regulatory Group v EPA*, 573 US 302, 320; 134 S Ct 2427; 189 L Ed 2d 372 (2014), quoting *Environmental Defense v Duke Energy Corp.*, 549 US 561, 574; 127 S Ct 1423; 167 L Ed 2d 295 (2007); see also *Reading Law*, § 25, p 171 (“Because it is so often disregarded, this canon is particularly defeasible by context.”).

²⁸ See *ante* at 317-318 n 32 (listing cases).

²⁹ We do not, however, sit in review of the Legislature’s literary style; “we ask only what the statute means.” Holmes, *The Theory of Legal Interpretation*, 12 Harv L Rev 417, 419 (1899); see also *Clam Lake Twp v Dep’t of Licensing and Regulatory Affairs*, 500 Mich 362, 373; 902 NW2d 293 (2017) (“Unambiguous statutes are enforced as written.”); Manning, *Textualism and Legislative Intent*, 91 Va L Rev 419, 450 (2005) (“The precise wording of any given statute may have been, for unknowable reasons, essential to its passage. Thus, efforts to augment or vary the text in the name of serving a genuine but unexpressed legislative intent risks displacing whatever bargain was actually reached through the complex and path-dependent legislative process.”).

TOMRA OF NORTH AMERICA, INC v DEPARTMENT OF TREASURY

Docket Nos. 158333 and 158335. Argued November 7, 2019 (Calendar No. 3). Decided June 16, 2020.

TOMRA of North America, Inc., brought two separate actions in the Court of Claims against the Department of Treasury, seeking a refund for use tax and sales tax that plaintiff had paid on the basis that plaintiff's sales of container-recycling machines and repair parts were exempt from taxation under the General Sales Tax Act (GSTA), MCL 205.51 *et seq.*, and the Use Tax Act (UTA), MCL 205.91 *et seq.* Plaintiff moved for summary disposition, seeking a ruling on the question whether plaintiff's container-recycling machines and repair parts perform, or are used in, an industrial-processing activity under the GSTA and UTA. The Court of Claims, MICHAEL J. TALBOT, J., denied plaintiff's motion and instead granted summary disposition in favor of defendant, holding that plaintiff's container-recycling machines and repair parts were not used in an industrial-processing activity and that plaintiff therefore was not entitled to exemption from sales and use tax for the sale and lease of the machines and their repair parts. The Court of Claims found that the tasks that plaintiff's machines performed occurred before the industrial process began, reasoning that the activities listed in MCL 205.54t(3) and MCL 205.94o(3) are only industrial-processing activities when they occur between the start and end of the industrial process as defined by MCL 205.54t(7)(a) and MCL 205.94o(7)(a), respectively. Plaintiff appealed, and the Court of Appeals consolidated the appeals. The Court of Appeals, GADOLA, P.J., and RIORDAN, J. (K. F. KELLY, J., dissenting), reversed, declining to interpret MCL 205.54t(7)(a) and MCL 205.94o(7)(a) as placing a temporal limitation on the activities listed in MCL 205.54t(3) and MCL 205.94o(3), respectively. 325 Mich App 289 (2018). Defendant sought leave to appeal in the Supreme Court, and the Supreme Court granted the application. 503 Mich 987 (2019).

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

Plaintiff's sales of container-recycling machines and repair parts were exempt from taxation under the industrial-processing

exemption because the temporal limitation specified in the general statutory definition of industrial processing under MCL 205.54t(7)(a) of the GSTA and MCL 205.94o(7)(a) of the UTA did not apply to the enumerated list of industrial-processing activities in MCL 205.54t(3) and MCL 205.94o(3), respectively; the rule of strict construction of tax exemptions was inapplicable in this case because the statutes were unambiguous.

1. There is a canon of construction that tax exemptions must be strictly construed in favor of the government, i.e., against the finding of an exemption. The preference against tax exemptions is a judicially created substantive canon, meaning that it is premised on certain policies or political objectives instead of its usefulness in uncovering a statute's ordinary meaning. Because the canon requiring strict construction of tax exemptions does not help reveal the semantic content of a statute, it is a canon of last resort. That is, courts should employ it only when an act's language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity. In this case, the canon was inapplicable because the statutes were unambiguous: their ordinary meaning was discernible by reading the text in its immediate context and with the aid of appropriate canons of construction.

2. The GSTA imposes taxes on the sale of goods, and the UTA imposes taxes on goods purchased outside the state for use in the state. To avoid the double taxation of a product that would result from exacting both use and sales taxes, the Legislature exempted certain property used or consumed in industrial processing from the taxes in each act. Pursuant to MCL 205.54t(1)(b) and (c) of the GSTA and MCL 205.94o(1)(b) and (c) of the UTA, the exemption covers, among other things, tangible personal property that is intended for ultimate use in and is used in industrial processing by an industrial processor or is used by a person, whether or not an industrial processor, to perform an industrial-processing activity for or on behalf of an industrial processor. The industrial-processing exemption provides both a general definition of industrial processing, MCL 205.54t(7)(a); MCL 205.94o(7)(a), and also a list of specific activities that constitute industrial-processing activities, MCL 205.54t(3); MCL 205.94o(3). Subsection (7)(a) generally defines industrial processing as the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. Subsection (7)(a) further provides that industrial processing begins when tangible personal property begins movement from raw-materials storage to

begin industrial processing and ends when finished goods first come to rest in finished-goods-inventory storage. The second sentence of Subsection (7)(a) thus establishes a temporal period during which industrial processing must occur, spanning from when property begins movement from raw-materials storage into processing until the finished goods enter inventory storage. Subsection (3) states that industrial processing includes 11 enumerated activities. In this case, plaintiff's machines facilitated the collection of raw materials outside the time frame described in Subsection (7)(a). However, *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28 (2015), explained that Subsection (7)(a) and Subsection (3) are discrete inquiries—Subsection (7)(a) does not establish a threshold requirement for an exemption as long as Subsection (3) applies. Some of the activities listed in Subsection (3) fall outside the period specified in the general definition but are still considered industrial-processing activities. Extending the temporal limitation in Subsection (7)(a) to all requests for exemptions would leave portions of Subsection (3) without meaning or function within the statute. Instead, interpreting Subsection (3) as the more specific provision resolves the conflict and accords the statutes their most natural and ordinary meanings. Therefore, the Court of Appeals correctly held that the temporal limitation in Subsection (7)(a) does not apply to the industrial-processing activities listed in Subsection (3).

Affirmed and remanded to the Court of Claims for further proceedings.

TAXATION — GENERAL SALES TAX ACT — USE TAX ACT — WORDS AND PHRASES —
“INDUSTRIAL PROCESSING.”

MCL 205.54t(7)(a) of the General Sales Tax Act (GSTA), MCL 205.51 *et seq.*, and MCL 205.94o(7)(a) of the Use Tax Act (UTA), MCL 205.91 *et seq.*, provide a general statutory definition of industrial processing and further establish a temporal period during which industrial processing must occur, spanning from when the property begins movement from raw-materials storage into processing until the finished goods enter inventory storage; MCL 205.54t(3) of the GSTA and MCL 205.94o(3) of the UTA provide a list of specific activities that constitute industrial processing; the temporal limitation specified in MCL 205.54t(7)(a) and MCL 205.94o(7)(a) does not apply to the enumerated list of industrial-processing activities in MCL 205.54t(3) and MCL 205.94o(3).

Honigman LLP (by *June Summers Haas* and *Daniel L. Stanley*) for plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Scott L. Damich* and *Randi M. Merchant*, Assistant Attorneys General, for defendant.

Amici Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Clifford W. Taylor, Paul D. Hudson, and Michael C. Simoni*) for the Michigan Manufacturers Association.

Fraser Trebilcock Davis & Dunlap, PC (by *Paul V. McCord*) for the Michigan Retailers Association.

The Mike Cox Law Firm (by *Jackie J. Cook*) for the Taxation Section of the State Bar of Michigan.

VIVIANO, J. At issue is whether plaintiff TOMRA of North America, Inc.'s container-recycling machines and repair parts are excluded as a matter of law from qualifying for the industrial-processing-activity exemptions under MCL 205.54t of the General Sales Tax Act (GSTA), MCL 205.51 *et seq.*, and MCL 205.94o of the Use Tax Act (UTA), MCL 205.91 *et seq.* Specifically, we must determine whether the temporal limitation specified in the general statutory definition of "industrial processing," MCL 205.54t(7)(a); MCL 205.94o(7)(a), applies to the enumerated list of "industrial processing" activities in MCL 205.54t(3) and MCL 205.94o(3), respectively. To answer this question, we first clarify that because the statutes are unambiguous, the interpretive principle that tax exemptions are strictly construed is inapplicable to this case. Under the proper interpretive standards, we hold that the temporal limitation in MCL

205.54t(7)(a) and MCL 205.94o(7)(a) does not apply to the activities listed in MCL 205.54t(3) and MCL 205.94o(3), respectively.

I. FACTS AND PROCEDURAL HISTORY

TOMRA sells and leases reverse-vending machines, the bottle- and can-recycling machines commonly found in grocery stores used to help retailers comply with Michigan's bottle-deposit law, MCL 445.571 *et seq.* The company also sells repair parts for the machines. The machines sort the bottles and cans, which are then placed in bins and brought to a recycling facility. The facility then sells the bottles and cans to manufacturers who use the materials in other products.

TOMRA claimed that its machines were exempt from both the GSTA and the UTA under each act's industrial-processing exemption.¹ After an audit by defendant, the Department of Treasury, TOMRA sought a determination from the Court of Claims that its machines fall within the industrial-processing exemptions. In granting summary disposition to the department, the Court of Claims found that the tasks that TOMRA's machines perform occur before the industrial process begins; therefore, TOMRA could not avail itself of the industrial-processing exemptions. The Court of Claims reasoned that the activities listed in MCL 205.54t(3) (establishing that industrial processing includes 11 enumerated activities) and MCL 205.94o(3) (same) are only industrial-processing activities when they occur between the start and end of the industrial process as defined by MCL 205.54t(7)(a) and MCL 205.94o(7)(a), respectively.

¹ See MCL 205.54t; MCL 205.94o.

The Court of Appeals, in a split, published decision, reversed the Court of Claims, declining to interpret MCL 205.54t(7)(a) and MCL 205.94o(7)(a) as placing a temporal requirement on the activities listed in MCL 205.54t(3) and MCL 205.94o(3), respectively.² The Court explained, “The statute does not state that industrial processing *must* begin this way but rather states that when tangible personal property begins movement from raw-materials storage to begin industrial processing, one can rest assured that industrial processing has begun.”³ The Court held that MCL 205.54t and MCL 205.94o do not preclude industrial processing from “occur[ring] without the initial step of moving raw materials from storage, or when tangible items are never in raw-materials storage,” and reversed and remanded.⁴ Judge K. F. KELLY dissented, arguing that the temporal limitation applied to the activities listed in MCL 205.54t(3) and MCL 205.94o(3).⁵

II. STANDARD OF REVIEW

“We review de novo a trial court’s determination regarding a motion for summary disposition. Summary disposition is appropriate if there is no genuine issue

² *TOMRA of North America, Inc v Dep’t of Treasury*, 325 Mich App 289, 301; 926 NW2d 259 (2018).

³ *Id.*

⁴ *Id.* at 302-303.

⁵ *Id.* at 304 (K. F. KELLY, J., dissenting).

regarding any material fact and the moving party is entitled to judgment as a matter of law.”⁶

III. ANALYSIS

A. INTERPRETIVE STANDARDS

Before addressing the question presented in this case, we first take this opportunity to clarify the interpretive standards applicable to statutory tax exemptions. In every case requiring statutory interpretation, we seek to discern the ordinary meaning of the language in the context of the statute as a whole.⁷ But with regard to tax exemptions, the oft-repeated rule is that they must be strictly construed in favor of the government, i.e., against the finding of an exemption.⁸ Stated more fully, this canon of construction provides that “[a]n intention on the part of the legislature to grant an exemption from the taxing power of the State will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used”⁹ The Court of Appeals below referred to this commonly recited principle, and the

⁶ *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs*, 500 Mich 362, 372; 902 NW2d 293 (2017) (quotation marks and citations omitted).

⁷ *Ally Fin Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018).

⁸ See, e.g., *Evanston YMCA Camp v State Tax Comm*, 369 Mich 1, 7; 118 NW2d 818 (1962).

⁹ *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948), quoting 2 Cooley, *Taxation* (4th ed), § 672, p 1403.

department invokes it in this Court.¹⁰ We therefore must determine, at the outset, the canon's proper function.

The preference against tax exemptions is a judicially created substantive canon, meaning that it is premised on certain policies or political objectives instead of its usefulness in uncovering a statute's ordinary meaning.¹¹ In other words, it loads the dice in favor of one interpretation, not because that interpretation is more likely to be semantically correct but because it better serves policy objectives. The justification for the canon has long been tied to political theory. When it first appeared in our caselaw in 1854, the Court explained that tax exemptions were "construed strictly" because they were "in derogation of equal rights."¹² "Equal rights" referred to the Jacksonian-era political doctrine—which found its way into the law in various

¹⁰ *TOMRA*, 325 Mich App at 296.

¹¹ See generally Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (Chicago: University of Chicago Press, 2015), p 174 ("[S]ubstantive canons are judge created and represent a wide range of concerns that are relevant to the law" and that "are not tied to particular linguistic phenomena . . ."); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 362 ("But almost always, the only announced justification for the rule [of narrow construction] is to the effect that it is necessary to achieve the beneficial purposes of the law."); Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U Chi L Rev 800, 807 (1983) ("But I know of no neutral, nonpolitical basis on which a judge can decide whether the legislature should be forced by some version of strict construction to legislate less . . .").

¹² *Detroit Young Men's Society v Detroit*, 3 Mich 172, 179 (1854). Earlier cases touched on the issue but did not make such a clear interpretive pronouncement. See *Lefevre v Detroit*, 2 Mich 586, 591 (1853) (noting, among other things, that the Legislature's inclusion of certain exempt properties suggested the exclusion of others); *People v Detroit & P R*, 1 Mich 458, 460 (1850) (noting that because the company's charter was silent regarding taxation, there was no exemption).

capacities—that legislation favoring one class or group should be limited, if allowed at all.¹³ This rationale, in the context of taxes, has continued to buttress the

¹³ See *Green v Graves*, 1 Doug 351, 366-367 (Mich, 1844) (discussing “the doctrine of equal rights and equal privileges, so much cherished by the people,” that militated against monopoly power or privilege); see also Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993), p 7 (discussing the “Jacksonian ethos that emphasized equal rights and the dangers of legislating special privileges for particular groups and classes” instead of equal laws for the general public); Binney, *Restrictions Upon Local and Special Legislation in State Constitutions* (Philadelphia: Kay & Brother, 1894), p 6 (discussing the “very general feeling of hostility to all local and special legislation” benefiting particular groups or areas and the legal restrictions that developed to stem this legislation); Cooley, *Constitutional Limitations* (5th ed), pp 486-487 (“Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government. . . . Special privileges are always obnoxious, and discriminations against persons or classes are still more so; and, as a rule of construction, it is to be presumed they were probably not contemplated or designed.”); Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 Harv J L & Pub Pol’y 181, 182-183 (1997) (“Jacksonian judges and treatise writers pointed to state due process, equal protection, and special legislation clauses to argue that states were not free to pass ‘special’ laws, or ‘class legislation,’ but had to legislate in the ‘public interest,’ or ‘for the purpose of benefiting the polity as a whole.’”) (citation omitted); Schlesinger, Jr., *The Age of Jackson* (Boston: Little, Brown & Co, 1945), p 316 (“The [Jacksonian] prescription of free enterprise thus became government action to destroy the ‘blighting influence of partial legislation, monopolies, congregated wealth, and interested combinations’ in the interests of the ‘natural order of society.’”) (citation omitted); White, *Foreword to Leggett, Democratick Editorials: Essays in Jacksonian Political Economy* (Indianapolis: Liberty Fund, 1984), pp xvii-xviii (“The equal rights principle meant . . . that the law may not discriminate among citizens, benefiting some at the expense of others. Few government programs could pass through this filter. Strict application of the equal rights principle thus led [its proponents] naturally to favor minimization of government powers. Every extension of the sphere of

canon in our cases.¹⁴ The canon does not, then, shed any light on whether the ordinary language of a statute enacted by the Legislature provides a tax exemption. Perhaps for this reason, our caselaw—especially in recent opinions—has also stressed that the canon cannot overcome the plain text, and in a few cases, we have not relied on or mentioned it at all.¹⁵

government action beyond the Jeffersonian night-watchman duties . . . created a privileged aristocratic class at the expense of the productive laboring class.”).

¹⁴ See, e.g., *Wexford Med Group v City of Cadillac*, 474 Mich 192, 204; 713 NW2d 734 (2006) (“[B]ecause tax exemptions upset the desirable balance achieved by equal taxation, they must be narrowly construed.”); *Retirement Homes of Detroit Annual Conference of United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348; 330 NW2d 682 (1982) (“A property tax exemption is in derogation of the principle that all property shall bear a proportionate share of the tax burden and, consequently, a tax exemption will be strictly construed.”); *In re Smith Estate*, 343 Mich 291, 297; 72 NW2d 287 (1955) (“[O]ur point of departure in the interpretation of any taxing act is the consideration that a preference in or an exemption from taxation must be clearly defined and without ambiguity. Taxation, like rain, falls on all alike. True, there are, in any taxing act, certain exceptions, certain favored classes, who escape the yoke. But one claiming the unique and favored position must establish his right thereto beyond doubt or cavil.”); cf. *East Saginaw Mfg Co v East Saginaw*, 19 Mich 259, 277-280 (1869) (finding no exemption and noting the danger that various classes, such as railroads or manufacturers, could seek perpetual exemptions from taxation and that strict construction was justified because a state should not lightly be taken to have given away its power to tax); 3A Singer, *Sutherland Statutes and Statutory Construction* (8th ed, April 2020 update), § 66:9 (“This rule of strict construction derives from the same rationale supporting strict construction of positive revenue laws, that the burdens of taxation should be distributed equally and fairly among members of society.”).

¹⁵ See, e.g., *Ally Fin Inc*, 502 Mich at 491-492 (noting the canon but observing that “we have also explained ‘that this requirement does not permit a “strained construction” that is contrary to the Legislature’s intent’”), quoting *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 71; 894 NW2d 535 (2017), in turn quoting *Mich United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664-665; 378 NW2d 737 (1985); *Gardner v Dep’t of Treasury*, 498 Mich 1; 869 NW2d 199

We take this opportunity to clarify that because the canon requiring strict construction of tax exemptions does not help reveal the semantic content of a statute, it is a canon of last resort. That is, courts should employ it only “when an act’s language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity.”¹⁶ In the present case, the canon is inapplicable because, as we explain below, the statutes are unambiguous: their ordinary meaning is discern-

(2015) (interpreting a tax exemption without mention of strict construction); *Stone v Michigan*, 467 Mich 288; 651 NW2d 64 (2002) (same); *Mich United Conservation Clubs*, 423 Mich at 665 (“However, this rule [of strict construction] does not mean that we should give a strained construction which is adverse to the Legislature’s intent.”), citing *City of Ann Arbor v Univ Cellar, Inc*, 401 Mich 279, 288-289; 258 NW2d 1 (1977); *Webb Academy v Grand Rapids*, 209 Mich 523, 536; 177 NW 290 (1920) (noting the canon but stating that it could not “be extended so far as to defeat the legislative intent”) (quotation marks and citation omitted); *Detroit Home & Day Sch v Detroit*, 76 Mich 521, 525; 43 NW 593 (1889) (“Where language is so plain as to convey a clear and intelligible meaning, we have no right to go beyond it, and impose another meaning. The language of the Legislature in exemption from taxation is as much entitled to obedience as that imposing taxation.”); *Schaub v Seyler*, 504 Mich 987, 991 (2019) (VIVIANO, J., concurring) (noting that strict-construction rules represent “a method of interpretation that has largely fallen out of favor”).

¹⁶ Singer, § 66:9; see also *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (“When a statute’s language is unambiguous, ‘the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted.’”) (citation omitted).

ible by reading the text in its immediate context and with the aid of appropriate canons of interpretation.¹⁷

B. THE EXEMPTION

The GSTA imposes taxes on the sale of goods, and the UTA imposes taxes on goods purchased outside the state for use in the state.¹⁸ To avoid the double taxation of a product that would result from exacting both use and sales taxes, the Legislature exempted certain property used or consumed in industrial processing from the taxes in each act.¹⁹ The exemption covers, among other things, “tangible personal property [that] is intended for ultimate use in and is used in industrial processing by an industrial processor” or “is used by [a] person [whether or not an industrial processor] to perform an industrial processing activity for or on behalf of an industrial processor.”²⁰

The GSTA’s industrial-processing exemption—which is, for present purposes, identical to the UTA’s

¹⁷ See *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 164-166; 680 NW2d 840 (2004) (noting that ambiguity can occur if a statutory provision “irreconcilably conflict[s] with another provision” but that “a finding of ambiguity is to be reached only after ‘all other conventional means of [] interpretation’ have been applied and found wanting”) (citations omitted; alterations in original).

¹⁸ MCL 205.52(1) (providing, in pertinent part, that “there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business”); MCL 205.93(1) (providing, in pertinent part, a tax “for the privilege of using, storing, or consuming tangible personal property” that applies “to a person who acquires tangible personal property or services that are subject to the tax levied under this act . . . who subsequently converts the tangible personal property or service to a taxable use”).

¹⁹ MCL 205.54t; MCL 205.94o.

²⁰ MCL 205.54t(1)(b) and (c); MCL 205.94o(1)(b) and (c).

exemption and will be quoted in the text going forward—provides both a general definition of industrial processing, MCL 205.54t(7)(a), and also a list of specific activities that constitute industrial-processing activities, MCL 205.54t(3).²¹ The general definition in Subsection (7)(a) states:

“Industrial processing” means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.^[22]

The definition’s second sentence establishes a temporal period during which industrial processing must occur, spanning from when the property begins movement from raw-materials storage into processing until the finished goods enter inventory storage. Subsection (3) states:

Industrial processing includes the following activities:

²¹ The parallel provisions in the UTA are located at MCL 205.94o(7)(a) and MCL 205.94o(3), respectively.

²² MCL 205.54t(7)(a). The UTA states:

“Industrial processing” means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage. [MCL 205.94o(7)(a).]

- (a) Production or assembly.
- (b) Research or experimental activities.
- (c) Engineering related to industrial processing.
- (d) Inspection, quality control, or testing to determine whether particular units of materials or products or processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage.
- (e) Planning, scheduling, supervision, or control of production or other exempt activities.
- (f) Design, construction, or maintenance of production or other exempt machinery, equipment, and tooling.
- (g) Remanufacturing.
- (h) Processing of production scrap and waste up to the point it is stored for removal from the plant of origin.
- (i) Recycling of used materials for ultimate sale at retail or reuse.
- (j) Production material handling.
- (k) Storage of in-process materials.^[23]

Machines and other equipment “used in an industrial processing activity and in their repair and maintenance” are eligible for the exemption, as are other types of property.²⁴

The question in this case is whether TOMRA’s container-recycling machines and repair parts qualify for the exemption under Subsection (3) even if they would not otherwise meet the temporal limitation in the general definition under Subsection (7)(a). The question arises because, as the Court of Appeals dissent noted, TOMRA’s machines here “simply facilitate the collection of raw materials” outside the time frame

²³ MCL 205.54t(3); see also MCL 205.94o(3).

²⁴ MCL 205.54t(4)(b); see also MCL 205.94o(4)(b).

described in Subsection (7)(a), i.e., the period beginning when the materials begin to move from raw-materials storage and ending when the finished goods are first stored as inventory.²⁵ Thus, if Subsection (7)(a) lays down a mandatory requirement, then TOMRA would not be entitled to an exemption even if it was engaged in one of the industrial-processing activities expressly set forth in Subsection (3).

We have never before addressed this issue, but general guidance can be found in *Detroit Edison Co v Dep't of Treasury*.²⁶ In deciding whether the exemption applied to equipment used in transmitting electricity, we suggested that a taxpayer could claim an exemption either by satisfying the general definition of industrial processing in Subsection (7)(a) or by showing that it was engaged in one or more of the enumerated activities listed in Subsection (3). Most directly, we stated that “the statute also provides that certain specific activities that do not satisfy the general MCL 205.94o(7)(a) definition nonetheless constitute ‘industrial processing’ activity for purposes of the statute,” such as the activity described in MCL 205.94o(3)(h).²⁷ In other words, we made it clear that Subsection (7)(a) and Subsection (3) are discrete inquiries—Subsection (7)(a) does not establish a threshold requirement for an exemption as long as Subsection (3) applies.²⁸

²⁵ *TOMRA*, 325 Mich App at 305 (K. F. KELLY, J., dissenting).

²⁶ *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28; 869 NW2d 810 (2015).

²⁷ *Id.* at 49 n 13.

²⁸ See *id.* at 39 (“If ‘industrial processing’ activity is not occurring under either MCL 205.94o(7)(a) or MCL 205.94o(3), . . . the analysis is complete and the taxpayer is entitled to no exemption.”); *id.* at 48 & n 12 (noting that industrial processing “occurs throughout the electric system under MCL 205.94o(7)(a)” but also recognizing “that ‘industrial

We agree with the Court of Claims that the tasks that TOMRA's machines perform occur before the industrial process begins under the general definition in Subsection (7)(a). Therefore, we need to address the department's argument that TOMRA is precluded from claiming an exemption under Subsection (3) based on the temporal limitation of Subsection (7)(a).

If we were to hold, as the department urges, that the temporal limitation in Subsection (7)(a) applies to industrial-processing exemptions sought under Subsection (3), we would create a conflict between those two provisions. That is because some of the activities listed in Subsection (3) fall outside the period specified in the general definition, i.e., from the movement of raw-materials storage until finished goods are placed in inventory storage. For example, it is difficult to see how the activity of "[p]lanning" or "scheduling" of production in Subsection (3) could ever occur within the time frame of Subsection (7)(a).²⁹ Perhaps an even better example is the "[d]esign, construction, or maintenance of production or other exempt machinery, equipment, and tooling," which must necessarily precede the period of industrial processing defined in

processing' may occur under other circumstances as well, e.g., MCL 205.94o(3)(d)" (citation omitted).

Our additional statement that "the analysis begins" with the general definition in Subsection (7)(a) does not lead us to a different conclusion. *Id.* at 39. The statutes in this case are anomalous because they contain a general definition in one subsection that, standing alone, does not encompass all the things that another subsection specifically identifies (and therefore includes) as "industrial processing" activities. Even so, we still think it makes sense to start with the general definitional section when applying the statutes (if only because it conforms to our usual practice).

²⁹ MCL 205.54t(3)(e); see also MCL 205.94o(3)(e).

Subsection (7)(a).³⁰ Or take “[r]esearch or experimental activities,” which likely must antedate the period by an even greater margin.³¹ What is more, Subsection (3)(d) establishes its own time frame for certain forms of “[i]nspection, quality control, or testing,” which must take place “at any time before materials or products first come to rest in finished goods inventory storage.”³² This would be yet another provision rendered either unnecessary or meaningless if the temporal limitation in Subsection (7)(a) applied to Subsection (3). In short, accepting the department’s interpretation would lay waste to large swaths of Subsection (3).

When a potential conflict like this surfaces within a statute, “it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them.”³³ Indeed, we must always read the text as a whole, “in view of its structure and of the physical and logical relation of its many parts.”³⁴ This is because “[c]ontext is a primary determinant of meaning,” and for an interpretation that seeks the ordinary meaning of the statute, it is the narrower context drawn from neighboring provisions within a statute that is most appropriate to consider.³⁵ Many

³⁰ MCL 205.54t(3)(f); see also MCL 205.94o(3)(f).

³¹ MCL 205.54t(3)(b); see also MCL 205.94o(3)(b).

³² MCL 205.54t(3)(d); see also MCL 205.94o(3)(d).

³³ *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002).

³⁴ *Reading Law*, p 167.

³⁵ *Id.*; see also *id.* at 33 (“This critical word *context* embraces not just textual purpose but also (1) a word’s historical associations acquired from recurrent patterns of past usage, and (2) a word’s immediate syntactic setting”); *Ordinary Meaning*, p 147 (“One way to capture generalizable meanings . . . is to conceive of ordinary meaning as semantic meaning that is determined based on facts from the narrow context.”).

principles follow from the emphasis on context, including the interpretive canon that words should not, if possible, be rendered surplusage.³⁶ Here, extending the temporal limitation in Subsection (7)(a) to all requests for exemptions would, as explained above, leave portions of Subsection (3) without meaning or function within the statute.

There is no reason to wreak such havoc upon the statutes here. Another contextual canon harmonizes the provisions and illuminates their ordinary meaning: “[W]here a statute contains a general provision and a specific provision, the specific provision controls.”³⁷ This principle is tailor-made for cases like this one, in which statutory provisions would otherwise conflict.³⁸ The conflict is dissipated by interpreting “the specific provision . . . as an exception to the general one.”³⁹

³⁶ *Reading Law*, p 167; see also *People v Seewald*, 499 Mich 111, 123; 879 NW2d 237 (2016) (“When possible, we strive to avoid constructions that would render any part of the Legislature’s work nugatory.”).

³⁷ *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002), quoting *Gebhardt v O’Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994) (alteration in original).

³⁸ *RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 566 US 639, 645; 132 S Ct 2065; 182 L Ed 2d 967 (2012) (“The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission.”); *Reading Law*, p 183 (“If there is a conflict between a general provision and a specific provision, the specific provision prevails . . .”). As we stated in *Detroit Edison Co*, 498 Mich at 44, “the rule only applies when there is some statutory tension or conflict between two possible treatments of a subject . . .” In that case, the canon was inapplicable because we found no conflict between the general definition in Subsection (7)(a) and various express exclusions from that definition carved out in Subsection (6)(b). *Id.* at 45.

³⁹ *RadLAX Gateway Hotel, LLC*, 566 US at 645; see also *Reading Law*, p 183 (“Under this canon, the specific provision is treated as an exception to the general rule.”).

In this case, interpreting Subsection (3) as the more specific provision resolves the conflict and accords the statutes their most natural and ordinary meanings. Subsection (3) lists specific activities that constitute industrial processing, whereas the second sentence of Subsection (7)(a) provides a temporal limitation on the general types of activities described in the first sentence of that subsection.⁴⁰ Thus, Subsection (3) is the specific provision with regard to the activities it enumerates.⁴¹ As to those activities, then, Subsection (3) controls and the time frame in Subsection (7)(a) is inapplicable. This interpretation reflects a holistic reading of the statutory text and gives each provision its appropriate meaning and function. We therefore conclude that the temporal limitation in Subsection (7)(a) does not apply to the industrial-processing activities in Subsection (3).

IV. CONCLUSION

For the reasons set forth above, we hold that the temporal limitation in Subsection (7)(a) does not apply to the activities listed in Subsection (3). In reaching this conclusion, we further conclude that the rule of strict construction of tax exemptions is inapplicable because the statutes here are unambiguous. On these bases, we affirm the Court of Appeals decision below and remand the case to the Court of Claims for further proceedings that are consistent with this opinion.

MCCORMACK, C.J., and MARKMAN, ZAHRA, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with VIVIANO, J.

⁴⁰ We do not address whether or how the first sentence of Subsection (7)(a) applies to the exemptions in Subsection (3) because that issue is not before the Court.

⁴¹ See *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008) (“In order to determine which provision is truly more specific and, hence, controlling, we consider which provision applies to the more narrow realm of circumstances, and which to the more broad realm.”).

PEOPLE v JEMISON

Docket No. 157812. Argued March 5, 2020 (Calendar No. 3). Decided June 22, 2020.

Arthur Jemison was convicted following a jury trial in the Wayne Circuit Court of first-degree criminal sexual conduct, MCL 750.520b, for a sexual assault that occurred in 1996. The victim underwent a forensic examination in 1996, and evidence was collected for a rape kit at that time. But the rape kit was not analyzed until 2015. In 2015, samples from the kit were sent to a laboratory in Utah for testing and analysis. A forensic analyst at the lab, Derek Cutler, concluded that a vaginal swab from the kit contained the DNA of at least one male donor. The Utah lab forwarded its report to the Michigan State Police (MSP) Forensic Science Division, where the sample was compared to DNA stored in a database. The MSP determined that there was an association between Jemison's DNA and the DNA of the male donor identified by the Utah lab as a contributor to the vaginal swab. Before trial, the prosecution moved to allow Cutler to testify via two-way, interactive video. Jemison objected, but the court, Antonio Viviano, J., granted the motion. At trial, Jemison renewed his objection before a new judge, but the trial court, Dalton A. Roberson, J., allowed the video testimony over the objection. Jemison appealed his conviction, arguing, in part, that his right of confrontation under the federal and state Constitutions was denied when the trial court allowed Cutler to testify via two-way, interactive video. In an unpublished per curiam opinion issued on April 12, 2018 (Docket No. 334024), the Court of Appeals, SAWYER, P.J., and HOEKSTRA, J. (MURRAY, J., concurring), concluded that Jemison's right of confrontation was adequately protected when Cutler testified via video because the video testimony allowed Jemison and the jury to observe the witness's responses and reactions in real time and Jemison was able to cross-examine the witness. Although the Court of Appeals held that the trial court abused its discretion when it allowed the video testimony over Jemison's objection in violation of MCR 6.006(C), it concluded that the error was harmless. The Supreme Court granted Jemison's application for leave to appeal. 503 Mich 936 (2019).

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

The Sixth Amendment of the United States Constitution and Article 1, § 20 of the Michigan Constitution guarantee criminal defendants the right to confront the witnesses against them. In *Ohio v Roberts*, 448 US 56 (1980), the United States Supreme Court held that the right of confrontation was satisfied even if a hearsay declarant was not present at trial for cross-examination as long as the statement bore adequate “indicia of reliability.” The Court later held in *Maryland v Craig*, 497 US 836 (1990), that a defendant’s right to confront a child witness may be satisfied absent a face-to-face confrontation when necessary to advance an important public-policy consideration and when the evidence is sufficiently reliable. However, in *Crawford v Washington*, 541 US 36 (2004), the Court overruled *Roberts* and rejected its open-ended balancing approach. The Court held that the right of confrontation requires face-to-face confrontation and is absolute for all testimonial evidence unless a witness is unavailable and the defendant had a prior opportunity for cross-examination. The United States Supreme Court did not overrule *Craig* with its decision in *Crawford*, but it cast its vitality into doubt by turning away from the reliability-balancing approach. The Court of Appeals relied on *Craig* when it concluded that the forensic analyst’s expert testimony should not raise the same confrontation-right concerns as the testimony of a fact witness. The United States Supreme Court disagrees, and has held that expert witnesses called by the prosecution are witnesses against the defendant and should be treated as such for purposes of protecting a defendant’s right of confrontation. The Court of Appeals also determined that cost-savings was a sufficient reason to extend *Craig*, but expense is not a sufficient justification to avoid face-to-face confrontation. Such a rule would potentially allow the prosecution to deprive a defendant of confrontation rights by, for instance, using out-of-state analysts to save money and then relying on cost-savings as a justification for not providing face-to-face testimony. *Craig* should be applied only to the specific facts it decided: a child victim may testify against the accused by means of one-way video testimony (or similar method) when the trial court has determined, consistently with statutory authorization, that such measures are necessary because the child requires special protection. *Craig* was not controlling here because the witness was neither a victim nor a child. Instead, *Crawford* was controlling, and the trial court denied Jemison’s right of confrontation when it allowed the video testimony over his objection because the forensic

analyst was available to testify and Jemison had not had a prior opportunity to cross-examine him.

Judgment of the Court of Appeals reversed; case remanded to the Court of Appeals for further proceedings.

Justice VIVIANO did not participate due to a familial relationship with a circuit court judge involved in this case.

1. CONSTITUTIONAL LAW — SIXTH AMENDMENT — RIGHT OF CONFRONTATION — VIDEO TESTIMONY BY AN ADULT WITNESS.

The Sixth Amendment of the United States Constitution and Article 1, § 20 of the Michigan Constitution guarantee criminal defendants the right to confront the witnesses against them; the right of confrontation requires face-to-face confrontation and is absolute for all testimonial evidence unless a witness is unavailable and the defendant had a prior opportunity for cross-examination; allowing an adult witness called by the prosecution to testify via two-way video over the defendant's objection denies the defendant his or her right of confrontation when the witness is available and the defendant did not have a prior opportunity to confront the witness.

2. CONSTITUTIONAL LAW — SIXTH AMENDMENT — RIGHT OF CONFRONTATION — VIDEO TESTIMONY BY A CHILD WITNESS.

The United States Supreme Court's holding in *Maryland v Craig*, 497 US 836 (1990)—that a defendant's right to confront a child witness may be satisfied absent a face-to-face confrontation when necessary to advance an important public-policy consideration and when the evidence is sufficiently reliable—is limited to its facts; that is, it only permits a child victim to testify against the accused by means of one-way video testimony (or similar method) when the trial court has determined, consistently with statutory authorization, that such measures are necessary because the child requires special protection (US Const, Am VI; Const 1963, art 1, § 20).

Kym L. Worthy, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Amy M. Somers*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Kristin E. LaVoy*) for defendant.

Amici Curiae:

Richard D. Friedman in support of defendant.

Michigan Innocence Clinic (by *David A. Moran*, *Imran J. Syed*, and *Megan Richardson*) for Julie Baumer.

MCCORMACK, C.J. The Sixth Amendment of the United States Constitution and Article 1, § 20 of the Michigan Constitution guarantee criminal defendants the right to confront the witnesses against them. In this case, we consider whether a forensic analyst's two-way, interactive video testimony violated the defendant's Confrontation Clause rights.

The Court of Appeals held that the video testimony satisfied the constitutional requirements of face-to-face confrontation. But the Court relied only on precedent that predated the United States Supreme Court's decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), which transformed the Court's approach to confrontation rights. See *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001), citing *Maryland v Craig*, 497 US 836, 845-846, 851; 110 S Ct 3157; 111 L Ed 2d 666 (1990) (holding that the Confrontation Clause did not categorically prohibit child witnesses from testifying outside the defendant's physical presence by one-way closed circuit television where reliability was otherwise supported).

For almost 25 years before *Crawford*, reliability was the touchstone of the Court's Confrontation Clause doctrine. In *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), the Court held that the Confrontation Clause is satisfied even if a hearsay declarant is not present for cross-examination at trial

as long as the statement bears adequate “indicia of reliability.” Citing *Roberts*, the Court held in *Craig* that a defendant’s right to confront a child witness may be satisfied absent a face-to-face encounter when necessary to advance an important public policy and when the testimony is reliable enough. *Craig*, 497 US at 850, citing *Roberts*, 448 US at 64. But in *Crawford*, the Court overruled *Roberts* and shifted from a reliability focus to a bright-line rule requiring a face-to-face encounter for testimonial evidence. *Crawford*, 541 US at 61-63, 68-69.

Crawford did not specifically overrule *Craig*, but it took out its legs. To reconcile *Craig* and *Crawford*, we read *Craig*’s holding according to its narrow facts.¹

Crawford requires face-to-face cross-examination for testimonial evidence unless a witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 US at 68. Here, admitting the prosecution witness’s video testimony over the defendant’s objection violated the defendant’s state and federal constitutional rights to confrontation. We reverse the judgment of the Court of Appeals and remand the case to that Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In September 1996, the victim was raped and robbed while waiting in a parked car for an acquaintance. Later that day, she filed a police report and went to a hospital for a forensic examination and the collec-

¹ In *Craig*, the Court held that in child abuse cases, as long as a trial court made a case-specific showing of necessity that a child witness needs special protection, as required by a Maryland statute, the Confrontation Clause did not prohibit the court from allowing the child witness to testify using one-way video. *Craig*, 497 US at 856, 860.

tion of evidence known as a “rape kit.” She did not know her assailant’s identity.

The rape kit was not analyzed until 2015.² The samples were sent to Sorensen Laboratory in Utah for serological processing and further DNA testing. Sorensen analyst Derek Cutler concluded that the vaginal swab from the rape kit contained a mixture of DNA profiles from at least two contributors, at least one of which was male and suitable for comparison. Sorensen forwarded the report to the Michigan State Police (MSP) Forensic Science Division, which analyzed and compared the sample to DNA data stored in the Combined DNA Index System (CODIS) database. The MSP identified an association between the defendant’s DNA and the male donor identified by the Sorensen report. The defendant was charged with two counts of first-degree criminal sexual conduct, MCL 750.520b.

Over the defendant’s objection, the circuit court granted the prosecution’s pretrial motion to allow Cutler to testify by video. Before a different judge who presided over the trial, the defendant renewed his objection to Cutler’s video testimony. But the trial court allowed it.

Cutler testified that it is “normal within the scientific community to have multiple people do work on these [rape] kits” and acknowledged that he “did not actually see the rape kit.” Instead, he “[went] off the notes that [we]re done by other serologists and technicians who are competent in their testing.”³ He ana-

² The 1996 rape kit remained in the Detroit Police Department’s property section until it was discovered in 2014 and tested in 2015.

³ Upon learning that Cutler never saw the rape kit but had interpreted other analysts’ notes, the defendant again objected to this specific part of Cutler’s testimony, arguing that it was inadmissible hearsay. (The defendant apparently did not also object to his inability to confront

lyzed those other serologists' notes and concluded that there were at least two contributors to the DNA on the vaginal swab—an unknown male donor and a second donor whose DNA was present at such a low level that it was not suitable for comparison. Catherine Maggert, the MSP analyst who used Cutler's report for her analysis, testified that when she compared that report's unknown male donor to the CODIS database, there was an association linking the defendant to the unknown male donor.

The jury convicted the defendant of one count of first-degree criminal sexual conduct and acquitted him of the other count. He was sentenced to serve 22 to 40 years in prison. He appealed, in part arguing that he was denied his right of confrontation when the trial court allowed Cutler's video testimony, rather than requiring his presence in the courtroom. The Court of Appeals affirmed. *People v Jemison*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2018 (Docket No. 334024). The panel relied on *Pesquera*, an opinion predating *Crawford*, in which the Court of Appeals held that a defendant's confrontation rights were adequately protected when a trial court allowed videotaped deposition testimony from child witnesses accusing the defendant of criminal sexual conduct. *Pesquera*, 244 Mich App at 309. *Pesquera* relied on *Craig* for this holding. Citing *Pesquera*, the panel stated that the Confrontation Clause requires the following:

- (1) a face-to-face-meeting of the defendant and the witnesses against him at trial;
- (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter;
- (3) the witnesses are subject

the witnesses who had conducted the analysis.) The trial court overruled the objection, and the defendant did not appeal that ruling.

to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor. [*Jemison*, unpub op at 5, citing *Pesquera*, 244 Mich App at 309, which in turn cited *Craig*, 497 US at 846, 851.]

Working within this analytic framework, the panel noted that although the defendant “was not able to confront the witness in the traditional sense” when the expert testified using two-way, interactive video, the defendant was able to “observe the expert’s responses and reactions in real time and [the defendant] took advantage of the opportunity to do so through cross-examination.” *Jemison*, unpub op at 6. The court further noted that “[t]he jury was able to observe the expert as he responded.” *Id.* The panel concluded that “[b]ecause the testimony met three of the Confrontation Clause criteria, and the trial court appropriately dispensed with the face-to-face requirement, defendant’s right to confrontation was not violated.” *Id.*

The panel also held that the trial court abused its discretion by allowing the witness’s two-way, interactive video testimony over the defendant’s objection because MCR 6.006(C) requires the parties to consent to the use of videoconferencing technology for trial testimony, but it found that error harmless. *Id.* at 5, 7.

The defendant filed an application for leave to appeal in this Court. We granted it and asked the parties to address “whether permitting an expert witness to testify by two-way interactive video, over the defendant’s objection, denied the defendant his constitutional right to confront witnesses and, if so, whether this error was harmless.” *People v Jemison*, 503 Mich 936, 936-937 (2019).⁴

⁴ The prosecution argues that the defendant waived appellate review of this issue by failing to object in writing when it notified the defendant that it intended to admit Cutler’s written report into evidence under MCR 6.202. In other words, the prosecution argues that a defendant’s

II. STANDARD OF REVIEW

Whether a defendant was denied his right to confront a witness is a constitutional question that we review de novo. *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018). When we review a question de novo, we review the legal issue independently without deference to the lower court. *Id.*

III. ANALYSIS

The Sixth Amendment of the United States Constitution provides, in part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” See also Const 1963, art 1, § 20. Before *Crawford*, the United States Supreme Court’s Confrontation Clause jurisprudence was built around the reliability of the challenged evidence. In *Roberts*, the Court held that the Confrontation Clause was not a barrier for admission if the challenged testimony bore adequate “indicia of reliability.” *Roberts*, 448 US at 66. *Crawford* overruled *Roberts* and transformed the Court’s approach to the Confrontation Clause from a case-by-case reliability-balancing test to a categorical rule for protected evidence.

Craig was decided before *Crawford* and therefore under the *Roberts* reliability framework. In *Craig*, the Court held that a defendant’s right to confront a child witness may be satisfied by one-way video testimony instead of a physical, face-to-face confrontation, if the

failure to comply with a court rule which governs the admissibility of an expert’s report waives his constitutional right to confront the witness who authored the report. Merits aside, because the prosecution did not raise this argument before the Court of Appeals, we decline to address it. See *People v Walker*, 504 Mich 267, 276 n 3; 934 NW2d 727 (2019), citing *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009).

testimony is reliable. *Craig*, 497 US at 850, citing *Roberts*, 448 US at 64. The Court identified four considerations that courts should weigh to determine reliability—physical presence, whether the testimony was taken under oath, the defendant’s ability to cross-examine, and whether the jury could observe the witness’s demeanor. See *Craig*, 497 US at 846. And having weighed those factors and determined that the testimony was reliable, the Court held that because the evidence was reliable, “protect[ing] a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child’s ability to communicate,” justified permitting the witness’s one-way video testimony. *Id.* at 857.

Justice Scalia dissented. He rejected the majority’s reliability-balancing test “because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was ‘face-to-face’ confrontation.” *Id.* at 862 (Scalia, J., dissenting). And he criticized the Court’s balancing test as inconsistent with the constitutional text. *Id.* at 870 (“The Court today has applied ‘interest-balancing’ analysis where the text of the Constitution simply does not permit it.”).

Fourteen years passed between *Craig* and *Crawford*, and things changed. In *Crawford*, Justice Scalia wrote for the majority and his dissent from *Craig* became the Court’s view, transforming its approach to the Confrontation Clause. Concluding that *Roberts* had “replac[ed] categorical constitutional guarantees with open-ended balancing tests,” *Crawford*, 541 US at 67-68, the Court shifted gears; balancing no longer had a role. Instead, the defendant’s confrontation right is

absolute for all “testimonial” evidence unless a witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 68.

The Court emphasized the importance of face-to-face testimony to the confrontation right, citing historical examples that illustrated how face-to-face testimony was critical to its enforcement. *Id.* at 43-45 (describing, for example, how a trial court refused to call Sir Walter Raleigh’s accuser to testify, over Raleigh’s pleading, “Call my accuser before my face,” which led to both Raleigh’s death sentence and then to English law developing the confrontation right as an important limit on government abuses against criminal defendants) (citation omitted). The Court explained that a reliability-balancing test would not have “provid[ed] any meaningful protection” in these cases. *Id.* at 68. And so the Court restored face-to-face testimony as a fundamental element of the confrontation right. *Id.* at 57, quoting *Mattox v United States*, 156 US 237, 244; 15 S Ct 337; 39 L Ed 409 (1895); see also *California v Green*, 399 US 149, 157; 90 S Ct 1930; 26 L Ed 2d 489 (1970) (explaining that “it is this literal right to ‘confront’ the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause”).⁵

⁵ While the Court’s early confrontation jurisprudence included both the right to cross-examine and the right to have the witness brought to face the defendant, face-to-face testimony has even deeper historical roots: it was a critical feature of ancient Roman court systems, while the cross-examination right was a seventeenth-century innovation. See Herrmann & Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va J Int’l L 481 (1994); see also *Coy v Iowa*, 487 US 1012, 1015-1016; 108 S Ct 2798; 101 L Ed 2d 857 (1988) (“The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: ‘It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.’ Acts 25:16.”).

The reliability-balancing approach established by the Court in *Roberts* was the basis for its rule in *Craig* allowing public-policy considerations to override the need for face-to-face testimony if the evidence is reliable enough. *Craig*, 497 US at 850. When *Crawford* overruled *Roberts* and did away with reliability balancing, it put *Craig*'s reliability-focused rule into doubt. We are not the first court to notice. See *United States v Carter*, 907 F3d 1199, 1206 n 3 (CA 9, 2018) (recognizing that “[t]he vitality of *Craig* itself is questionable in light of the Supreme Court’s later decision in *Crawford*”); see also *State v Thomas*, ___ NM ___; 2016-NMSC-024; 376 P3d 184, 193 (2016) (noting that “*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony”). But the Supreme Court did not specifically overrule *Craig*, and, of course, we leave to that Court “the prerogative of overruling its own decisions.” *Rodriguez de Quijas v Shearson/American Express, Inc.*, 490 US 477, 484; 109 S Ct 1917; 104 L Ed 2d 526 (1989).

The Court of Appeals extended *Craig*'s rule here for two reasons. See *Jemison*, unpub op at 5-6. First, because Cutler was an expert witness, the panel believed that his testimony should not raise the same confrontation-right concerns as the testimony of a fact witness. *Id.* Put differently, the Court of Appeals rea-

The Court previewed this aspect of its *Crawford* holding in 2002, when it refused to pass along to Congress a proposed amendment to the Federal Rules of Criminal Procedure that would have allowed a trial witness to give testimony by video. In an accompanying statement, Justice Scalia remarked that the proposed rule was “of dubious validity under the Confrontation Clause.” Order Amending the Federal Rules of Criminal Procedure, 535 US 1159, 1159 (2002) (statement of Scalia, J.). As he put it, “Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.” *Id.* at 1160.

soned that Cutler’s *expert* testimony does not present the same credibility concerns as nonexpert witnesses, effectively placing him outside the confrontation right. The United States Supreme Court, however, disagrees: expert witnesses called by the prosecution are witnesses against the defendant. *Melendez-Diaz v Massachusetts*, 557 US 305, 313-314; 129 S Ct 2527; 174 L Ed 2d 314 (2009) (“The text of the [Sixth] Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.”).

Second, the Court of Appeals believed that cost savings was a sufficient reason to extend *Craig*’s rule. *Jemison*, unpub op at 5. We disagree; expense is not a justification for a constitutional shortcut. This is especially true where the prosecution elects to use an out-of-state laboratory for its analysis. Such a rule would have perverse consequences: the prosecution could deprive a criminal defendant of confrontation rights by using out-of-state analysts to save money and then cite cost savings as a justification for not providing face-to-face testimony.⁶

⁶ Courts applying *Craig*’s rule have almost universally concluded that expense is not a sufficient reason for sacrificing face-to-face testimony. See, e.g., *State v Rogerson*, 855 NW2d 495 (Iowa, 2014) (the state’s justification of distance, cost, and inefficiency could not overcome a defendant’s confrontation rights); *Lipsitz v State*, 135 Nev 131; 442 P 3d 138 (2019) (it was necessary to use two-way video technology for a witness who was medically unavailable due to being admitted to an out-of-state residential treatment center); *Thomas*, 376 P3d at 195 (a defendant’s confrontation rights were violated when the trial court permitted an out-of-state forensic analyst to testify using two-way video in order to avoid inconveniencing the witness); *Bush v State*, 193 P3d 203, 214-216; 208 WY 108 (2008) (no confrontation violation when a

We will apply *Craig* only to the specific facts it decided: a child victim may testify against the accused by means of one-way video (or a similar *Craig*-type process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection. *Craig*, 497 US at 860. The witness here was neither the victim nor a child; *Crawford* thus provides the applicable rule.

The Court of Appeals answered the wrong question when it held that “the trial court appropriately dispensed with the face-to-face requirement.” *Jemison*, unpub op at 6.⁷ As *Crawford* makes clear, for testimonial evidence, that requirement may be dispensed with

witness testified over two-way video when his physician warned against traveling and he gave testimony after being sworn in by a district court judge). Only one state’s highest court appears to have adopted a test allowing for two-way video testimony in response to impossibility or impracticality because of distance or expense. *Missoula v Duane*, 380 Mont 290; 2015 MT 232; 355 P3d 729, 731, 734 (2015). But the defendant was charged with a misdemeanor and the out-of-state witness would have had to travel for three separate trials, which the Montana Supreme Court found would have imposed a significant burden on the witness and a significant expense on the city. *Id.*

Even if we were to apply *Craig*’s rule, our result would be the same: mere convenience, efficiency, and cost-savings interests are not important enough public-policy considerations to dispense with a defendant’s constitutional right to face-to-face confrontation.

⁷ Perhaps because the defendant did not cite *Crawford* in his briefing in the Court of Appeals, or perhaps because this Court has cited *Craig* without the need to consider *Crawford*’s sea change to Confrontation Clause jurisprudence, see *People v Buie*, 491 Mich 294, 304-305; 817 NW2d 33 (2012), the Court of Appeals did not address *Crawford*. It cited only *Buie*, in which this Court quoted *Craig*. See *Jemison*, unpub op at 5, quoting *Buie*, 491 Mich at 304. While *Buie* was decided after *Crawford*, it does not appear that *Crawford* was raised in that case either; there was, in fact, little need for a Confrontation Clause analysis in *Buie* given that we held that the defendant through his counsel had waived his right to confrontation. *Buie*, 491 Mich at 317-318.

only when the witness is unavailable and the defendant had a prior chance to cross-examine the witness.

The parties do not dispute that Cutler's evidence was testimonial.⁸ And we agree—Cutler's evidence was, after all, *testimony*. See *Crawford*, 541 US at 51-52. The defendant had a right to face-to-face cross-examination; Cutler was available, and the defendant did not have a prior chance to cross-examine him. See *id.* The defendant's state and federal constitutional rights to confrontation were violated by the admission of Cutler's two-way, interactive video testimony.⁹

IV. CONCLUSION

In allowing this witness's two-way, interactive video testimony over the defendant's objection, the trial

But had there been no waiver, *Crawford* would have controlled. *Craig's* language that “the face-to-face confrontation requirement is not absolute” and that the preference for face-to-face confrontations “must occasionally give way to considerations of public policy and the necessities of the case,” *Craig*, 497 US at 849-850, citing *Mattox*, 156 US at 243; see also *Jemison*, unpub op at 5 (quotation marks and citations omitted), envisions the possibility of open-ended exceptions to the confrontation requirement that has since been rejected in *Crawford*. See *Crawford*, 541 US at 54 (“The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.”).

⁸ In a footnote in its supplemental brief, the prosecution suggests that Cutler's testimony could be considered to be nontestimonial because of the plurality decision in *Williams v Illinois*, 567 US 50; 132 S Ct 2221; 183 L Ed 2d 89 (2012). This footnote notwithstanding, the prosecution has consistently conceded that Cutler's *testimony* is *testimonial*. But even if it had not so conceded, we are not persuaded by the prosecution's alternative argument presented in the footnote. *Williams* decided whether out-of-court statements made solely to explain the assumptions used to form an expert opinion were beyond the consideration of the Confrontation Clause. *Id.* at 58 (opinion of Alito, J.). Cutler testified, just not face-to-face.

⁹ We agree with the Court of Appeals that the trial court's decision to

court violated the defendant's Confrontation Clause rights. We reverse the judgment of the Court of Appeals and remand to that Court for further proceedings consistent with this opinion, including determining whether that violation was harmless beyond a reasonable doubt. *Delaware v Van Arsdell*, 475 US 673, 684; 106 S Ct 1431; 89 L Ed 2d 674 (1986).

MARKMAN, ZAHRA, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

VIVIANO, J., did not participate due to a familial relationship with a circuit court judge involved in this case.

allow the two-way, interactive video testimony also violated MCR 6.006(C). This Court has never addressed whether a violation of MCR 6.006(C) can be harmless, and if so, the appropriate standard to apply to determine whether it is harmless. See, e.g., *Buie*, 491 Mich at 320 (finding no violation of MCR 6.006(C)). The Court of Appeals appeared to treat the MCR 6.006(C) error as interchangeable with a Confrontation Clause violation and reviewed it for whether it was harmless beyond a reasonable doubt. We vacate its analysis on that point. On remand, the Court of Appeals should also consider (1) whether the violation of MCR 6.006(C) is susceptible to harmless-error review; (2) if so, what standard applies in determining whether the error was harmless; and (3) whether the error was harmless in this case.

SKANSKA USA BUILDING INC v
MAP MECHANICAL CONTRACTORS, INC

Docket Nos. 159510 and 159511. Argued April 15, 2020 (Calendar No. 2).
Decided June 29, 2020.

Skanska USA Building Inc. filed an action in the Midland Circuit Court against M.A.P. Mechanical Contractors, Inc. (MAP), Amerisure Insurance Company (Amerisure), and Amerisure Mutual Insurance Company, seeking coverage under an Amerisure policy for the cost of repairs Skanska performed to correct faulty work performed by MAP in the renovation of a medical center. Skanska, acting as the construction manager, subcontracted the heating and cooling portion of the renovation project to MAP. In connection with the project, Amerisure issued a commercial general liability insurance policy (the CGL policy) to MAP; Skanska and the medical center were additional named insureds on the CGL policy. In 2009, MAP performed the work on the medical center's heating system; two years later, Skanska determined that MAP had installed some of the expansion joints backward, resulting in damage to concrete, steel, and the heating system. Skanska repaired and replaced the damaged property and sent a demand letter to MAP, asserting that MAP was responsible for all repair costs. Skanska submitted a claim to Amerisure for the costs, seeking coverage as an additional insured under the CGL policy; Amerisure denied the claim. Skanska filed this action, and Amerisure moved for summary disposition, asserting, in part, that MAP's defective work was not a covered "occurrence," which was defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions"; the term "accident" was not defined in the policy. Applying the definition of "accident" set forth in *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369 (1990), the court, Michael J. Beale, J., denied Amerisure's motion. Amerisure later filed a renewed motion for summary disposition, and Skanska moved for summary disposition on the issue of Amerisure's liability to Skanska. The court denied both motions, reasoning that it was bound to follow *Hawkeye* because the case had not been overruled. However, the court did not determine whether an accident occurred and therefore did not determine whether the defective workmanship resulted in an

“occurrence.” Amerisure and Skanska separately appealed by leave granted, and the Court of Appeals consolidated the appeals. Relying on *Hawkeye*, the Court of Appeals, SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ., reversed the trial court’s orders and remanded the case for entry of summary disposition in favor of Amerisure. The Court reasoned that although Skanska could seek coverage for any damage its work did to a third party’s property, it could not recover for damage to its own work. The Court concluded that there was no “occurrence” under the CGL policy because the only damage was to Skanska’s own work product, which did not constitute an “accident.” *Skanska USA Bldg, Inc v MAP Mech Contractors, Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2019 (Docket Nos. 340871 and 341589). Skanska filed an application for leave to appeal in the Supreme Court, and the Supreme Court granted the application. 504 Mich 980 (2019).

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

Under the current standard language of CGL policies, an “accident” may include unintentionally faulty subcontractor work that damages an insured’s work product. Accordingly, Skanska may be able to recover under the Amerisure policy the cost of repairs Skanska incurred when it corrected faulty work performed by MAP in the renovation of the medical center. The holding in *Hawkeye*, which interpreted a 1973 CGL policy that did not cover damage caused by a subcontractor’s faulty workmanship, was limited to cases involving pre-1986 insurance policies and was, therefore, not controlling in this case.

1. Under *Allstate Ins Co v McCarn*, 466 Mich 277 (2002), an “accident” is an undefined contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected. Faulty work by a contractor falls within the definition of “accident”; that is, it may happen by chance, is outside the usual course of things, and is neither anticipated nor naturally to be expected. To hold otherwise would render nugatory CGL policy language that precludes coverage for an insured’s own work product but contains an exception for work performed by a subcontractor on the insured’s behalf. In addition, the word “accident” plainly has a broader meaning than “fortuity.” That is, while fortuity is one way to show that an incident is an accident, it is not the only way. Instead, an unanticipated or unforeseeable injury to a person or property—even absent true fortuity—may be an accident that is a covered occurrence; thus, an insured need not act unintentionally

for the act to constitute an “accident.” That an insured may recover under a CGL policy for faulty subcontractor work does not convert the policy into a performance bond, which is different in that the performance bond benefits the owner of the project by guaranteeing the completion of the project in the event the contractor defaults. For those reasons, faulty subcontractor work that was unintended by the insured may constitute an “accident” (and thus an “occurrence”) under the CGL policy language at issue. That an “accident” may include damage to an insured’s own work product is supported by the context and history of CGL policies and is reflective of significant changes in the insurance industry since the 1970s. Specifically, the 1973 CGL policy language developed by the Insurance Services Office, which was interpreted in *Hawkeye*, contained language that excluded many risks inherent in doing business, causing many earlier courts to read a general business-risk exception into the initial grant of coverage; the distinction between damage to a third party’s property and an insured’s own work product in relation to coverage is grounded in that policy language related to the business-risk doctrine. In contrast, the 1986 policy language at issue in this case expanded the scope of CGL coverage to include some of the previously excluded business risks, including damage caused by a subcontractor’s faulty workmanship, with no differentiation based on whose property is damaged; thus, the 1986 reformation of CGL policy coverage emphasizes a plain reading of “accident,” specifically, that faulty subcontractor work may fall within a policy’s coverage.

2. In this case, the CGL policy did not limit the definition of “occurrence” based on the owner of the damaged property; therefore, the Court of Appeals erred by concluding that the word “accident” cannot include damage limited to the insured’s own work product. While the CGL policy excluded coverage for damage to an insured’s own work product arising out of that work, the exclusion expressly did not apply if the damaged work or the work out of which damage arose was performed on the insured’s behalf by a subcontractor, a fact the Court of Appeals failed to recognize. Because an “accident” may include unintentionally faulty subcontractor work that damages an insured’s work product, Skanska may be able to recover under the policy for the cost of repairs it incurred to correct MAP’s faulty work. The Court of Appeals erred by reversing the trial court and ordering the court to enter summary disposition in favor of Amerisure. *Hawkeye*, which interpreted a 1973 CGL policy that did not cover damage caused by a subcontractor’s faulty workmanship, was not persuasive, and its holding was limited to cases involving pre-1986 insurance policies.

Court of Appeals judgment reversed and case remanded to the Court of Appeals for consideration of any remaining issues.

CONSTRUCTION LAW — COMMERCIAL GENERAL LIABILITY INSURANCE POLICIES — WORDS AND PHRASES — “ACCIDENT.”

An “accident” is an undefined contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected; faulty subcontractor work that was unintended by the insured may constitute an “accident” (and thus an “occurrence”) under the language of commercial general liability insurance policies published by the ISO in 1986.

Kotz Sangster Wysocki PC (by *R. Edward Boucher, Lauren Virzi, Tyler P. Phillips, and Jeffrey M. Sangster*) for Skanska USA Building Inc.

Plunkett Cooney (by *Jeffrey C. Gerish and Tanya M. Murray*) for Amerisure Insurance Company and Amerisure Mutual Insurance Company.

Amici Curiae:

Clark Hill PLC (by *Jay M. Berger*) and *Cokinis Young* (by *Patrick J. Wielinski*) for the Associated General Contractors of Michigan and the Associated General Contractors of America.

Butzel Long, PC (by *Eric J. Flessland, Kurtis T. Wilder, and Michael R. Griffie*) for the Michigan Infrastructure & Transportation Association, Inc.

Facca, Richter & Pregler, PC (by *Bruce M. Pregler*) for the Construction Association of Michigan.

Deneweth Dugan & Parfitt, PC (by *Ronald A. Deneweth and Deborah S. Kaleta*) for Turner Construction Company and Gilbane Building Company.

Bush Seyferth PLLC (by *Stephanie A. Douglas, Michael J. Laramie, Justin B. Weiner, and Andrea S. Carone*) for the Home Builders Association of Michigan.

Collins Einhorn Farrell PC (by *Deborah A. Hebert*) for the Insurance Alliance of Michigan.

Hilger Hammond (by *Benjamin H. Hammond* and *Mark A. Rysberg*) for Associated Builders & Contractors, Inc., of Michigan; Associated Builders & Contractors, Inc., Western Michigan Chapter; and Associated Builders and Contractors of Southeastern Michigan, Inc.

MCCORMACK, C.J. May unintentionally faulty subcontractor work that damages an insured's work product constitute an "accident" under a commercial general liability insurance policy? Because we conclude the answer is yes, we reverse the Court of Appeals' judgment to the contrary. We also cabin the Court of Appeals' decision in *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369; 460 NW2d 329 (1990), to cases involving pre-1986 comprehensive general liability insurance policies. We remand to the Court of Appeals for consideration of any remaining issues.

I. FACTS AND PROCEDURAL HISTORY

The plaintiff, Skanska USA Building Inc., served as the construction manager on a renovation project for Mid-Michigan Medical Center—Midland (the Medical Center); the plaintiff subcontracted the heating and cooling portion of the project to defendant M.A.P. Mechanical Contractors, Inc. (MAP). MAP obtained a commercial general liability insurance policy (the CGL policy) from defendant Amerisure Insurance Company (Amerisure). The plaintiff and the Medical Center are additional named insureds on the CGL policy.

In 2009, MAP installed a steam boiler and related piping for the Medical Center's heating system. MAP's

installation included several expansion joints. Sometime between December 2011 and February 2012, the plaintiff determined that MAP had installed some of the expansion joints backward. Significant damage to concrete, steel, and the heating system occurred as a result. The Medical Center sent a demand letter to the plaintiff, asserting that it must pay for all costs of repair and replacement.

The next day, the plaintiff sent a demand letter to MAP, asserting that MAP was responsible for all costs of repair and replacement. The plaintiff performed the work of repairing and replacing the damaged property. According to the plaintiff, the cost of the repair and replacement work was about \$1.4 million. The plaintiff submitted a claim to Amerisure, seeking coverage as an insured. Amerisure denied the claim.

The plaintiff sued MAP and Amerisure, seeking payment for the cost of the repair and replacement work. Before the parties had completed discovery, Amerisure moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(10) (no genuine issue of material fact), alleging among other things that MAP's defective construction was not a covered "occurrence" within the CGL policy. The trial court denied Amerisure's motion. The trial court first looked to the policy to determine whether installation of the backward expansion joints was an "occurrence." The relevant provision provides:

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies. . . .

b. This insurance applies to . . . "property damage" only if:

(1) The . . . “property damage” is caused by an “occurrence”]

The policy defined “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” But the policy did not define the word “accident.” The trial court looked to the Court of Appeals’ decision in *Hawkeye*, 185 Mich App at 374, which defined “accident” as “anything that begins to be, that happens, or that is a result which is not anticipated and . . . takes place without the insured’s foresight or expectation and without design or intentional causation on his part.” (Quotation marks and citation omitted.) But, again citing *Hawkeye*, the trial court concluded that “[d]efective workmanship, standing alone, is not an occurrence within the meaning of a[] general liability insurance contract[;] an occurrence exists where the insured’s faulty work product damages the property of another.”

The trial court held that the plaintiff and others affected by MAP’s negligence did not anticipate backward expansion joints or property damage. Because no one argued that MAP had purposefully installed the expansion joints backward, the trial court determined that an “occurrence” may have happened, triggering Amerisure’s duty of coverage under the insurance policy. Finally, the trial court cited caselaw, including *Hawkeye*, for the proposition that damage arising out of an insured’s defective workmanship that is confined to the insured’s own work product cannot be viewed as accidental under the policy.¹ Because the damage caused by defective installation of

¹ The plaintiff urged the trial court to follow *Amerisure Mut Ins Co v Hall Steel Co*, unpublished per curiam opinion of the Court of Appeals, issued December 10, 2009 (Docket No. 286677), pp 3-4, in which the

the expansion joints by MAP may have gone beyond the scope of the work required by the contract between the plaintiff and the Medical Center, the court found a question of material fact was in dispute and denied summary disposition to Amerisure. Amerisure moved for reconsideration; the trial court denied the motion.

Amerisure then deposed the plaintiff's project manager and filed a renewed summary disposition motion. In response to Amerisure's renewed motion, the plaintiff sought summary disposition on Amerisure's liability to the plaintiff. The plaintiff argued that *Hawkeye* did not control because *Hawkeye* had interpreted a prior version of the standard CGL policy issued by the Insurance Services Office (ISO).² The new version of the policy (the one at issue here) provides coverage for defective construction claims as long as a subcontractor completed the defective work.³ The plaintiff further argued that MAP's backward installation of the expansion joints was an accident, which constituted an "occurrence" under the policy.

Court of Appeals concluded that supplying defective steel was an unanticipated event that qualified as an "accident" as that term was defined in *Hawkeye*.

² According to its website, the ISO "began life in 1971 as Insurance Services Office." ISO is not itself an insurance company; it "provides advisory services and information to many insurance companies" and "develops and publishes policy language that many insurance companies use as the basis for their products." Verisk, *Frequently Asked Questions* <<https://www.verisk.com/insurance/about/faq>> (accessed May 22, 2020) [<https://perma.cc/LNQ2-5HVA>].

³ *Hawkeye* involved a 1973 comprehensive general liability policy (the 1973 policy) that contained an express exclusion of coverage for "property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof[.]" *Hawkeye*, 185 Mich App at 383. But in 1986, the ISO revised the "your product" and "your work" exclusions to include coverage for construction defects by the insured's subcontractors (the 1986 policy).

The trial court again denied summary disposition to both parties. The court reiterated its determination that “defective workmanship, standing alone, is not an occurrence within the meaning of a general liability insurance contract.” The trial court clarified that it did not determine whether an accident occurred, and it therefore did not make a finding about whether there was an “occurrence.” Rather, the court held that an occurrence *may* have happened because the damage caused by MAP’s defective installation of the expansion joints *may* have gone beyond the scope of the work required by the contract between the plaintiff and the Medical Center. The trial court acknowledged the plaintiff’s argument that it should not rely on *Hawkeye* but concluded that it had to follow the decision because it had not been overruled.

Both plaintiff and Amerisure filed an application for leave to appeal in the Court of Appeals, arguing that the trial court should have resolved the issue in their respective favors. The Court of Appeals granted the applications and consolidated the appeals. In an unpublished per curiam opinion, it reversed the trial court and ordered that summary disposition be granted to Amerisure; applying the *Hawkeye* Court’s definition of “accident,” the Court reasoned that there was no “occurrence” under the CGL policy because the only damage was to the insured’s own work product. *Skanska USA Bldg, Inc v MAP Mech Contractors, Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2019 (Docket Nos. 340871 and 341589), pp 9-10.

The plaintiff filed an application for leave to appeal in this Court, arguing that the Court of Appeals erred by concluding that *Hawkeye* controlled and that installing the expansion joints backward constituted an “accident”

as a matter of law. We granted leave to appeal, directed the parties to address two issues,⁴ and invited several organizations to file amicus curiae briefs. 504 Mich 980 (2019).⁵

II. CONTRACTUAL ANALYSIS

Insurance policies are contracts and, absent an applicable statute, are subject to the same construction principles applicable to other contracts. *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012). This case thus involves an issue of contract interpretation, which is an issue of law that this Court reviews de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). That means that the Court reviews the issue independently, with no required deference to the trial court. *Millar v Constr Code Auth*, 501 Mich 233, 237; 912 NW2d 521 (2018).

A. TEXT

As usual, when interpreting a contract, we begin with the text. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). The contract defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Accordingly, the parties’

⁴ Our grant order directed the parties to brief “whether: (1) the definition of ‘occurrence’ in *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369 (1990), remains valid under the terms of the commercial general-liability policy at issue here; and (2) the plaintiff has shown a genuine issue of material fact as to the existence of an ‘occurrence’ under those terms.”

⁵ We again thank counsel for both parties for agreeing to use video-conferencing software to participate in oral arguments. That agreement prevented delay in disposition of this case because of the COVID-19 pandemic.

arguments rightfully focus on whether MAP's erroneous backward installation of the expansion joints is an "accident."

This Court has said that an "accident" is "an undefined contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." *Allstate Ins Co v McCarn*, 466 Mich 277, 281; 645 NW2d 20 (2002) (quotation marks and citation omitted).⁶ Generally, faulty work by a subcontractor may fall within the plain meaning of most of these terms. It happens by chance, is outside the usual course of things, and is neither anticipated⁷ nor naturally to be expected.⁸

⁶ The parties concede that the policy does not define "accident" and that the definition of "accident" from this Court's opinion in *McCarn* controls here; they disagree only over how it applies.

⁷ Even if an insured acts intentionally, the act may still be an accident. *Metro Prop & Liability Ins Co v DiCicco*, 432 Mich 656, 670; 443 NW2d 734 (1989) (opinion by RILEY, C.J.); see also *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 638; 527 NW2d 760 (1994) ("[A]n accident may include an unforeseen consequence of an intentional act of the insured.") (opinion by RILEY, J.). In *Frankenmuth Mut Ins Co*, 460 Mich at 115, in interpreting a CGL policy like the one at issue here, this Court reiterated that "an insured need not act unintentionally for the act to constitute an 'accident' and therefore an 'occurrence.'" (Quotation marks and citation omitted.) "[T]he appropriate focus of the term 'accident' must be on both the injury-causing act or event and its relation to the resulting property damage or personal injury." *McCarn*, 466 Mich at 282 (quotation marks, citations, and emphasis omitted). And this analysis is subjective from the standpoint of the insured. *Id.* at 284.

⁸ Other courts have reached this same conclusion in this same context. See, e.g., *Greystone Constr, Inc v Nat'l Fire & Marine Ins Co*, 661 F3d 1272, 1283 (CA 10, 2011) (stating that "damage caused by faulty workmanship is neither expected nor intended from the standpoint of the policyholders and, therefore, receives coverage so long as it does not fall under a policy exclusion"); *Capstone Bldg Corp v American Motorists Ins Co*, 308 Conn 760, 776; 67 A3d 961 (2013) (stating that "because

Reading the contract as a whole confirms this conclusion. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003) (“We read contracts as a whole[.]”). The policy contains an exclusion precluding coverage for an insured’s own work product, but it contains an exception for work performed by a subcontractor on the insured’s behalf:

1. Damage To Your Work

“Property damage” to “your work”^[9] arising out of it or any part of it and included in the “products-completed operations hazard”.^[10]

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

If faulty workmanship by a subcontractor could never constitute an “accident” and therefore never be an “occurrence” triggering coverage in the first place, the subcontractor exception would be nugatory. Just as with statutory interpretation, courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract nugatory. *Klapp v United Ins Group*

negligent work is unintentional from the point of view of the insured, we find that it may constitute the basis for an ‘accident’ or ‘occurrence’ under the plain terms of the commercial general liability policy”); *Lamar Homes, Inc v Mid-Continent Cas Ins Co*, 242 SW3d 1, 8 (Tex, 2007) (stating that “a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly”).

⁹ The CGL policy defines “your work” in relevant part as “(1) Work or operations performed by you or on your behalf; and (2) Materials, parts, or equipment furnished in connection with such work or operations.”

¹⁰ The CGL policy defines “products-completed operations hazard,” which includes, in relevant part, “‘property damage’ occurring away from premises you own or rent and arising out of ‘your product’ or ‘your work’ except: . . . (2) Work that has not yet been completed or abandoned.” (Paragraph structure omitted.)

Agency, Inc, 468 Mich 459, 468; 663 NW2d 447 (2003).¹¹ Many other courts have recognized this same flaw in the reasoning put forth by insurers. See, e.g., *Greystone Constr, Inc v Nat'l Fire & Marine Ins Co*, 661 F3d 1272, 1289 (CA 10, 2011) (“[T]he only way [the “your work” exclusion] has effect is if we find that physical injury caused by poor workmanship—whether to some part of the work itself or third-party property—may be an occurrence under standard CGL policies.”); *Sheehan Constr Co, Inc v Continental Cas Co*, 935 NE2d 160, 171 (Ind, 2010) (“If the insuring provisions do not confer an initial grant of coverage, then there would be no reasons for a ‘your work’ exclusion.”), mod on reh 938 NE2d 685 (Ind, 2010).

Amerisure counters that mere unanticipated damage is insufficient; an “accident,” Amerisure asserts, must involve a “fortuity,” which means something over which the insured has no control. This is an overly stingy reading of the word “accident.” As our definition in *McCarn* shows, fortuity is *one way to show that an*

¹¹ Considering the exclusions as part of our textual analysis does not, as Amerisure argues, violate this Court’s two-step process for assessing whether there is coverage under an insurance policy: first, determine whether coverage exists and second, determine whether an exclusion applies that would negate coverage. *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562 (2014). Nor does it violate the corollary rule that “exclusionary clauses *never* grant coverage, but rather limit the scope of the basic protection statement.” *Fresard v Mich Millers Mut Ins Co*, 414 Mich 686, 697; 327 NW2d 286 (1982). Not allowing the exclusions to grant coverage does not require us to blind ourselves to their existence when determining the scope of coverage; to do so would violate the rule that courts must read the contract as a whole. *Id.* at 694; see also *US Fire Ins Co v JSUB, Inc*, 979 So 2d 871, 886 (Fla, 2007) (stating that “our interpretation of the term ‘occurrence’ is guided by a view of the policy as a whole, . . . [and] ‘[a]lthough exclusionary clauses cannot be relied upon to create coverage, principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read *in pari materia*’ ”) (second alteration in original).

incident is an accident, but it is not the *only* way.¹² See also *Greystone Constr, Inc*, 661 F3d at 1285 (stating that “an *unanticipated* or *unforeseeable* injury to person or property—even in the absence of true fortuity—may be an accident and, therefore, a covered occurrence”); *Capstone Bldg Corp v American Motorists Ins Co*, 308 Conn 760, 775; 67 A3d 961 (2013) (rejecting the argument that “defective construction lacks the element of ‘fortuity’ necessary for an accident” because “the mere fact that defective work is in some sense volitional does not preclude it from coverage under the terms of the policy”); *Lamar Homes, Inc v Mid-Continent Cas Co*, 242 SW3d 1, 8 (Tex, 2007) (stating that “a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result”). Amerisure’s position would also contradict this Court’s statement that “an insured need not act unintentionally” for the act to constitute an “accident.” *Frankenmuth*, 460 Mich at 115 (quotation marks and citation omitted). And as discussed, the plain meaning of the word “accident” has a broader meaning than “fortuity.” See *Greystone Constr, Inc*, 661 F3d at 1285 (concluding that “fortuity is not the sole prerequisite to finding an accident under a CGL policy” and citing dictionary definitions of “accident” to conclude that the covered occurrences included unanticipated or unforeseeable injuries “even in the absence of true fortuity”).¹³

¹² We reject Amerisure’s argument that because we used eight descriptors for the term “accident” in *McCarn* and connected those descriptors with the word “and,” each one of those descriptors must be satisfied for an “accident” to have occurred. We have never said that, and when interpreting a contractual or statutory term, we typically apply the definition of a term that is the most reasonable given the context in which it is used; we do not hold that a term has to meet every single one of the potential definitions.

¹³ The courts that have held that an “accident” must involve a true

Nor is there any support for the Court of Appeals' conclusion that "accident" cannot include damage limited to the insured's own work product. See *Skanska USA Bldg*, unpub op at 10. Amerisure does little to defend that holding, and focuses mainly on its fortuity argument. Most significantly, the Court of Appeals

fortuity notwithstanding the plain meaning of "accident" have relied more on judicial gloss on that term than on the plain meaning of the word. See, e.g., *Kvaerner Metals Div of Kvaerner US, Inc v Commercial Union Ins Co*, 589 Pa 317, 335; 908 A2d 888 (2006) (holding that "the definition of 'accident' required to establish an 'occurrence' under the policies cannot be satisfied by claims based upon faulty workmanship" because "[s]uch claims simply do not present the degree of fortuity contemplated by the ordinary definition of 'accident' or its common judicial construction in this context") (emphasis added); *Cincinnati Ins Co v Motorists Mut Ins Co*, 306 SW3d 69, 74 (Ky, 2010) (stating that "[i]nherent in the plain meaning of 'accident' is the doctrine of fortuity" but citing two secondary sources rather than a lay dictionary for the proposition that "[t]he fortuity principle is central to the notion of what constitutes insurance") (second alteration in original). We acknowledge, but decline to adopt, this view for the reasons stated in this opinion.

Some courts retain a fortuity requirement not based on the plain meaning of the word "accident" but, instead, based on a common-law prerequisite to insurance coverage. See, e.g., *Aluminum Co of America v Aetna Cas & Surety Co*, 140 Wash 2d 517, 556; 998 P2d 856 (2000) (noting that "the fortuity principle never appears in insurance contracts" but that "[t]he principle is rooted in common law"); *Fed Ins Co v Coast Converters, Inc*, 130 Nev 960, 967; 339 P3d 1281 (2014) (stating that "the fortuity principle applies even if not explicitly written into the insurance contract"); see also 7 Couch, Insurance, 3d (rev ed), § 102:10, p 102-35 (stating that "[t]he known risk, known loss, and loss in progress defenses are generally considered to be part of the 'fortuity' requirement that runs throughout insurance law"); Couch, § 101:2, pp 101-7, 101-9 (stating that to be covered, an insured's loss "must occur as a result of a fortuitous event, not one planned, intended, or anticipated" and that "[e]xcept for the risk requirements previously discussed and barring public policy considerations, the parties are free to contract for which risks the insurer shall or shall not insure") (emphasis added). We decline to address whether an extra-textual fortuity requirement could provide an independent basis for denying coverage here because Amerisure has not made that argument; it argues only that the meaning of "accident" in the policy is limited to a true fortuity.

accepted that an insured can seek coverage for its damage to a third party's property. *Id.* at 9-10. But the policy does not limit the definition of "occurrence" by reference to the owner of the damaged property. See *Capstone Bldg Corp*, 308 Conn at 777 (stating that "we see no basis in the language of the policy for limiting coverage to liability for harm to third parties"); *Lamar Homes*, 242 SW3d at 9 (noting that "no logical basis within the 'occurrence' definition allows for distinguishing between damage to the insured's work and damage to some third party's property"); *Greystone Constr, Inc*, 661 F3d at 1283 (concluding that the cases that define "occurrence" on the basis of *who* was injured, and not on *what caused* the injury, "subdivide[] 'occurrence' into two camps," which renders "the 'your work' exception superfluous, the subcontractor exception unnecessary, and therefore creates a fundamental inconsistency with the logic of CGL policies").¹⁴

¹⁴ Indeed, an inquiry based on "whose property is damaged" has been pretty universally condemned. See, e.g., *US Fire Ins Co*, 979 So 2d at 883-884, which stated:

Further, we fail to see how defective work that results in a claim against the contractor because of injury to a third party or damage to a third party's property is "unforeseeable," while the same defective work that results in a claim against the contractor because of damage to the completed project is "foreseeable." This distinction would make the definition of "occurrence" dependent on which property was damaged. For example, applying U.S. Fire's interpretation in this case would make the subcontractor's improper soil compaction and testing an "occurrence" when it damages the homeowners' personal property, such as the wallpaper, but not an "occurrence" when it damages the homeowners' foundations and drywall. As the Tennessee Supreme Court explained, in rejecting this distinction:

A shingle falling and injuring a person is a natural consequence of an improperly installed shingle just as water damage is a natural consequence of an improperly installed window. If we assume that either the shingle or the

The Court of Appeals failed to recognize that an insured's own defective workmanship is excluded from coverage via the explicit exclusions, not in the initial grant of coverage. See, e.g., *American Family Mut Ins Co v American Girl, Inc*, 268 Wis 2d 16, 39; 2004 WI 2; 673 NW2d 65 (2004) ("CGL policies generally do not cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss actionable only in contract can never be the result of an 'occurrence' within the meaning of the CGL's initial grant of coverage.").¹⁵

window installation will be completed negligently, it is foreseeable that damages will result. If, however, we assume that the installation of both the shingle and the window will be completed properly, then neither the falling shingle nor the water penetration is foreseeable and both events are "accidents." Assuming that the windows would be installed properly, Moore could not have foreseen the water penetration. Because we conclude the water penetration was an event that was unforeseeable to Moore, the alleged water penetration is both an "accident" and an "occurrence" for which there is coverage under the "insuring agreement."

[Quoting *Travelers Indemnity Co of America v Moore & Assoc, Inc*, 216 SW3d 302, 309 (Tenn, 2007).]

¹⁵ Many courts have expressly limited the extent to which damages may be covered for faulty subcontractor work based on whether the damage is to defective or nondefective work product. For example, the court in *Greystone Constr, Inc*, 661 F3d at 1283, held that "CGL policies are meant to cover unforeseeable damages—a category that encompasses faulty workmanship that leads to physical damage of nondefective property." The court explained "that CGL policies implicitly distinguish between damage to nondefective work product and damage to defective work product" and because "[t]he obligation to repair defective work is neither unexpected nor unforeseen under the terms of the construction contract or the CGL policies," only damage to the nondefective work product is covered under the policy. *Id.* at 1286. Other courts, however, have held that—rather than limit coverage to nondefective work based on the definition of "accident"—the defective workmanship itself is not covered because it does not constitute "property

Amerisure also argues that interpreting the policy to cover faulty subcontractor work essentially converts the policy into a performance bond. But that coverage may overlap with a performance bond is not a reason to deviate from the most reasonable reading of the policy language. *Lamar Homes*, 242 SW3d at 10 (observing that “[t]he CGL policy covers what it covers” and finding no basis for eliminating coverage “simply because similar protection may be available through another insurance product”). Performance bonds have a few key differences from the CGL policies. First, “a performance bond benefits the owner of a project rather than the contractor” because the bond’s purpose “is to guarantee the completion of the contract upon default by the contractor.” *US Fire Ins Co v JSUB, Inc*, 979 So 2d 871, 887 (Fla., 2007) (quotation marks and citation omitted). Second, “a surety, unlike a liability insurer, is entitled to indemnification from the contractor.” *Id.* at 888. And third, a performance bond’s coverage “is broader than a CGL policy in that it guarantees the completion of a construction contract upon the default of the general contractor.” *Id.*

For these reasons, given the plain meaning of the word “accident,” we conclude that faulty subcontractor work that was unintended by the insured may constitute an “accident” (and thus an “occurrence”) under a CGL policy.

damage” as defined under the policy. See, e.g., *Capstone Bldg Corp*, 308 Conn at 776, *Taylor Morrison Servs, Inc v HDI-Gerling America Ins Co*, 293 Ga 456; 746 SE2d 587 (2013), and *US Fire Ins Co*, 979 So 2d at 886. We express no opinion regarding these approaches because they were not raised by the parties and do not have any direct impact on how we define “accident.” Because our holding is simply that faulty subcontractor work *may* constitute an “accident,” we leave any determination regarding the extent to which the damages to the work product are covered under the policy to the lower courts.

B. CONTEXT AND HISTORY

The context and history of CGL policies support our conclusion that an “accident” may include damage to an insured’s own work product, and they are particularly helpful in understanding the term given the significant changes in the insurance industry since the 1970s. The distinction between damage to property of a third party and the insured’s own work product stands on an outdated rationale grounded in the language of the 1973 policy. That earlier policy featured the “business risk” doctrine—a concept advanced by Roger Henderson in a 1971 law review article¹⁶—under which many risks inherent in doing business were excluded.¹⁷ O’Connor, *What Every Court Should Know About Insurance Coverage for Defective Construction*, 5 C Con-

¹⁶ See Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 Neb L Rev 415, 438-441 (1971).

¹⁷ The 1973 CGL policy included language that purported to exclude certain “business risks”; in that regard, the 1973 policy stated that the insurance did not apply to the following:

(n) to property damage to the named insured’s products arising out of such products or any part of such products;

(o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;

(p) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured’s products or work completed by or for the named insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein [French, *Revisiting Construction Defects as “Occurrences” Under CGL Insurance Policies*, 19 U Pa J Bus L 101, 106-107 (2016) (referring to the three “business risk exclusions” in the 1973 CGL policy), quoting ISO Form No. GL 00 02 01 73, *Comprehensive General Liability Insurance Coverage Form* (1973).]

str Law J 1, 12-13 (Winter, 2011) (arguing that “[t]he common denominator of the reported decisions that reject as outcome-determinative the ‘business risk’ doctrine and the old Henderson article, is the courts’ conscientious insistence that policy coverage disputes begin and end with the language of the policy” and that “[a]s between these two conflicting coverage criteria—the ‘business risk’ doctrine and the actual language of the policy—the latter should always control”).¹⁸ Indeed, *Weedo v Stone-E-Brick, Inc.*, 81 NJ 233, 240-241; 405 A2d 788 (1979), a seminal case in this area (and cited in *Hawkeye*) relied on Henderson’s article in distinguishing covered occurrences involving damage to the property of a third party and noncovered business risks involving damage to the contractor’s own work. See *id.* (quoting the Henderson article and then including a hypothetical about “the boundaries between ‘business risks’ and occurrences giving rise to insurable liability”).

Decisions such as *Weedo* reflect an outdated view of the insurance industry.¹⁹ In 1986, the ISO distributed the policy language at issue, reshaping the scope of coverage under CGL policies. And it adopted those changes to expand coverage to include some of those

¹⁸ Earlier courts appear to have erred by reading a general “business risk” exception into the initial grant of coverage—instead of relying on the explicit exclusions in the contract. See, e.g., *Travelers Indemnity Co of America*, 216 SW3d at 307 (“Reliance upon a CGL’s ‘exclusions’ to determine the meaning of ‘occurrence’ has resulted in ‘regrettably overbroad generalizations’ concerning CGLs.”) (citation omitted). This error allowed courts to distinguish damage to a third party’s property and damage to an insured’s work product despite the absence of any textual support for it. This error has also resulted in courts, like the Court of Appeals here, continuing to deny coverage for a subcontractor’s faulty workmanship despite the ISO’s 1986 changes to the CGL policy.

¹⁹ As we do here, the New Jersey Supreme Court also distinguished *Weedo* from cases involving 1986 CGL policies. See *Cypress Point Condo Ass’n, Inc v Adria Towers, LLC*, 226 NJ 403; 143 A3d 273 (2016).

business risks, specifically damage caused by a subcontractor's faulty workmanship (with no carveout based on whose property is damaged). See *US Fire Ins Co*, 979 So 2d at 879 (citing the ISO circular confirming that the 1986 revisions to the standard CGL policy not only incorporated the "Broad Form" property endorsement but also specifically "cover[ed] damage caused by faulty workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor's work after the insured's operations are completed") (quotation marks and citation omitted; alteration in original); French, *Revisiting Construction Defects as "Occurrences" Under CGL Insurance Policies*, 19 U Pa J Bus L 101, 119 (2016) (stating that "the *Weedo* decision is obsolete and of little value today in analyzing whether construction defects can constitute occurrences" and noting that "the court did not analyze the definition of 'occurrence' in the policy at issue" and that "the business risk exclusions at issue in the case were redrafted in 1986 to provide much narrower reductions in coverage than the earlier versions of such exclusions").²⁰ Thus, the 1986 reformation of the scope of coverage under the CGL policies underscored a plain reading of "accident"—that faulty subcontractor work may fall within the policy's coverage.²¹

²⁰ See generally *Ohio Northern Univ v Charles Constr Servs, Inc*, 155 Ohio St 3d 197, 205-206; 2018-Ohio-4057; 120 NE3d 762 (2018) (citing Ohio Supreme Court precedent for the proposition that "the general principle underlying CGL policies is that they are not intended to protect business owners from ordinary business risks" but not considering the 1986 changes to CGL policies).

²¹ Of course, an insurer is free to contractually limit the coverage for subcontractor work. "[I]f the insurer decides that this is a risk it does not want to insure, it can clearly amend the policy to exclude coverage, as can be done simply by either eliminating the subcontractor exception or adding a breach of contract exclusion." *US Fire Ins Co*, 979 So 2d at 891; see also *Lamar Homes*, 242 SW3d at 12 ("More recently, the [ISO] has issued an endorsement that may be included in the CGL to eliminate the subcontractor exception to the 'your-work' exclusion.").

III. HAWKEYE

So what of *Hawkeye*? *Hawkeye* considered whether a 1973 policy provided coverage to a contractor for damages resulting from its own defective work, not the work of its subcontractor. Those differences are significant, and as a result, whether *Hawkeye* was correctly decided is not properly before us. We therefore see no reason to answer that question today.²² Further, because *Hawkeye* interpreted a 1973 policy that did not cover damage caused by a subcontractor's faulty workmanship, *Hawkeye* is not persuasive.²³

²² While the alteration to the definition of "occurrence" from the 1973 policy to the 1986 policy was slight and didn't change the portion of the definition analyzed in *Hawkeye*, as explained, the changes to other portions of the policy language illustrate that the new policy broadened the scope of coverage. Despite this change, in a case involving the 1986 policy, *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 147; 610 NW2d 272 (2000), the Court of Appeals described the state of the law in Michigan as follows: "[W]hen an insured's defective workmanship results in damage to the property of others, an 'accident' exists within the meaning of the standard comprehensive liability policy." This statement doesn't reflect the revised policy's broadened scope of coverage given the revised language of the exclusions, under which defective workmanship by the insured's subcontractor resulting in damage to work performed by or on behalf of the insured is not excluded from coverage. Given the broadened scope of coverage stemming from the changes to the language of the exclusions, we do not find it significant that the definition of "occurrence" in *Radenbaugh* was "not significantly different in substance" from the definition in *Hawkeye*. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 38; 772 NW2d 801 (2009).

²³ *Hawkeye* is also arguably not persuasive here because the plaintiff appears to seek coverage for property damage that goes beyond the scope of MAP's defective work. See, e.g., *High Country Assoc v New Hampshire Ins Co*, 139 NH 39, 43; 648 A2d 474 (1994) (distinguishing its prior decision in *McAllister v Peerless Ins Co*, 124 NH 676; 474 A2d 1033 (1984), relied on by the *Hawkeye* panel, see *Hawkeye*, 185 Mich App at 377-378, because "the plaintiff in the underlying suit alleged negligent construction that resulted in property damage, rather than merely negligent construction"). In *Hawkeye*, the defendant sought coverage solely for the removal and repouring of defective concrete—the fixing and redoing of the work it had performed before. *Hawkeye*, 185 Mich

Therefore, we limit its holding to cases involving the pre-1986 CGL policy language.²⁴

IV. CONCLUSION

We hold that an “accident” may include unintentionally faulty subcontractor work that damages an insured’s work product. We therefore reverse the Court of Appeals’ judgment and cabin the Court of Appeals’ decision in *Hawkeye* to cases involving pre-1986 insurance policies. We remand to the Court of Appeals for consideration of any remaining issues.²⁵

MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

App at 378-379. Thus, its holding that defective workmanship “standing alone” is not a covered occurrence, *id.* at 378, does not apply. But we need not definitively resolve that issue because we hold that subcontractor work that damages only an insured’s work product may constitute an “accident.” See note 15 of this opinion.

²⁴ The last four digits of the 10-digit ISO policy form provide the edition date in month and year format. For example, the policy form at issue here is CG 00 01 12 07, so the edition date is December 2007.

²⁵ In addition to the issues discussed, Amerisure argues briefly that we should affirm the Court of Appeals on alternative grounds because coverage is barred by the “your work” policy exclusion. Specifically, Amerisure asserts that because MAP is a named insured under the CGL policy, the subcontractor exception to the “your work” exclusion does not apply. See, e.g., *Double AA Builders, Ltd v Preferred Contractors Ins Co, LLC*, 241 Ariz 304, 306; 386 P3d 1277 (2016) (holding that the subcontractor exception to the “your work” exclusion did not apply because the subcontractor was a “Named Insured” under the CGL policy). Amerisure also asks that if we overrule *Hawkeye* (and presumably that if we simply limit it, as we have here), we do so only prospectively, citing our decision in *Pohutski v Allen Park*, 465 Mich675, 695-696; 641 NW2d 219 (2002). We also directed the parties to brief whether there is a genuine issue of material fact as to the existence of an occurrence. We decline to address these issues because the first two were not decided below and the parties do not present adversarial arguments about the last. On remand, the Court of Appeals may, but need not necessarily, address these issues, depending on whether it determines they are properly presented and preserved for its review.

PEOPLE v VANDERPOOL

Docket No. 158486. Argued on application for leave to appeal November 6, 2019. Decided July 13, 2020.

In August 2016, John D. Vanderpool pleaded no contest to possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v), second offense, and to violating probation. On June 24, 2013, Vanderpool had been sentenced to a two-year term of probation after pleading guilty to assaulting a police officer. Vanderpool's term of probation expired on June 25, 2015. On September 23, 2015, a probation officer petitioned the Tuscola Circuit Court to extend Vanderpool's term of probation until June 25, 2016. Without providing Vanderpool notice or a hearing on the petition, the court, Amy Grace Gierhart, J., granted the petition and purported to extend Vanderpool's term of probation until June 25, 2016. On December 4, 2015, probation officers conducted a compliance check at Vanderpool's residence and found heroin that Vanderpool admitted belonged to him. Vanderpool was arrested on December 30, 2015, when he was again found in possession of heroin, and he was subsequently charged with two counts of possession with intent to deliver heroin and violating probation. Vanderpool moved to suppress the evidence found during the compliance check on the basis that it was not authorized because the circuit court had lacked the authority to extend his term of probation after it had expired. The circuit court denied the motion, and Vanderpool pleaded no contest to one count of possession of heroin and to violation of probation. The Court of Appeals granted Vanderpool's delayed application for leave to appeal. In a split decision, the Court of Appeals, CAMERON, P.J. (O'CONNELL, J., concurring, and JANSEN, J., concurring in part and dissenting in part), affirmed Vanderpool's conviction. 325 Mich App 493 (2018). The Supreme Court ordered and heard oral argument on whether to grant Vanderpool's application for leave to appeal. 504 Mich 872 (2019).

In an opinion by Justice CAVANAGH, joined by Chief Justice MCCORMACK and Justices BERNSTEIN and CLEMENT, the Supreme Court *held*:

When read together, MCL 771.2 through MCL 771.6 require the result that after Vanderpool's term of probation expired on

June 25, 2015, the circuit court no longer had the authority to extend his probationary period under MCL 771.5(1) or to amend it under MCL 771.2(5). On June 25, 2013, the court fixed Vanderpool's probationary period, as required by MCL 771.2(1), at two years; the two-year period ended on June 25, 2015. Under MCL 771.5(1), on or before that date, Vanderpool's probation officer was required to report on his conduct during the probationary term. Pursuant to that statute, upon receiving that report, the court would have had the choice to either discharge Vanderpool from probation or extend the probationary period. However, Vanderpool's probation officer did not report on Vanderpool's conduct on or before the two-year term of probation ended on June 25, 2015. Therefore, Vanderpool's period of probation terminated on that date. When Vanderpool's probation officer sought to extend the probation period on September 23, 2015, the court no longer had statutory authority to do so because the period had already terminated under MCL 771.5(1) or expired under MCL 771.6. Logically, once a period has expired, or come to an end, it cannot be extended. Further, the circuit court's authority to extend the probation period is conditioned under MCL 771.5(1) upon its receiving the report of the probation officer, which must be provided to the court "when the probation period terminates"; the court's attempt to extend the probation period several months after it had terminated did not align with this statutory language. The court also lacked authority to amend the probationary period by extending it after it expired. MCL 771.2(5) allows the court to amend a probation order "at any time" while a defendant is under the order of probation. Once the order expired in this case, the court could no longer amend it. The Court of Appeals' reliance on *People v Marks*, 340 Mich 495 (1954), in concluding that MCL 771.2(5) and MCL 771.4 require a contrary outcome was misplaced. *Marks* did not address whether the predecessor to MCL 771.2 allowed a probation order that had expired to be amended. *Marks* also relied on *Burns v United States*, 287 US 216 (1932), which addressed probation revocation during the period of probation. *Burns* therefore did not dictate the result in this case, in which probation was extended after the probationary term expired. Additionally, whether Vanderpool was discharged from probation did not depend on whether the court had entered an order discharging him. Vanderpool was discharged from probation when the period of probation ended because he was relieved of his duty to comply with the terms of probation as of that date. MCL 771.6 recognizes that a probationer is simply discharged from probation upon expiration of the probationary period, which does not require any action by the court.

Reversed and remanded.

Justice ZAHRA, joined by Justices MARKMAN and VIVIANO, dissenting, disagreed with the majority's statutory analysis. MCL 771.2(5) permits the circuit court to amend an order of probation "at any time," in contrast to the language of MCL 771.4, which requires that a revocation proceeding commence during the "probation period." The lack of reference in MCL 771.2(5) to the defendant's "probation period" must be considered intentional in light of the Legislature's use of the broader "at any time" language in MCL 771.2(5). Accordingly, MCL 771.2(5) indicates that the Legislature did not limit a circuit court's authority to amend a probation order to the "probation period," and instead, the court may amend an order "at any time" within the statutory maximum period of five years, even after the expiration of the originally imposed period of probation. The majority's contrary conclusion relies heavily on the reporting requirement in MCL 771.5(1) and adds a temporal requirement. A probation officer is not required by the statute to furnish to the court a report on the defendant's conduct during probation at the very moment of the defendant's discharge. Rather, the statute anticipates a sequence of events that occur following the termination of the probation period, including the preparation and presentation of the probation officer's report, which necessarily means the court's jurisdiction extends past the expiration of the defendant's originally imposed period of probation. A defendant is not automatically discharged from probation when the probation period expires. MCL 771.2(1) makes clear that a trial court maintains jurisdiction over an individual convicted of a felony for up to five years; therefore, Vanderpool should have been aware that his order of probation was subject to extension until he received an order of discharge from the court. Justice ZAHRA agreed with the Court of Appeals that due process did not require that Vanderpool receive notice and an opportunity for a hearing before the court extended the order of probation. Although *Gagnon v Scarpelli*, 411 US 778 (1973), extends due-process protections to the revocation of probation, the extension of probation does not result in the type of loss of liberty that is caused by revocation of parole or probation; due-process protections therefore need not be afforded to defendants before probation is extended.

CRIMINAL LAW — PROBATION — THE COURT'S AUTHORITY TO EXTEND THE PROBATIONARY PERIOD AFTER IT HAS ENDED.

Sentencing courts have wide discretion in setting the terms of probation and may extend the period of probation through amendment under MCL 771.2(5) or at the termination of the

period of probation under MCL 771.5(1); but when read together, MCL 771.2 through MCL 771.6 indicate that the sentencing court lacks the authority to extend a probationer's period of probation after the period of probation has ended; that is, after the probationary period has ended, the sentencing court has neither the authority to "extend" the probationary period under MCL 771.5(1) nor to "amend" the probationary period under MCL 771.2(5); although a defendant has the right to be discharged per the procedures in MCL 771.6, the circuit court's failure to carry out its duty to provide the defendant with documentation of his or her discharge does not result in the defendant having to comply with an expired order of probation.

Mark E. Reene, Prosecuting Attorney, and *Eric F. Wanink*, Chief Assistant Prosecuting Attorney, for the people.

Warner Norcross & Judd (by *Gaëtan Gerville-Réache* and *Brandon Cory*) for defendant.

CAVANAGH, J. While conducting a probation compliance check on defendant John D. Vanderpool's house, a probation agent found heroin. Defendant admitted that the heroin belonged to him. A few weeks later, defendant was arrested and was again found in possession of heroin. He was charged with two counts of possession with intent to deliver heroin and with violating probation. Defendant moved to suppress evidence from the compliance check, arguing that the search was illegal because he was not on probation at the time of the search, but the circuit court denied the motion. Defendant pleaded no contest to having violated probation and to having possessed less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(v), second offense. Defendant has appealed, arguing that because he was not on probation when his home was searched, the search was unlawful. We agree. While the circuit court attempted to extend defendant's probation before the compliance check, because the term of probation had

already expired, the court did not have the authority to extend it. Consequently, the warrantless search of defendant's home was not justified. Accordingly, we reverse the Court of Appeals' judgment and remand to the Tuscola Circuit Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant was sentenced to a two-year term of probation on June 25, 2013, after pleading no contest to assaulting a police officer. The terms of probation included a prohibition on the use or possession of controlled substances and authorization of compliance checks permitting probation officers to search his property. The two years passed; June 25, 2015, came and went; and defendant's term of probation expired without the circuit court either discharging defendant from probation or extending his probation. On September 23, 2015, defendant's probation officer filed a Petition for Amendment of Order of Probation, which requested that defendant's term of probation be "extended" until June 25, 2016, "to allow for the time he was on warrant status as well [as] time to pay his Court ordered fines and fees." The circuit court—without notice or a hearing—granted the petition and "extended" defendant's probation, setting a new expiration date of June 25, 2016.

The record is unclear whether defendant continued to comply with the terms of his probation, or whether he was asked to comply with the terms of his probation, following its expiration on June 25, 2015, until its "extension" on September 23, 2015. On November 12, 2015, however, defendant's probation officer sought to have him arrested for failing a drug screen. On December 3, 2015, another arrest warrant indicated defendant had "stopped" reporting to the probation

office on a weekly basis, though the order did not indicate when he stopped. On December 4, 2015, probation officers conducted a compliance check of defendant's home and found heroin, which defendant admitted belonged to him. Defendant was not arrested that day, but was arrested on December 30, 2015, when a deputy responded to a tip regarding his location and warrant status. At the time of his arrest, defendant was again found in possession of heroin, and he was charged with two heroin offenses as well as violating probation.

Defendant moved to suppress the evidence produced in the search, arguing that the December 4, 2015 compliance check was not authorized because the circuit court lacked the authority to extend his probation after it had expired. The circuit court denied the motion, and defendant pleaded no contest to one charge of possession of less than 25 grams of heroin, second offense, and to the probation-violation charge. Defendant was sentenced to concurrent prison terms of 18 months to 8 years for the heroin conviction and 459 days for the probation-violation conviction.

The Court of Appeals granted defendant's application for leave to appeal but affirmed his convictions in a split decision. *People v Vanderpool*, 325 Mich App 493; 925 NW2d 914 (2018). Defendant sought leave to appeal here, and this Court scheduled oral argument on the application, directing the parties to address whether the circuit court had jurisdiction to extend defendant's probationary term on September 23, 2015, and whether the extension of the probationary term without notice and a hearing violated defendant's due-process rights. *People v Vanderpool*, 504 Mich 872, 872 (2019).

II. STANDARD OF REVIEW

This Court reviews de novo questions of both statutory interpretation, *People v Carter*, 503 Mich 221, 226; 931 NW2d 566 (2019), and constitutional law, *People v Hammerlund*, 504 Mich 442, 451; 939 NW2d 129 (2019).

III. ANALYSIS

Several statutory provisions are relevant to our analysis in this case. MCL 771.2(1) limits the probationary period for a felony to five years.¹ MCL 771.2(5) requires the sentencing court to set the period and conditions of probation and allows the court to amend the order of probation “at any time”:

The court shall, by order to be entered in the case as the court directs by general rule or in each case, fix and determine the period and conditions of probation. The order is part of the record in the case. The court may amend the order in form or substance at any time. If the court reduces a defendant’s probationary term under subsection (2), the period by which that term was reduced must be reported to the department of corrections.

The court can revoke probation “during the probation period.” MCL 771.4. The end of the probationary period and the probation officer’s duties at that time are directed by MCL 771.5(1):

¹ Even under the prosecution’s reading of the statute, defendant would have been discharged June 23, 2018. If the only relief defendant sought were discharge from probation, this case might be in danger of being rendered moot by the passage of time. However, defendant also seeks to have his convictions vacated, arguing that they flowed from evidence that was improperly obtained during the compliance check. Further, even regarding discharge from probation, the relatively short timelines involved in probation cases compared with the often sluggish pace of the appellate process might make this situation one that is capable of repetition, yet evading review. See *People v Kaczmarek*, 464 Mich 478, 481; 628 NW2d 484 (2001).

When the probation period terminates, the probation officer shall report that fact and the probationer's conduct during the probation period to the court. Upon receiving the report, the court may discharge the probationer from further supervision and enter a judgment of suspended sentence or extend the probation period as the circumstances require, so long as the maximum probation period is not exceeded.

Finally, MCL 771.6 requires a record of discharge.

When interpreting a statute, a court's duty is to "discern the legislative intent that may reasonably be inferred from the words expressed in the statute by according those words their plain and ordinary meaning." *Sotelo v Grant Twp*, 470 Mich 95, 100; 680 NW2d 381 (2004). Statutory words and phrases are to be "understood according to the common and approved usage of the language," except when a "peculiar" legal meaning has attached. MCL 8.3a. The common meaning of statutory words and phrases takes into account the context in which the words are used. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). In giving meaning to the statute, "we examine the provision[s] within the overall context of the statute 'so as to produce, if possible, a harmonious and consistent enactment as a whole.'" *People v Cunningham*, 496 Mich 145, 153-154; 852 NW2d 118 (2014), quoting *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922). Statutory provisions "cannot be read in isolation, but instead must be read reasonably and in context." *Cunningham*, 496 Mich at 154. Reading various probation statutes together, we conclude that after June 25, 2015, when defendant's probationary period expired, the circuit court had neither the authority to "extend" defendant's probationary period under MCL 771.5(1) nor to "amend" the probationary period under MCL 771.2(5).

The circuit court fixed defendant's probationary period, as required by MCL 771.2(1), at two years on June 25, 2013. That two-year period ended on June 25, 2015. On or before that date, the probation officer was required to report the termination of the probationary period to the circuit court and report on defendant's conduct during the probationary period. MCL 771.5(1). Upon receiving that report, the circuit court would have had the choice of discharging defendant or extending the probationary period. *Id.* However, defendant's probation officer did not notify the circuit court or report on defendant's conduct on or before June 25, 2015. Defendant's period of probation therefore terminated on that date.

When defendant's probation officer sought to "extend" defendant's probationary period on September 23, 2015, there was no statutory authority to do so because the period had already "terminate[d]," MCL 771.5(1), or "expir[ed]," MCL 771.6. "Terminate" means "to form an ending" and "to come to an end in time." *Merriam-Webster's Collegiate Dictionary* (11th ed). "Expire" means "to come to an end." *Id.* The most relevant definition of "extend" is "to cause to be longer[;] prolong." *Id.* The order of probation was signed on June 25, 2013, and set a two-year term of probation. By its own terms, the order of probation ended the period of probation on June 25, 2015. A probationary period that has terminated is over. And therefore, logically, once a period has terminated, it cannot be made longer (extended).

Additionally, the circuit court's authority to "extend" the probationary period is conditioned "[u]pon receiving the report" of the probation officer, which must be provided to the court "[w]hen the probation period terminates." MCL 771.5(1). The phrase "[w]hen the

probation period terminates” is unambiguous. “When” means “at or during the time that.” *Merriam-Webster’s Collegiate Dictionary* (11th ed). The circuit court’s attempt to extend the probationary period several months after the probation period terminated does not align with the statutory phrase “when the probation period terminates.”

Neither could the circuit court “amend” the order of probation to extend the probationary period under MCL 771.2(5). MCL 771.2(5) allows a sentencing court to amend an order of probation “in form or substance,” including the term of probation, “at any time.” That is, at any time while defendant was under the order of probation, the court could have extended the term of probation by amendment. But, just as the court could not “extend” an order that had expired, neither could the court “amend” an order that had expired.

The Court of Appeals came to the opposite conclusion, noting the textual differences between MCL 771.2(5) and MCL 771.4 and reasoning that we addressed “the exact issue now before this Court, albeit under the prior version of the probation statute” in our opinion in *People v Marks*, 340 Mich 495; 65 NW2d 698 (1954). *Vanderpool*, 325 Mich App at 497-499 (opinion by CAMERON, P.J.). See also *id.* at 501 (O’CONNELL, J., concurring). The Court’s reliance on *Marks* was misplaced for two reasons. *Marks*’s treatment of whether a sentencing court has statutory authority to extend a term of probation after the term has expired failed to account for the entire statutory scheme. And *Marks*’s treatment of the due-process question relied on general principles that do not require a particular outcome in this case.

In *Marks*, the Court considered whether the sentencing court had “jurisdiction and authority to extend

the probation period for an additional 2 years and alter the original terms of probation to include restitution after the original period of probation had expired[.]” *Marks*, 340 Mich at 498. *Marks* quoted the statutory predecessors of MCL 771.2 and MCL 771.3. *Id.* at 498-499. The predecessor of MCL 771.2 was similar to the current statutory text, and the quoted portion of the MCL 771.3 predecessor discussed a sentencing court’s authority to impose restitution as a term of probation. *Marks*, 340 Mich at 498-499. Without further discussion of either section, and without any discussion of the then-existing version of MCL 771.5, which set forth the same requirements as the current version, *Marks* held that a defendant is not denied due process when restitution is imposed as a condition of probation without a hearing. *Id.* at 499, citing *People v Good*, 287 Mich 110; 282 NW 920 (1938). *Marks* did not explain how the predecessor of MCL 771.2, which provided that an order of probation “shall be at all times alterable and amendable, both in form and in substance, in the court’s discretion,” meant that a probation order that has expired could be amended. Nor did the court address the interplay with MCL 771.5. Neither *Marks*’s unexamined reference to MCL 771.2 nor its reliance on *Good*’s due-process holding controls this case.

Lastly, *Marks* quoted at length from *Burns v United States*, 287 US 216; 53 S Ct 154; 77 L Ed 266 (1932). See *Marks*, 340 Mich at 500-501. The defendant in *Burns*, a federal probationer, had his probation revoked during the first year of a five-year probationary term, and *Burns* addressed what procedure was required in order to successfully terminate the probationary period. *Burns*, 287 US at 217-219, 222-223. So, *Burns* addressed probation revocation occurring during the period of probation. *Marks*’s discussion of

Burns also addressed what constitutional procedures, like notice, are required to extend probation; those constitutional issues are irrelevant here. Consequently, there is no holding from *Burns* that dictates a result here—where probation has been extended *after* the probationary term has expired.²

Judge CAMERON reasoned that it was “important” that the circuit court “had not entered an order discharging Vanderpool from probation pursuant to MCL 771.6,” but he did not elaborate. *Vanderpool*, 325 Mich App at 499 (opinion by CAMERON, P.J.). We cannot see why an expired order of probation can be extended before a defendant’s discharge is recorded but not after. Defendant was indeed entitled to have his discharge recorded as detailed in MCL 771.6, but the circuit court’s failure to carry out its duty to do so did not expand its authority to extend defendant’s term of probation.

The prosecution takes this further, arguing that defendant was not discharged. This is incorrect. Defendant was discharged from probation when the period of probation ended. MCL 771.6. “Discharge” means “to relieve of a charge, load, or burden[;] . . . to release from an obligation.” *Merriam-Webster’s Collegiate Dictionary* (11th ed). The order of probation set the end of the defendant’s obligations on June 25, 2015. On that day,

² Furthermore, the due-process analysis in *Marks* is dubious given that the United States Supreme Court has rejected the rights-privilege distinction that previously dominated legal thinking. See, e.g., *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972) (“[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a ‘right’ or as a ‘privilege.’”). See also *Gagnon v Scarpelli*, 411 US 778, 782, n 4; 93 S Ct 1756; 36 L Ed 2d 656 (1973) (“It is clear . . . that a probationer can no longer be denied due process, in reliance on the dictum . . . that probation is an ‘act of grace.’”). But given our disposition of this matter on statutory grounds, we do not reach the due-process argument.

defendant was relieved of his charge to comply with the terms of probation, and he was therefore discharged. The circuit court's failure to carry out its obligation to record this event and provide defendant with documentation as required by statute does not result in defendant having to comply with the expired order.

The prosecution elaborated at oral argument that the end of the term of probation is nothing more than a "control date" or "review date" and probation continues unabated until a defendant's discharge from probation is recorded or a defendant has served the five-year statutory maximum. Although a defendant might expect his or her term of probation to conclude on the last day of the term as described by the order of probation, the prosecution represents that in practice, probation officers often inform defendants to the contrary. But this understanding of the probation end date essentially converts every term of probation to a five-year term.

This reading conflicts with the plain meaning of the statute in that an order of probation that has expired cannot be amended, as described above. This reading also fails to produce a "harmonious and consistent enactment as a whole," *Cunningham*, 496 Mich at 153-154, because the careful description in MCL 771.5(1) of how a probation period should end in either extension or discharge would be little more than a misleading suggestion that probation officers and sentencing courts would be free to ignore. Why require the trial court to fix an initial period of probation if the court can change the terms and length of probation at any time within the five-year maximum; that is, even after that initial fixed period has expired?

The prosecution does not offer any statutory support for the idea that the end of a term of probation is merely a "control date" without independent effect. To

the contrary, MCL 771.2(5) requires the sentencing court to “fix and determine the period and conditions of probation,” while MCL 771.2(1) sets an upper limit for felony probationary terms, requiring that “the probation period shall not exceed 5 years.” If every term of probation were five years, then there would be no period for the sentencing court to “fix and determine.” If the period that the sentencing court fixed and determined ended with a mere “control date,” then the period being determined would not be the “period . . . of probation” because the period of probation would be anything up to five years. Additionally, if the prosecution were correct that defendants remain on probation until discharge is recorded without regard to the expiration of the period of probation, it is not clear why the period of probation would even need to be extended.

The prosecution is correct that sentencing courts have wide discretion in setting terms of probation. See MCL 771.3(2) and (3). Nothing in our holding constrains courts from exercising that discretion when setting the period and conditions of probation. And courts also have the authority to extend the period of probation through amendment under MCL 771.2(5) or at the termination of the period of probation under MCL 771.5(1). They simply do not have the authority to extend a probation period that is already over.

The dissent largely focuses on MCL 771.2(5), which states that a sentencing court “may amend the order in form or substance at any time.” The dissent points out that, in contrast, the revocation procedure in MCL 771.4 limits a sentencing court’s power to a time “during the probation period.” And given that MCL 771.4 includes an explicit temporal limitation but MCL 771.2(5) lacks such a limitation, so the argument goes, the court must retain the power to amend the terms of probation at any

time, even after the expiration of the probation period. The only limitation the dissent sees in the sentencing court's power to amend an order of probation is the "statutory maximum period of five years."

The absence of a temporal limitation in MCL 771.2(5) combined with the presence of a temporal limitation in MCL 771.4 is a textual clue relevant to this discussion, to be sure. But that textual clue must be weighed in light of the other textual evidence that supports our interpretation. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 59 ("The skill of sound construction lies in assessing the clarity and weight of each clue and deciding where the balance lies."). The language "at any time" in MCL 771.2(5) indicates that the sentencing court has broad power to amend the order of probation. But that power, in light of the statute as a whole, as we discussed earlier, is limited to when the order is operative.

The dissent argues, like the prosecution does, that the order of probation remains operative after it has expired because the court has not entered an order of discharge under MCL 771.6. The dissent does not explicitly adopt the prosecution's description of the expiration of the order of probation as a mere "control date," but the logic is the same. In the dissent's view, so long as the statutory maximum period has not yet been met when the order of probation expires, nothing happens.

However, this reading of the statute fails to adequately address the language of MCL 771.6, which states that "[w]hen a probationer is discharged upon the expiration of the probation period, or upon its earlier termination by order of the court, entry of the discharge shall be made in the records of the court, and the probationer shall be entitled to a certified copy

thereof.” MCL 771.6 recognizes that while a court may terminate probation before the expiration of the probation period, and conversely, that a court may also extend probation before the expiration of the probation period, a probationer is simply discharged from probation upon the expiration of the probation period. Nowhere in the language of MCL 771.6 is there a requirement that a court act to discharge a probationer upon the termination of the original probation period set by the original probation order; a court need only act in order to amend that probation order, which otherwise expires according to its original terms if there is no timely intervention.

This reading of MCL 771.6 is not hostile to the language found in MCL 771.5(1). As even the dissent recognizes, “when” may be defined in context to refer to “at or during the time that” or “upon or after which.” Given the plain language of MCL 771.6, it is the first definition of “when” that allows for the most cohesive reading of both MCL 771.5(1) and MCL 771.6. MCL 771.6 dictates that a probationer is discharged from probation upon the expiration of the original probation period, absent earlier intervention by a court to modify the original probation order. MCL 771.5(1) merely acknowledges the reality that a probation officer must prepare a report concerning a probationer’s conduct and submit it to the court, which relies on that report to make a decision as to whether to amend the order *before* a probationer is discharged upon the expiration of the probation period. In other words, the phrase “so long as the maximum probation period is not exceeded” in MCL 771.5(1) modifies the extent to which a court may extend a probation period if it moves to amend the probation order in a timely manner. But MCL 771.6 restricts a court’s ability to amend an order

to the time before a probationer is automatically discharged upon the expiration of the probation period.³

Although the dissent argues that the original order of probation could not have expired because defendant failed to fulfill some of his obligations under the order, a probationer's discharge from probation does not eliminate all obligations that were previously incurred. Similarly to child-support orders that often expire upon a child reaching the age of majority, the expiration of such an order merely reflects the lack of *future* obligations but does not impact outstanding obligations that were incurred while the order was in effect.

Further, we reject the idea that a defendant should ignore the face of the order of probation, which specifies a fixed term. The idea that nothing happens when an order of probation expires conflicts with our direction that an order of probation “must be sufficiently clear to enable the probationer to know what he is required to do in order to comply with it,” *People v Sutton*, 322 Mich 104, 109; 33 NW2d 681 (1948), and “specify the period during which it is to continue,” *Hill v Hill*, 322 Mich 98, 103; 33 NW2d 678 (1948).

The dissent worries our reading of the statute would be “very difficult, if not impossible, to accomplish in practice.” The dissent notes that a probation officer's report must describe the conduct during the probationary period, and that must “necessarily include the moments leading right up to termination.” So, in the

³ The dissent argues that our reading of the statute “strips the trial court of [its] important duty” to discharge defendants. We disagree. Here, the sentencing court retained its authority to amend the order of probation for the entire period it specified in its own order. The sentencing court did fail to carry out the evaluation required by MCL 771.5 “[w]hen the probation period terminate[d],” and in doing so allowed the period to expire. The sentencing court stripped itself of its duty by failing to address defendant until months after his probationary period expired.

dissent's view, the probation officer would wait until the last day of the probationary period to write the report, then submit the report to the sentencing court, which would consider it at some later date past the expiration of the probationary period. We have every confidence that sentencing courts can navigate this responsibility.⁴

In practice, probation officers already perform a very similar, if not more burdensome, function in preparing presentence investigation reports for sentencings. While all that is required by MCL 771.5(1) is to generally report the termination of probation and “the probationer’s conduct during the probation period,” these same probation agents comply with much more stringent statutory requirements in preparation for sentencing. In addition to a host of specific information that might be compiled ahead of sentencing,⁵ MCL 771.14 requires an inquiry into “the antecedents, character, and circumstances of the person,” MCL 771.14(1), as well as “[a]n evaluation of and a prognosis for the person’s adjustment in the community based on factual information contained in the report,” MCL 771.14(2)(a). In practice, this includes a defendant’s conduct while awaiting sentencing and events that transpire between completion of the report and sentencing, which are offered orally to the court. Probation officers can and do comply with statutory deadlines.⁶ Even supposing the dissent’s analysis were cor-

⁴ Furthermore, Michigan’s manual for probation officers already instructs them to “review the probationer’s file in a timely fashion.” See SCAO, *Manual for District Court Probation Officers* (Dec 2019), § 7-08(B), p 154, available at <<https://courts.michigan.gov/administration/SCAO/Resources/Documents/Publications/Manuals/prbof/prb.pdf>> (accessed May 19, 2020).

⁵ See MCL 771.14(2)(a) through (h).

⁶ At any rate, the dissent’s solution of extending the probationary period does not solve the problem the dissent imagines. In the dissent’s

rect, there would still be a lot of blanks to fill in. If a probationer's responsibility to comply with the terms of probation did not end when the order of probation indicated it would, it would not be clear how the probationer would know when his or her responsibilities ended. If a probationer's term of probation continued past its expiration, and the sentencing court was not required to comply with the procedure in MCL 771.5 at that time, it would not be clear how long the sentencing court could wait to make a decision. If the only limitation on the court's power to amend an order of probation was the statutory maximum term, it would not be clear whether a sentencing court could amend an order of probation even after entering an order of discharge.

For these reasons, the trial court lacked authority to extend defendant's probation. Because defendant was not on probation, officers had no authority to enter his home and conduct a warrantless search under the probation exception to the Fourth Amendment. See *Griffin v Wisconsin*, 483 US 868; 107 S Ct 3164; 97 L Ed 2d 709 (1987); US Const, Am IV; Const 1963, art 1, § 11.

IV. CONCLUSION

Because the trial court was without authority to extend defendant's probation, we reverse the judgment of the Court of Appeals and remand the case to the circuit court for further proceedings.

MCCORMACK, C.J., and BERNSTEIN and CLEMENT, JJ.,
concur with CAVANAGH, J.

view, the probationary period would continue past the expiration of the original term of probation until the sentencing court entered an order of discharge. Probation officers would still have to report on the intervening period.

ZAHRA, J. (*dissenting*). I respectfully dissent. The issues presented in this case are whether the trial court was statutorily permitted to extend defendant's probationary term after it expired but before defendant was formally discharged, and if so, whether due process entitled defendant to notice and a hearing before the court did so. I agree with the Court of Appeals that the trial court maintained jurisdiction to extend defendant's probationary term after its expiration, because MCL 771.2(5) permits the amendment of a defendant's order of probation "in form or substance *at any time*."¹ This is in contrast to the revocation of probation, which must take place during the specific "probation period" imposed on a particular defendant pursuant to MCL 771.4. In this case, while defendant's original term of probation had expired when the trial court extended it, the trial court never discharged defendant from probation, and the court's one-year extension was within the five-year statutory maximum period prescribed by MCL 771.2(1). The trial court therefore maintained jurisdiction to extend defendant's probationary period after its expiration.

Defendant's due-process rights were not violated by this extension. A defendant is entitled to the due-process protections of notice and a hearing before a *revocation* of his or her probation. But this case does not involve a revocation of probation. Instead, the trial court merely extended the term of defendant's probation. Probation is a noncustodial supervisory period far less onerous to a probationer than the incarceration that generally results from the revocation of probation. The mere extension of probation does not constitute a "grievous loss" of liberty entitling a defendant to the due-process protections requested by defendant. For these reasons, I would affirm the lower courts.

¹ Emphasis added.

I. BASIC FACTS AND PROCEEDINGS

On June 25, 2013, defendant was sentenced to two years' probation after pleading no contest to assaulting a police officer, a felony.² The terms of defendant's probation barred the use or possession of controlled substances. Probation agents were also authorized to conduct compliance checks and search defendant's property.

While on probation, defendant did not consistently report to the probation department as directed and did not pay his court-ordered fines and fees. Defendant's probation was due to expire on June 25, 2015, but the trial court did not enter an order discharging him from probation at that time. On September 23, 2015, defendant's probation agent filed a petition with the trial court to extend defendant's probation for one year "to allow for the time [defendant] was on warrant status as well [as] time to pay his Court ordered fines and fees." The trial court granted the petition and extended defendant's probation to June 25, 2016.

On November 12, 2015, defendant's probation agent petitioned the trial court for a bench warrant because defendant tested positive for opiates. Defendant was arrested for an unspecified offense on November 18, 2015. Notwithstanding the bench warrant issued for drug use, defendant was again released on bond and informed to report weekly to the probation office. Defendant, however, stopped reporting to the probation office on a weekly basis. Another probation-violation warrant was issued on December 3, 2015. On December 4, 2015, probation agents conducted a compliance check at defendant's home and found heroin, which defendant admitted belonged to him.

² MCL 750.81d(1).

Defendant asserts that the December 4, 2015 compliance check led to his subsequent arrest, when he was again found in possession of heroin. Defendant was charged with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), second or subsequent offense, MCL 333.7413(2), and with possession with intent to deliver less than 25 grams of heroin, MCL 333.7403(2)(a)(v), second or subsequent offense, MCL 333.7413(2). Defendant was also charged with violating probation.

Defendant moved to suppress the evidence and for dismissal of the charges. He challenged the legality of the December 4, 2015 compliance check, arguing that he was not on probation at that time because the trial court lacked the authority to extend his probationary period beyond June 25, 2015. The trial court denied defendant's motion. Defendant thereafter pleaded no contest to possession of less than 25 grams of heroin, second or subsequent offense, and to the probation violation. On September 29, 2016, the trial court sentenced defendant to concurrent prison terms of 18 months to 8 years for the drug-possession conviction and 459 days for the probation violation.

The Court of Appeals granted defendant's application for leave to appeal and affirmed defendant's convictions in a split decision, with the majority relying on *People v Marks*, 340 Mich 495; 65 NW2d 698 (1954), to hold that "the trial court had jurisdiction to modify and extend probation up to the statutory maximum term even after [defendant's] original probationary period expired."³ Defendant sought leave to appeal in this Court, and in lieu of granting leave to appeal, we ordered oral argument on the application, directing the

³ *People v Vanderpool*, 325 Mich App 493, 496-499; 925 NW2d 914 (2018).

parties to file supplemental briefs addressing (1) whether the trial court had jurisdiction to extend defendant's probationary term in September 2015 and (2) whether the extension of the probationary term without notice or a hearing violated defendant's due-process rights.⁴

II. STANDARD OF REVIEW

We review de novo constitutional issues and matters of statutory interpretation.⁵

III. ANALYSIS⁶

A. THE STATUTORY SCHEME PERMITS A TRIAL COURT TO EXTEND A TERM OF PROBATION AFTER ITS EXPIRATION

The question presented is whether a trial court maintains jurisdiction to extend a defendant's proba-

⁴ *People v Vanderpool*, 504 Mich 872 (2019).

⁵ *People v Harris*, 499 Mich 332, 342; 885 NW2d 832 (2016).

⁶ As an initial matter, I question whether the issues presented are properly preserved. It appears that defendant did not raise a due-process argument in the Court of Appeals. In his application to that court, defendant's question presented asked only whether he was entitled to resentencing because "Tuscola County authorities delayed in petitioning for an amendment of probation from June 2015 through September of 2015." "The failure to raise a question in the lower court precludes the Supreme Court considering it on appeal." *Young v Morrall*, 359 Mich 180, 187; 101 NW2d 358 (1960). In his application to this Court, defendant, perhaps inspired by the Court of Appeals dissent, presented only the question of whether the Due Process Clause "require[s] that a probationer be given notice and an opportunity to be heard on a probation officer's petition to extend probation[.]" Defendant did not present to this Court the question of whether the trial court maintained jurisdiction to extend his probationary term after its expiration. Thus, both issues posed by this Court's order directing oral argument are arguably unpreserved. But because this Court asked the parties to address both issues, and because the majority resolves this case on the merits, I will address the substantive issues in this dissent.

tionary term after it has expired but before an order is issued discharging the defendant from probation. This question is answered by the interpretation of several statutes that are relevant to this inquiry. MCL 771.2(1) provides that a probation period for a felony conviction “shall not exceed five years.”⁷ MCL 771.2(5) provides that the trial court may amend an order of probation “at any time”:

The court shall, by order to be entered in the case as the court directs by general rule or in each case, fix and determine the period and conditions of probation. The order is part of the record in the case. *The court may amend the order in form or substance at any time.* If the court reduces a defendant’s probationary term under subsection (2), the period by which that term was reduced must be reported to the department of corrections.^[8]

MCL 771.4, pertaining to the revocation of probation, provides:

It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to its continuance. If *during the probation period* the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation. All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer’s part for which the court determines that revocation is proper in the public interest. Hearings on the revocation shall be summary and informal and not subject to the

⁷ Defendant’s original conviction for assaulting a police officer is a felony for purposes of both the Penal Code and the Code of Criminal Procedure. MCL 750.81d(1); MCL 761.1(f).

⁸ Emphasis added.

rules of evidence or of pleadings applicable in criminal trials. In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition or conduct inconsistent with the public good. The method of hearing and presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing. The court may investigate and enter a disposition of the probationer as the court determines best serves the public interest. If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made. . . .^[9]

MCL 771.5(1) governs the procedure to be followed upon the termination of a probationer's period of probation. It provides:

When the probation period terminates, the probation officer shall report that fact and the probationer's conduct during the probation period to the court. Upon receiving the report, the court may discharge the probationer from further supervision and enter a judgment of suspended sentence or extend the probation period as the circumstances require, so long as the maximum probation period is not exceeded.^[10]

Finally, MCL 771.6, which requires a record of discharge, provides:

When a probationer is discharged upon the expiration of the probation period, or upon its earlier termination by order of the court, entry of the discharge shall be made in the records of the court, and the probationer shall be entitled to a certified copy thereof.

⁹ Emphasis added.

¹⁰ MCL 771.5(1).

Reading these statutes as reasonably as possible, harmoniously, and in their entirety,¹¹ I agree with the Court of Appeals that the trial court possessed the authority to extend defendant’s originally imposed probationary period after its stated date of expiration.

The language of MCL 771.2(5) pertaining to the amendment of probation orders differs significantly from that of MCL 771.4 pertaining to the revocation of probation. MCL 771.2(5) states that the “court may amend the [probation] order in form or substance at any time.” This broad language, permitting amendment “at any time,” is in contrast to the language of MCL 771.4, which requires that a revocation proceeding commence during the “probation period.”¹² The reference in MCL 771.4 to a defendant’s “probation period” is absent from MCL 771.2(5), an omission that we must consider intentional, especially when coupled with the Legislature’s specific use of the broader “at any time” language in MCL 771.2(5).¹³ Thus, we must assume that the Legislature intentionally declined to impose in MCL 771.2(5) the temporal limitation referred to in MCL 771.4. Accordingly, the Court of Appeals correctly held that a trial court is not confined to the terms of the

¹¹ *People v Cunningham*, 496 Mich 145, 153-154; 852 NW2d 118 (2014), quoting *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922) (“[W]e examine the provision[s] within the overall context of the statute ‘so as to produce, if possible, a harmonious and consistent enactment as a whole.’”).

¹² The “probation period” for purposes of MCL 771.4 “refers to the specific probation term that the sentencing court has imposed on a particular defendant,” not the statutory maximum term of probation. *People v Glass*, 288 Mich App 399, 405; 794 NW2d 49 (2010).

¹³ See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) (“Courts 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.”).

“probation period” when amending probation, which includes the extension of probation. Instead, as plainly stated in MCL 771.2(5), a trial court has the authority to amend probation “at any time” within the statutory maximum period of five years, even after the expiration of the originally imposed period of probation.

In concluding to the contrary, the majority relies heavily on the requirement in MCL 771.5(1) that “[w]hen the probation period terminates, the probation officer shall report that fact and the probationer’s conduct during the probation period to the court.” The majority takes this reporting requirement and engrafts onto it a temporal requirement not expressly found in the statute. Specifically, the majority reads this statute to mean that if the probation officer does not provide the required report to the trial court before or at the very moment that a probation period expires, the trial court loses jurisdiction over the probationer to extend the probation period since it has already “terminated” or come to an end. The majority’s myopic reading of the law is flawed. Not only would it be odd for a probation officer’s inaction to strip a court of jurisdiction, but this interpretation is unworkable in practice and contrary to the plain language of the statute.

MCL 771.5(1) does not require that the probation officer furnish his or her report to the court before or at the very second a probation period expires. To the contrary, MCL 771.5(1) anticipates an extension of probation *after* the expiration of a defendant’s period of probation. The first sentence of MCL 771.5(1) says that “[w]hen the probation period terminates, the probation officer shall report,” and the second sentence says that “[u]pon receiving the report,” the court may discharge the probationer from further supervision or extend the probation period. This language makes clear the legis-

lative understanding that there is going to be some passage of time between these two events—the termination of the probation period and the court’s receipt of the probation officer’s report. The statute is written in a manner that contemplates a sequence of events: (1) the termination of the probation period, (2) the preparation of a report by the probation officer, (3) the presentation of this report to the court, and (4) the court’s discharge of the probationer from further supervision or the extension of the probation period. This sequence clearly envisions that a court’s jurisdiction extends past the expiration of the defendant’s originally imposed period of probation.¹⁴

Additionally, the majority’s reading of MCL 771.5(1) would be very difficult, if not impossible, to accomplish in practice. The required report must indicate that the defendant’s probation period has terminated, which a

¹⁴ The majority’s reliance on the definition of “when” as “‘at or during the time that’ ” is not particularly helpful given that “when” can also be defined in a manner favorable to the dissent. (Citation omitted.) Indeed, one of the definitions of “when” is “upon or after which; and then.” *Random House Webster’s College Dictionary* (1992). In other words, it is completely reasonable to interpret the language “when the probation period terminates” to mean “after the probation period terminates” the probation officer must provide the court with a report and then, once the court receives the report, the court can either discharge the defendant from probation or extend probation.

The majority relies on dictionary definitions of the terms “terminate” and “expire” to conclude that defendant’s term of probation came to an “end.” But I see no reason why a period that has come to an end cannot later be extended. And, as discussed later in this opinion, I do not believe that the mere passage of time can permanently “terminate” a probation period and result in the automatic discharge of a defendant from probation. Indeed, had the Legislature intended an automatic discharge to enter, it would not have afforded the sentencing court the opportunity to take other action. Recall that MCL 771.5(1) permits the sentencing court to either “discharge the probationer from further supervision and enter a judgment of suspended sentence *or* extend the probation period as the circumstances require.” (Emphasis added.)

probation officer cannot indicate until after the probation period has actually terminated. The report must also describe the probationer's conduct during the probation period, which would necessarily include the moments leading right up to termination. If the probationer violates a condition of probation moments before the period of probation terminates, the probation officer would have to include a description of this conduct in his or her report. Simply put, this is an impossible task to impose on a rapidly moving, high-volume trial court. A trial court with dozens, if not hundreds of probationers cannot be expected to accept a report at the very moment that the probationer's probation period terminates. For these reasons, I find the majority's reliance on MCL 771.5 to be unpersuasive.

Relatedly, I disagree with the majority's understanding of an order of "discharge" as contemplated by the statutory scheme. The majority, relying on a dictionary defining "discharge" to mean "'to relieve of a charge, load, or burden[;] . . . to release from an obligation,'" concludes that "[d]efendant was discharged from probation when the period of probation ended."¹⁵ But the mere expiration of a probation period does not automatically discharge a defendant from probation. If this were the case, there would be no reason for MCL 771.5 to require "*the court*" to "discharge the probationer from further supervision" "[u]pon receiving the report."¹⁶ The statute clearly contemplates that it is the court that must take the affirmative act of discharging a defendant from probation. The majority also opines that the "circuit court's failure to carry out its obligation to record this event [the discharge] and provide defendant with documentation as required by statute

¹⁵ Citation omitted.

¹⁶ Emphasis added.

does not result in defendant having to comply with the expired order.”¹⁷ But the issuance of an order discharging a defendant from probation is not the ministerial task that the majority makes it out to be. Instead, MCL 771.5 requires the trial court to exercise its discretion in determining whether discharge is appropriate after receiving the report from the probation officer detailing the probationer’s conduct on probation.¹⁸ The majority’s conclusion that the mere passage of time results in a “discharge” strips the trial court of this important duty.¹⁹

¹⁷ This case does not present to us the question of whether a defendant must comply with the conditions of probation imposed in his or her original order of probation during the period after the expiration of that order and before its extension. The search that defendant claims was unlawful was conducted while defendant was subject to the conditions imposed after his probationary period was extended. Therefore, the only question at issue is whether the trial court was permitted to extend defendant’s probationary period after its expiration.

¹⁸ It is because of this directive in MCL 771.5 that I am not persuaded by the majority’s reliance on MCL 771.6. MCL 771.6 simply requires that a record be made of a discharge. It does not purport to set forth the discharge procedure, but instead provides the procedure governing what shall happen *after* there has been a discharge: “entry of the discharge shall be made in the records of the court, and the probationer shall be entitled to a certified copy thereof.” In contrast, MCL 771.5 provides instructions as to the discharge process itself and explicitly indicates that it is the *court* that must either extend the probation period or “discharge the probationer from further supervision.” The reporting requirement in MCL 771.6 cannot trump the discharge instructions set forth in MCL 771.5.

¹⁹ We must bear in mind that an important purpose of probation is to rehabilitate a defendant. See *People v Miller*, 182 Mich App 711, 713; 452 NW2d 890 (1990) (courts may impose conditions of probation under MCL 771.3(4) so long as there is a rational relationship between the restriction and rehabilitation). MCL 771.2(5) gives trial courts broad discretion to amend and modify probation orders as needed in furtherance of this rehabilitation effort. Automatically releasing a probationer from probation without the probation officer or trial court examining a probationer’s performance while on probation undermines the effort to ensure that he or she has been rehabilitated.

It is also ironic that the majority “reject[s] the idea that a defendant should ignore the face of the order of probation,” when defendant did just this by failing to comply with the explicit terms of his probation. It is undisputed that defendant failed to consistently report to the probation department, and significantly, he did not pay the fines and fees required by his order of probation. I am hard-pressed to conclude that defendant would reasonably expect to be automatically discharged from a period of probation that he did not successfully complete. The majority is correct that courts speak through written orders. But defendant’s order of probation did not state that his discharge from probation would be automatic upon the expiration of the originally imposed term. Moreover, the trial court never “spoke” to defendant through an order of discharge to inform him that he was released from his probation obligations.²⁰ Because MCL 771.2(1) makes clear that a trial court maintains jurisdiction over an individual convicted of a felony offense for up to five years and given that defendant did not successfully complete the terms of his probation, it should not have come as a surprise to defendant that his order of probation was subject to extension until he received an order of discharge from the court.²¹

²⁰ The majority asserts that it “cannot see why an expired order of probation can be extended before a defendant’s discharge is recorded but not after.” We are not tasked with considering in this case whether a court may extend a term of probation after the court discharges a defendant from probation. That is not what happened here. MCL 771.5 requires a trial court to either extend a term of probation or discharge a defendant from probation. The trial court in this case never discharged defendant from probation, so there is no question as to whether the court surrendered its jurisdiction over defendant. It did not.

²¹ I disagree with the majority that this interpretation “essentially converts every term of probation to a five-year term.” And I equally disagree with the majority’s statement that “[i]f every term of probation

In this case, while defendant's original probationary period had expired when the trial court extended it, the one-year extension was within the five-year statutory maximum period prescribed by MCL 771.2(1). The trial court therefore maintained the authority to extend defendant's probationary period after its expiration. The compliance check at issue, which was conducted after this extension of defendant's probation period, was lawful under the statutory scheme.²²

B. DUE PROCESS DOES NOT REQUIRE ADDITIONAL NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE THE EXTENSION OF PROBATION

Given my conclusion that the statutory scheme permitted the trial court to extend defendant's proba-

were five years, then there would be no period for the sentencing court to 'fix and determine.' A trial court is permitted to impose a five-year term of probation for a felony from the outset pursuant to MCL 771.2(1), but may impose a lesser term if it believes that this will be sufficient to rehabilitate the defendant. The entire reason that MCL 771.2(5) permits amendment of an order of probation "at any time" is because the trial court needs flexibility to amend a defendant's probationary terms and conditions depending on the performance of the probationer. It may very well be the case that the initial term "fixed and determined" by the court will require no modification, but it might also be the case that a defendant is noncompliant with the probationary terms, warranting an extension or modification of the initially fixed and determined terms and conditions. I do not share the majority's apparent concern that permitting a court to extend a probationary period after its expiration will convert all terms of probation into five-year terms. If a trial court has always possessed the authority to impose a five-year term of probation from the outset, there is no reason to believe that a court will take advantage of the ability to extend a probationary period after its extension to convert every lesser term of probation into a five-year term.

²² My review of the statutory scheme leads to the same result that this Court reached in *Marks*, 340 Mich 495. Although a different version of MCL 771.2 was at issue in *Marks*, the language of the relevant statute was substantially the same. In *Marks*, 4 months and 14 days after the expiration of the original period of probation, the trial court extended the defendant's probation for a period of two years and added the

tionary period after its expiration, I must address whether due process required that defendant receive notice and an opportunity to be heard before this extension.

Both the United States Constitution and the Michigan Constitution of 1963 dictate that no person may be deprived of life, liberty, or property without due process of law.²³ In finding a due-process violation in this case, the dissenting Court of Appeals judge relied on a couple of cases from the United States Supreme Court.²⁴ In *Morrissey v Brewer*,²⁵ the Supreme Court concluded that the Due Process Clause of the Fourteenth Amendment requires that a state afford an individual some opportunity to be heard before revoking his or her parole. In reaching this conclusion, the Court “‘rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a “right” or as a “privilege,” ’” and instead clarified that “[w]hether any procedural protections are due depends on the extent to which an individual will be ‘condemned to suffer grievous loss.’”²⁶ The Court reasoned that the termination of parole “inflicts

condition of restitution. This Court held that “defendant’s rights were not impinged by the alteration in the probation order made within the statutory 5-year period, even though the conditions of the original order had not been violated and its term had expired.” *Id.* at 501. As this Court explained, “[t]he trial judge . . . was at liberty ‘at all times’ within the 5-year period to alter and amend the order ‘both in form and in substance.’” *Id.* at 501-502. “The only limitation, and this applies to both the grant and any modification of it, is that the total period of probation shall not exceed 5 years.” *Id.* at 501.

²³ US Const, Am XIV; Const 1963, art 1, § 17.

²⁴ See *Vanderpool*, 325 Mich App at 503-506 (JANSEN, J., concurring in part and dissenting in part).

²⁵ *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

²⁶ *Id.* at 481 (citations omitted).

a grievous loss” because while on parole a parolee is able “to do a wide range of things open to persons who have never been convicted of any crime,” but, “[i]n many cases, the parolee faces lengthy incarceration if his parole is revoked.”²⁷ In determining what process was due, the Court held that “[w]hat is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior.”²⁸ The Court then explained the procedures that should apply, including both a preliminary and a final revocation hearing.²⁹

In *Gagnon v Scarpelli*,³⁰ the Supreme Court of the United States held that the same due-process protections that apply to the revocation of parole apply to the revocation of probation, noting that the “[p]etitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one.”³¹

This precedent is meaningfully distinguishable from the case at hand, as the loss of liberty that follows the revocation of parole or probation is significantly different than the substantially lesser constraint on liberty imposed by the extension of a period of probation. Per *Morrissey*, the pertinent inquiry is whether the extension of probation condemns a probationer to suffer

²⁷ *Id.* at 482 (quotation marks omitted).

²⁸ *Id.* at 484.

²⁹ *Id.* at 484-489.

³⁰ *Gagnon v Scarpelli*, 411 US 778, 782; 93 S Ct 1756; 36 L Ed 2d 656 (1973).

³¹ *Id.* at 782.

“grievous loss” such that due process requires notice and an opportunity to be heard. It does not. As the Court explained in *Morrissey*, a parolee and a probationer are able “to do a wide range of things open to persons who have never been convicted of any crime.”³² “Though the State properly subjects [a probationer] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.”³³ Indeed, “the liberty of a parolee [and a probationer] . . . includes many of the core values of unqualified liberty”³⁴ In sum, probation is a non-custodial supervisory period far less onerous to the probationer than the incarceration that generally results from the revocation of probation or parole. For this reason, the extension of probation does not result in the type of “grievous loss” caused by the revocation of parole or probation. Consequently, while the extension of probation restricts one’s liberty to a certain extent, it does not constitute a “grievous loss” entitling a defendant to additional due-process protections.

Federal courts that have addressed this issue have likewise declined to apply *Morrissey* and *Gagnon* to the extension of probation.³⁵ I find the reasoning set forth

³² *Morrissey*, 408 US at 482.

³³ *Id.*

³⁴ *Id.*

³⁵ See *Skipworth v United States*, 508 F2d 598, 601-602 (CA 3, 1975); *United States v Carey*, 565 F2d 545, 547 (CA 8, 1977); *United States v Cornwell*, 625 F2d 686, 688 (CA 5, 1980); *Forgues v United States*, 636 F2d 1125, 1127 (CA 6, 1980); *United States v Silver*, 83 F3d 289, 291-292 (CA 9, 1996).

Our Court of Appeals has also held that a defendant need not be given an opportunity to be heard before the trial court extends his or her probation period, *People v Kendall*, 142 Mich App 576, 579; 370 NW2d 631 (1985), or adds a new condition of probation, *People v Graber*, 128 Mich App 185, 190-191; 339 NW2d 866 (1983). This Court concluded in

by the United States Court of Appeals for the Third Circuit in *Skipworth v United States* to be particularly persuasive:

After careful consideration of the principles set forth in *Morrissey* and *Gagnon* and their applicability to this case, we do not believe that due process required notice and a hearing prior to the extension of the petitioner's probation. While we acknowledge that probation entails significant restrictions on an individual, an extension of probation is clearly not as "grievous" a "loss" as revocation, and here it entailed no greater restrictions than those which existed previously. In fact, the primary "loss" suffered by an individual whose probation has been extended lies not in the continuing restrictions themselves, but in the possibility of future revocation. While such a loss is indeed serious, it is merely potential at the time of extension, and the due process clause clearly provides the protection of a hearing in the event that revocation proceedings should subsequently occur. We add that the petitioner in fact received a revocation hearing at which he was represented by counsel.

We also note that the kind of factual inquiry in an extension proceeding is quite different from that in a revocation proceeding. In revocation proceedings, the trial judge must reasonably satisfy himself that the probationer has broken some law while on probation or has otherwise violated a condition of his probation. While the judge has considerable discretion as to whether to order

Marks, 340 Mich at 499-502, that due process does not require notice or a hearing prior to the alteration of a probation order after its expiration, but did so in part by relying on *People v Good*, 287 Mich 110; 282 NW 920 (1938), and *Burns v United States*, 287 US 216; 53 S Ct 154; 77 L Ed 266 (1932), for the proposition that probation is a "period of grace" and is a privilege rather than a right. As noted above, the Supreme Court in *Morrissey* "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Morrissey*, 408 US at 481 (quotation marks and citation omitted). For this reason, I apply the "grievous loss" test referred to in *Morrissey* rather than focusing on probation's status as a "privilege." See *id.* at 481-482. Consequently, while I reach the same result that this Court reached in *Marks*, I do so for different reasons.

revocation, he must at a minimum make an initial factual finding of a probation violation. A revocation hearing, therefore, provides the probationer with the crucial opportunity to contest an allegation of violation.

In granting an extension, however, the trial judge is given greater latitude, and he need not find that any probation violation has occurred. For example, in *United States v Squillante*, 144 F Supp 494, 497 (SDNY 1956), the court refused to terminate the probation which it had previously extended, despite finding that the probationer had complied with the express condition of his probation, because it believed that “the best interest of society warrants the continuation of supervision over the probationer.”^[36]

Furthermore, the applicable statutes already provide a probationer with sufficient notice that extension of his or her probation period is a possibility. MCL 771.2(5) notifies defendants that “[t]he court may amend the [probation] order in form or substance at any time.” In addition, MCL 771.5(1) notifies defendants that “[w]hen the probation period terminates . . . the court may . . . extend the probation period as the circumstances require, so long as the maximum probation period is not exceeded.” And MCL 771.2(1) notifies defendants that the maximum probation period for felonies is five years. These statutes inform defendants convicted of felonies that their period of probation may be extended up to five years. Moreover, defendants have an opportunity to be heard at their trials or plea hearings and at sentencing before the trial court originally imposes probation. For the reasons set forth above, defendants are not entitled to an additional opportunity to be heard after probation is ordered when the trial court is merely extending probation.

³⁶ *Skipworth v United States*, 508 F2d at 601-602.

IV. CONCLUSION

I conclude that the trial court maintained jurisdiction under the applicable statutory scheme to extend defendant's probationary period after its expiration. I further conclude that this extension did not violate defendant's due-process rights. I would therefore affirm the lower courts. I respectfully dissent.

MARKMAN, and VIVIANO, JJ., concurred with ZAHRA, J.

RAFAELI, LLC v OAKLAND COUNTY

Docket No. 156849. Argued November 7, 2019 (Calendar No. 1). Decided July 17, 2020.

Rafaeli, LLC, and Andre Ohanessian brought an action in the Oakland Circuit Court against Oakland County and its treasurer, Andrew Meisner, alleging due-process and equal-protection violations as well as an unconstitutional taking of their properties. Rafaeli owed \$8.41 in unpaid property taxes from 2011, which grew to \$285.81 after interest, penalties, and fees. Defendants foreclosed on Rafaeli's property for the delinquency, sold the property at public auction for \$24,500, and retained all the sale proceeds in excess of the taxes, interest, penalties, and fees. Ohanessian owed approximately \$6,000 in unpaid taxes, interest, penalties, and fees from 2011. Like Rafaeli's property, defendants foreclosed on Ohanessian's property for the delinquency, sold his property at auction for \$82,000, and retained all the proceeds in excess of Ohanessian's tax debt. Plaintiffs specifically alleged that defendants, by selling plaintiffs' real properties in satisfaction of their tax debts and retaining the surplus proceeds from the tax-foreclosure sale of their properties, had taken their properties without just compensation in violation of the Takings Clauses of the United States and Michigan Constitutions. The circuit court, Denise K. Langford-Morris, J., granted summary disposition to defendants, finding that defendants did not "take" plaintiffs' properties because plaintiffs forfeited all interests they held in their properties when they failed to pay the taxes due on the properties. The court determined that property properly forfeited under the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, and in accordance with due process is not a "taking" barred by either the United States or Michigan Constitution. Because the GPTA properly divested plaintiffs of all interests they had in their properties, the court concluded that plaintiffs did not have a property interest in the surplus proceeds generated from the tax-foreclosure sale of their properties. Plaintiffs appealed in the Court of Appeals. In an unpublished per curiam opinion issued on October 24, 2017 (Docket No. 330696), the Court of Appeals, MARKEY, P.J., and METER and SHAPIRO, JJ., affirmed the circuit court's decision and rejected plaintiffs' argument that the GPTA's

“scheme” allows for unconstitutional takings. Drawing on *Bennis v Michigan*, 516 US 442 (1996), a United States Supreme Court case regarding civil-asset forfeiture resulting from criminal activity, the Court of Appeals held that defendants acquired their interest in plaintiffs’ properties by way of a statutory scheme that did not violate due process and thus that defendants were not required to compensate plaintiffs for property that was lawfully obtained. Plaintiffs sought leave to appeal in the Supreme Court, raising the takings issue as the sole issue on appeal. The Supreme Court granted the application. 503 Mich 909 (2018).

In an opinion by Justice ZAHRA, joined by Chief Justice MCCORMACK and Justices MARKMAN, BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court *held*:

Michigan’s common law recognizes a former property owner’s property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property, and this right is vested such that it is to remain free from unlawful governmental interference. Accordingly, when the government takes property to satisfy an unpaid tax debt, Michigan’s Takings Clause requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property as just compensation. To the extent the GPTA permits the government to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties. The trial court’s reliance on the term “forfeiture” in the GPTA was incorrect, and the Court of Appeals erred by relying on *Bennis* to conclude that no taking occurred in this case.

1. The trial court’s reliance on the term “forfeiture” in the GPTA was incorrect. Under MCL 211.78(8)(b), “forfeiture” simply permits defendants to seek a judgment of foreclosure. Forfeiture does not affect title, nor does it give the county treasurer (or the state if the state is the foreclosing governmental unit) any rights, titles, or interests to the forfeited property. Therefore, plaintiffs did not “forfeit” all rights, titles, and interests they had in their properties by failing to pay their real-property taxes.

2. The Court of Appeals erred by relying on *Bennis* to conclude that no taking occurred in this case. *Bennis* is distinguishable because the purpose of civil-asset forfeiture is different than the purpose of the GPTA provisions at issue in this case. *Bennis*

recognized that civil-asset forfeiture serves, at least in part, to punish the owner of property, but the GPTA is not punitive in nature; its aim is to encourage the timely payment of property taxes and to return tax-delinquent properties to their tax-generating status, not necessarily to punish property owners for failing to pay their property taxes. The Court's holding in *Bennis* focused narrowly on forfeited property that was used as an instrumentality for criminal activity and the government's interest in deterring illegal activity. In this case, plaintiffs did not use their properties for illicit purposes. They simply failed to pay their property taxes, which is not a criminal offense. Accordingly, the Court of Appeals improperly conflated the meaning of "forfeiture" in an unrelated area of law with the meaning of "forfeiture" as expressly described under the GPTA.

3. A claim of an unconstitutional taking is distinct from a claim of property deprivation without due process of law. The remedy for a taking of private property is just compensation, whereas the remedy for being deprived of property without due process of law is the return of the property. In this case, plaintiffs did not dispute the legitimacy of defendants' authority to foreclose on their properties, nor did plaintiffs contest the adequacy of defendants' efforts to notify plaintiffs of the tax delinquency, forfeiture, and foreclosure; instead, plaintiffs challenged defendants' retention of the surplus proceeds as an unconstitutional taking. Plaintiffs' request for a determination of just compensation demonstrated that the nature of their claim was a taking without just compensation, not a deprivation of property without due process of law. Therefore, there was no legal basis to conclude that defendants' compliance with the GPTA's notice provisions justified defendants' retention of the surplus proceeds.

4. Under US Const, Am V and Const 1963, art 10, § 2, private property shall not be taken for public use without just compensation. Michigan's Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain. A "taking" for purposes of inverse condemnation means that the government has permanently deprived the property owner of any possession or use of the property without the commencement of formalized condemnation proceedings. When such a taking occurs, the property owner is entitled to just compensation for the value of the property taken. In order to assert a takings claim of this nature, a claimant must first establish a vested property right under state law. In this case, plaintiffs alleged that they have a

cognizable, vested property right to the surplus proceeds that resulted from the tax-foreclosure sale of their properties under Michigan law that is protected by Michigan's Takings Clause. The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. The whole of Article 10, § 2 has a technical meaning that must be discerned by examining the purpose and history of the power of eminent domain. *People ex rel Seaman v Hammond*, 1 Doug 276 (Mich, 1844), *United States v Lawton*, 110 US 146 (1884), and *Nelson v City of New York*, 352 US 103 (1956), all address a former property owner's statutory right to recover the surplus proceeds. *Seaman* recognized that the owner or claimant of the land at the time of the tax-foreclosure sale had a statutory right to recover the surplus. Consistent with *Seaman*, *Lawton* not only recognized this statutory right but also made it clear that a Takings Clause violation will arise when a tax-sale statute grants a former owner an independent property interest in the surplus proceeds and the government fails to return that surplus. *Nelson*, on the other hand, held that no federal Takings Clause claim will exist when there is a statutory path to recover the surplus proceeds but the property owners fail to avail themselves of that procedure. Read together, *Lawton* and *Nelson* establish that the Takings Clause under the United States Constitution may afford former property owners a remedy when a tax-sale statute provides the divested property owner an interest in the surplus proceeds and the government does not honor that statutory interest. However, *Seaman*, *Lawton*, and *Nelson* do not provide direction on what occurs when the statutes governing foreclosure make no mention of, or expressly preclude, a divested property owner's right to the surplus proceeds but the divested property owner establishes a property right to the surplus proceeds through some other legal source, such as the common law. In that instance, the failure to provide the divested property owner an avenue for recovering the surplus proceeds would produce an identical result to *Lawton*: property to which an individual is legally entitled has been taken without recourse. Michigan's statutory scheme under the GPTA does not recognize a former property owner's statutory right to collect these surplus proceeds; therefore, it had to be determined whether plaintiffs have a vested property right to these surplus proceeds through some other legal source, such as the common law.

5. Michigan's common law is adopted from England; therefore, English cases and authorities may be considered when identifying common law. A review of English common law supported the notion that an owner of real or personal property has

a right to any surplus proceeds that remain after the property is sold to satisfy a tax debt. The Magna Carta protected property owners from uncompensated takings and recognized that tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess. Sir William Blackstone similarly explained in the context of bailments that whenever the government seized property for delinquent taxes, it did so subject to an implied contract in law to either return the property if the tax debt was paid or to render back the surplus if the property was sold to satisfy the delinquent taxes. The right to collect the surplus proceeds was also firmly established in the early years of Michigan's statehood, and throughout Michigan's history the Michigan Supreme Court has held that the government's takings power is limited to only that property which is necessary to serve the public. These fundamental principles—that the government shall not collect more taxes than are owed, nor shall it take more property than is necessary to serve the public—protect taxpayers and property owners alike from government overreach and have remained a staple in Michigan's jurisprudence. A property owner's right to collect the surplus proceeds from the tax-foreclosure sale of his or her property has also withstood the most recent ratification of the Michigan Constitution, as exemplified by *Dean v Dep't of Natural Resources*, 399 Mich 84 (1976), which recognized a right to collect those proceeds under the common-law claim of unjust enrichment. *Dean* stands for more than just a recognition of the plaintiff's right to bring a claim under unjust enrichment for the surplus proceeds; inherent in *Dean*'s holding is Michigan's protection under the common law of a property owner's right to collect the surplus proceeds that result from a tax-foreclosure sale. Accordingly, Michigan's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property, and this right is vested such that it is to remain free from unlawful governmental interference.

6. The amendments of the GPTA did not abrogate the common-law right to collect the surplus proceeds. The 1963 Constitution protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale under Article 10, § 2. While the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause.

7. As the foreclosing governmental unit under the GPTA, defendants were entitled to seize plaintiffs' properties to satisfy

the unpaid delinquent real-property taxes as well as any interest, penalties, and fees associated with the foreclosure and sale of plaintiffs' properties. But defendants could only collect the amount plaintiffs owed and nothing more. Once defendants foreclosed on plaintiffs' properties, obtained title to those properties, and sold them to satisfy plaintiffs' unpaid taxes, interest, penalties, and fees related to the foreclosures, any surplus resulting from those sales belonged to plaintiffs. Defendants' retention of those surplus proceeds under the GPTA amounted to a taking of a vested property right requiring just compensation. To the extent the GPTA permits defendants to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties. Defendants were required to return the surplus proceeds to plaintiffs, and defendants' failure to do so constituted a government taking under the Michigan Constitution entitling plaintiffs to just compensation.

8. The remedy for a government taking is just compensation for the value of the property taken. The property "taken" is the surplus proceeds from the tax-foreclosure sale of plaintiffs' properties to satisfy their tax debts. Therefore, plaintiffs are entitled to the value of those surplus proceeds as just compensation.

Reversed and remanded to the Oakland Circuit Court for further proceedings.

Justice VIVIANO, concurring, agreed with the majority's result but disagreed with much of its reasoning. Justice VIVIANO would interpret the Constitution by discerning the ordinary meaning of the term "property" and applying it to the facts of this case, concluding that the property right taken from plaintiffs was their equity in their respective properties and not any independent interest in the surplus proceeds from the tax-foreclosure sale. The majority did not explain which words in the Takings Clause were in need of interpretation, and the majority's investigation of what the ratifiers understood property to mean ultimately rested on a flawed understanding of its original meaning. By reasoning that "property" must be defined as the particular types the ratifiers had in mind, the majority interpreted the Takings Clause as exalting those interests above the Legislature's authority to modify them, raising serious concerns regarding the separation of powers. Under the majority's position, any property rights extant when the Constitution was ratified would be insulated from

legislative change, whereas later-developed property rights would presumably be subject to change. The majority's broad position would not allow the Legislature to repeal rights that were recognized property rights at the time of ratification and thereby preserved in the Takings Clause, and this prohibition would extend even to legislation that prospectively modified or abrogated nonvested property rights—i.e., rights to property that individuals might acquire in the future. Furthermore, the majority characterized the property at issue as merely the surplus proceeds from the foreclosure sale but did not consider the property interests that existed before the sale or how those interests affected the taxpayer's entitlement to anything resulting from the sale. And it was far from clear what implications the former existence of a statutory right to surplus proceeds had in determining the application of the constitutional right in this case. In sum, Justice VIVIANO would have characterized the property right at issue in this case as the taxpayer's equity in the property, which best fits the development of ownership rights in property laden with debts and liens. The Legislature did not purport to abrogate the taxpayer's equity; therefore, a taking occurred when title to plaintiffs' property was vested in the government without any possibility of redemption, and plaintiffs were owed the surplus proceeds from the tax-foreclosure sales.

CONSTITUTIONAL LAW — PROPERTY — TAKINGS CLAUSE — GENERAL PROPERTY TAX ACT — COLLECTION OF SURPLUS PROCEEDS IN A TAX-FORECLOSURE SALE OF REAL PROPERTY.

Michigan's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property, and this right is vested such that it is to remain free from unlawful governmental interference; when the government takes property to satisfy an unpaid tax debt, Michigan's Takings Clause requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property as just compensation; to the extent the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, permits defendants to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties (Const 1963, art 10, § 2).

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ZAHRA, J. Plaintiff Rafaeli, LLC, owed \$8.41 in unpaid property taxes from 2011, which grew to \$285.81 after interest, penalties, and fees. Oakland County and its treasurer, Andrew Meisner (collectively, defendants), foreclosed on Rafaeli's property for the delinquency, sold the property at public auction for \$24,500, and retained all the sale proceeds in excess of the taxes, interest, penalties, and fees. Plaintiff Andre Ohanessian owed approximately \$6,000 in unpaid taxes, interest, penalties, and fees from 2011. Like Rafaeli's property, defendants foreclosed on Ohanessian's property for the delinquency, sold his property at auction for \$82,000, and retained all the proceeds in excess of Ohanessian's tax debt. The issue in this case is whether defendants have committed an unconstitutional taking by retaining the surplus proceeds from the tax-foreclosure sale of Rafaeli's and Ohanessian's (collectively, plaintiffs) properties that exceed the amount plaintiffs owed in unpaid delinquent taxes, interest, penalties, and fees under the General Property Tax Act (GPTA).¹ We hold that defendants' retention of those surplus proceeds is an unconstitutional taking without just compensation under Article 10, § 2 of our 1963 Constitution. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the Oakland Circuit Court for proceedings consistent with this opinion.

¹ MCL 211.1 *et seq.*

I. FACTS AND PROCEDURAL HISTORY

Rafaeli purchased a rental property in Southfield for \$60,000 on August 15, 2011, but failed to pay the 2011 taxes due on the property in the amount of \$536.24.² Defendants mailed to Rafaeli notice of the delinquency on June 11, 2012. Rafaeli sent payment to defendants on August 30, 2012, yet this payment was insufficient to cover the full amount of the tax delinquency. Defendants mailed a second notice of the delinquency to Rafaeli on September 3, 2012, and Rafaeli sent another payment to defendants on January 14, 2013; however, even after Rafaeli's second payment, a deficiency of \$8.41, plus \$2.26 in interest, penalties, and fees remained on Rafaeli's property. On February 1, 2013, defendants sent Rafaeli a third notice of delinquency. This delinquency was never paid, and as a result, on March 1, 2013, Rafaeli's property was forfeited in the amount of the unpaid taxes, interest, penalties, and fees.

On May 16, 2013, defendants filed a petition seeking to foreclose all tax-delinquent properties that were forfeited for unpaid 2011 real-property taxes, including Rafaeli's property. On February 26, 2014, a foreclosure hearing was held in the Oakland Circuit Court. Rafaeli did not appear. After the hearing, the court entered a judgment of foreclosure that included Rafaeli's property. At the time of the foreclosure, the delinquency had grown to \$285.81 because of penalties, interest, and fees. Rafaeli failed to timely redeem the property by March 31, 2014, resulting in the transfer to defendants of fee simple title to Rafaeli's property.

² In plaintiffs' complaint, Rafaeli alleges that a tax deficiency remained on the property despite certification from Meisner that all taxes were paid on the property from the previous five years. This led to a tax delinquency of \$496.52 plus \$39.72 in penalties, fees, and interest.

On August 19, 2014, defendants sold Rafaeli's property at auction to a third party for \$24,500. Defendants retained all the surplus proceeds that exceeded the \$285.81 debt Rafaeli owed to defendants.

Ohanessian purchased a 2.7-acre property located in the city of Orchard Lake Village in 2004. Ohanessian paid \$2,510.05 to defendants to satisfy his 2010 delinquent property taxes but failed to pay his 2011 property taxes.³ After Ohanessian's property was forfeited for the amount of the unpaid taxes, interest, penalties, and fees, defendants added his property to the petition for foreclosure for unpaid 2011 real-property taxes. The same judgment of foreclosure entered on February 26, 2014, that included Rafaeli's property also included Ohanessian's property. At the time of the foreclosure, Ohanessian owed approximately \$6,000 in unpaid taxes, interest, penalties, and fees. Ohanessian failed to redeem his property by March 31, 2014, and defendants obtained fee simple title to his property. On September 26, 2014, defendants sold Ohanessian's property at auction to a third party for \$82,000. Defendants retained all the surplus proceeds exceeding Ohanessian's tax debts.

Plaintiffs filed this action against defendants in the Oakland Circuit Court, alleging due-process and equal-protection violations as well as an unconstitu-

³ According to Ohanessian, he moved to California sometime in 2011. He alleges that he filled out an electronic change-of-address form on defendants' website but that he stopped receiving his tax bills when he moved. He states that he used a mailbox at a UPS store in Eastpointe to receive his property-tax bills. Defendants claim that they used this address, as well as Ohanessian's former residence in Livonia, to send Ohanessian notice of the tax delinquency in June 2013, December 2013, and February 2014. Defendants claim that they received no response to these notices.

tional taking.⁴ As relevant to this case, plaintiffs specifically alleged that defendants, by selling plaintiffs' real properties in satisfaction of their tax debts and retaining the surplus proceeds from the tax-foreclosure sale of their properties, had taken their properties without just compensation in violation of the Takings Clauses of the United States and Michigan Constitutions.

The circuit court granted summary disposition to defendants, finding that defendants did not "take" plaintiffs' properties because plaintiffs forfeited all interests they held in their properties when they failed to pay the taxes due on the properties.⁵ The court determined that property properly forfeited under the GPTA and in accordance with due process is not a "taking" barred by either the United States or Michigan Constitution. Because the GPTA properly divested plaintiffs of all interests they had in their properties, the court concluded that plaintiffs did not have a property interest in the surplus proceeds generated from the tax-foreclosure sale of their properties.⁶ Plaintiffs appealed in the Court of Appeals. The Court

⁴ Prior to filing this action, Rafaeli and a nonparty to this case filed a putative class action against the counties of Wayne and Oakland in federal court, asserting, among other things, an unconstitutional-takings claim. The case was dismissed for lack of subject-matter jurisdiction. *Rafaeli, LLC v Wayne Co*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued June 4, 2015 (Case No. 14-13958).

⁵ *Rafaeli, LLC v Oakland Co*, unpublished opinion and order of the Oakland Circuit Court, issued October 8, 2015 (Docket No. 15-147429-CZ), p 3.

⁶ Plaintiffs moved for reconsideration and also moved to amend their complaint to add claims of substantive due-process violations, violations of the Eighth Amendment's prohibition against excessive fines, and unjust enrichment. The circuit court denied reconsideration and denied plaintiffs' proposed amendment as futile.

of Appeals affirmed the circuit court and rejected plaintiffs' argument that the GPTA's "scheme" allows for unconstitutional takings.⁷ Drawing on precedent from the United States Supreme Court regarding civil-asset forfeiture resulting from criminal activity, the Court of Appeals held that defendants acquired their interest in plaintiffs' properties "by way of a statutory scheme that did not violate due process" and thus defendants were not required to compensate plaintiffs for property that was lawfully obtained.⁸

Plaintiffs sought leave to appeal in this Court, raising the takings issue as the sole issue on appeal. We granted plaintiffs' application, ordering the parties to address whether defendants violated the Takings Clause of the United States Constitution, the Michigan Constitution, or both by retaining the proceeds from the sale of tax-foreclosed property that exceeded the amount of the taxes, penalties, interest, and fees owed on the property.⁹

II. OVERVIEW OF THE GPTA

The GPTA permits the recovery of unpaid real-property taxes, penalties, interest, and fees through the foreclosure and sale of the property on which there

⁷ *Rafaeli, LLC v Oakland Co*, unpublished per curiam opinion of the Court of Appeals, issued October 24, 2017 (Docket No. 330696), p 5.

⁸ *Id.*, citing *Bennis v Michigan*, 516 US 442, 452; 116 S Ct 994; 134 L Ed 2d 68 (1996). Judge SHAPIRO concurred with the majority's conclusion that plaintiffs failed to state a compensable takings claim but disagreed with the majority's reliance on principles of civil-asset forfeiture. Instead, Judge SHAPIRO relied on different authority from the United States Supreme Court, which he concluded had rejected a similar claim to recover the surplus proceeds from a tax-foreclosure sale. *Rafaeli* (SHAPIRO, J., concurring), unpub op at 1-2, citing *Nelson v City of New York*, 352 US 103, 111; 77 S Ct 195; 1 L Ed 2d 171 (1956).

⁹ *Rafaeli, LLC v Oakland Co*, 503 Mich 909 (2018).

is a tax delinquency. Under the current process, tax-delinquent properties are forfeited to the county treasurers; foreclosed on after a judicial foreclosure hearing; and, if not timely redeemed, sold at a public auction.¹⁰ Counties may elect to serve as the “foreclosing governmental unit”; otherwise, the state will do so.¹¹

Real-property taxes are assessed and collected first by the city, township, or village treasurer where the

¹⁰ Before 1999, delinquent-tax liens were offered at annual tax-lien sales in which anyone could purchase the tax liens. See Smith, *Foreclosure of Real Property Tax Liens Under Michigan’s New Foreclosure Process*, 29 Mich Real Prop Rev 51, 51 (2002); see also Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind L J 747, 760 (2000) (“This transfer of the lien is distinct from the sale of the underlying property which occurs at a tax foreclosure sale. Instead, what is transferred is the lien itself, vesting in the purchaser the right to enforce the lien in accordance with statutory procedures.”). The tax-lien sale was followed by a one-year redemption period. If the property was not timely redeemed, the tax-lien purchaser, or the state if there was no tax-lien purchaser, would be deeded the property and was responsible for the final foreclosure of the property. The former foreclosure process could extend many years, causing properties to deteriorate and become clouded with poor title, which often led to title-insurance companies refusing to insure these properties. As a result, the Legislature overhauled the GPTA in 1999. See 1999 PA 123. The current scheme expedites the foreclosure process, thereby reducing the amount of abandoned, tax-delinquent properties within the state. Given that the sole issue in this appeal is whether a “taking” occurred, many of the GPTA’s procedures regarding the notice and hearing requirements, which are relevant to due-process jurisprudence, are either described briefly or omitted entirely from this general overview. For a complete discussion of the current foreclosure process, see *Michigan’s New Foreclosure Process*, 29 Mich Real Prop Rev at 51. And for a comprehensive overview of the prior foreclosure process, see Smith, *Foreclosure of Real Property Tax Liens*, 75 Mich B J 953 (1996).

¹¹ MCL 211.78(8)(a). Seventy-five of Michigan’s 83 counties elect to act as the foreclosing governmental unit. See Michigan Department of Treasury, *New Law Tax Foreclosure Archive* <https://www.michigan.gov/taxes/0,4676,7-238-43535_55601_55605-235134--,00.html> (accessed May 12, 2020) [<https://perma.cc/L9V2-BC35>].

property is located.¹² When property taxes are not satisfied and become delinquent, collection is turned over to the foreclosing governmental unit.¹³ If the county elects to serve as the foreclosing governmental unit, it may create a “delinquent tax revolving fund” that funds local municipalities for the unpaid delinquent taxes.¹⁴ The county treasurer then attempts to collect the delinquent taxes.¹⁵

On March 1 of each tax year, taxes due in the immediately preceding year that remain unpaid are returned to the county treasurer as “delinquent.”¹⁶ Notice of the delinquency, which must explain the effect of failing to pay the tax delinquency and the possibility of foreclosure, must be afforded to property

¹² MCL 211.44; MCL 211.45; see also OAG, 2014, No. 7,279 (June 11, 2014) (“[Real property taxes] are assessed and, in the first instance, collected by the city, township, or village treasurer.”).

¹³ MCL 211.55.

¹⁴ MCL 211.87b. Local municipalities rely heavily on real-property taxes for revenue streams. Thus, counties use the delinquent tax revolving fund to advance municipalities’ funds that would otherwise come from the unpaid real-property taxes. This advance allows local municipalities to continue with their day-to-day operations without having to wait for payment of the delinquent property taxes.

¹⁵ Any taxes, interest, penalties, and fees subsequently collected by the county treasurer are deposited into the delinquent tax revolving fund. If delinquent property taxes are not collected, properties are foreclosed and typically sold at a public auction known as a tax-foreclosure sale. In disbursing the proceeds from the tax-foreclosure sale, the first priority is to reimburse the delinquent tax revolving fund for “all taxes, interest, and fees on all of the property . . .” MCL 211.78m(8)(a). If the county is ultimately unable to collect the entire amount it advanced to the municipalities, either by tax collection or foreclosure sales, then the county can charge the municipalities back the uncollected amount. MCL 211.87b(1). When a surplus exists, the county board of commissioners may transfer the surplus into the county’s general fund. MCL 211.78m(8)(h).

¹⁶ MCL 211.78a(2).

owners throughout the next 12 months.¹⁷ On March 1 of the year following delinquency, properties with delinquent taxes are “forfeited” to the county treasurer for the amount of the tax delinquency, as well as any interest, penalties, and fees associated with the delinquency.¹⁸ Notably, the term “forfeiture,” as used in the GPTA, means only that a foreclosing governmental unit may seek a judgment of foreclosure if the property is not redeemed; it does not affect title.¹⁹

Once forfeiture occurs, the county treasurer must record a certificate of forfeiture with the county register of deeds, placing all parties with an interest in the property on notice that the property has been forfeited to the county treasurer, that the property has not been redeemed, and “that absolute title to the property will vest in the county treasurer on the March 31 immediately succeeding the entry of a judgment foreclosing the property”²⁰ Forfeited property may be redeemed at any time on or before that March 31 date if the total amount of unpaid delinquent taxes, interest, penalties, and fees are paid to the county treasurer.²¹ Meanwhile, foreclosing governmental units must file a petition for foreclosure with the circuit court that presides over where the forfeited

¹⁷ See MCL 211.78a through MCL 211.78c; MCL 211.78f.

¹⁸ MCL 211.78g(1).

¹⁹ MCL 211.78(8)(b) (“‘Forfeited’ or ‘forfeiture’ means a foreclosing governmental unit may seek a judgment of foreclosure under [MCL 211.78k] if the property is not redeemed as provided under [the GPTA], but does not acquire a right to possession or any other interest in the property.”).

²⁰ MCL 211.78g(2).

²¹ MCL 211.78g(3)(a). This subsection details additional taxes, interest, and fees that must be paid to the county treasurer in order to successfully redeem the property. MCL 211.78g(3)(b) through (d).

property is located no later than the 15th day of June following the forfeiture.²² The petition must “seek a judgment in favor of the foreclosing governmental unit for the forfeited unpaid delinquent taxes, interest, penalties, and fees listed against each parcel of property . . . [and] shall request that a judgment be entered vesting absolute title to each parcel of property in the foreclosing governmental unit, without right of redemption.”²³

A judicial foreclosure hearing must be held in the circuit court within 30 days of March 1 of the year after the petition for foreclosure is filed.²⁴ After the judicial foreclosure hearing, the judgment of foreclosure must be entered by March 30, with an effective date of March 31.²⁵ Unless the delinquent taxes, interest, penalties, and fees are paid on or before March 31, fee simple title to the property vests absolutely in the foreclosing governmental unit without any further redemption rights available to the delinquent taxpayer.²⁶ Thereafter, the foreclosing governmental unit’s title to the property is not subject to any recorded or unrecorded lien.²⁷

²² MCL 211.78h(1).

²³ *Id.* Forfeited properties listed in the petition may be redeemed after the petition for foreclosure is filed, in which case the properties are removed from the petition for foreclosure. MCL 211.78h(2).

²⁴ MCL 211.78h(5). In the meantime, the GPTA provides for various notices and hearings that must be given before foreclosure is finalized. These include various notices by mail, publication, recordation, and even a personal visit to the property, see MCL 211.78h through MCL 211.78i, as well as a show cause hearing within seven days of the judicial foreclosure hearing, see MCL 211.78j.

²⁵ MCL 211.78k(5). The final redemption date is March 31. *Id.*

²⁶ MCL 211.78k(5) and (6).

²⁷ MCL 211.78k(6).

After foreclosure, and assuming the state, city, village, township, or county where the property is located does not purchase the property, the GPTA provides for one or more auction sales beginning on the third Tuesday in July immediately succeeding the entry of the judgment of foreclosure.²⁸ Once sold, the foreclosing governmental unit deposits the sale proceeds into an account designated as the “delinquent tax property sales proceeds for the year [the taxes became delinquent]” (hereinafter, the account).²⁹

Importantly, the account is comprised of the proceeds of all sales for that year, such that the proceeds of a single sale are commingled with the proceeds of all the other sales.³⁰ The foreclosing governmental unit then distributes the proceeds in the account in a specific order of priority. The first priority is to reimburse the delinquent tax revolving fund for the full amount of unpaid taxes, interest, and fees owed on the

²⁸ MCL 211.78m(2). All property not sold on or before December 30 immediately succeeding entry of the judgment of foreclosure is transferred to the city, village, or township where the property is located unless the city, village, or township objects to the transfer. MCL 211.78m(6). If the property remains unsold and is not transferred to the city, village, or township, the foreclosing governmental unit retains the property. *Id.*

²⁹ MCL 211.78m(8). Notably, this account is a subsidiary account within the delinquent tax revolving fund. The delinquent tax revolving fund is segregated into separate accounts for each year’s delinquent taxes. Those accounts continue to exist until all the delinquent taxes for that tax year have been collected. See generally Michigan Department of Treasury, *2001-5 Delinquent Tax Revolving Funds Revisions To Accounting After Public Act 123 of 1999* (February 8, 2001), available at <https://www.michigan.gov/treasury/0,4679,7-121-1751_2194-6024--,00.html> (accessed May 13, 2020) [<https://perma.cc/395W-FWHC>].

³⁰ Money and property within the delinquent tax revolving fund, however, remain separate from any other money, property, or assets in the custody of the county treasurer. MCL 211.87b(1).

property.³¹ This is followed by the annual costs incurred as a result of conducting foreclosure sales and general overhead in conducting the foreclosure proceedings for the year.³² The statutory scheme for reimbursement is quite exhaustive and even includes costs for maintaining property foreclosed under the GPTA, defending title actions, and administering the foreclosure and the disposition of forfeited property for delinquent taxes.³³

The parties acknowledge that sale proceeds are often insufficient to cover the full amount of the delinquent taxes, interest, penalties, and fees related to the foreclosure and sale of the property. But when there are excess proceeds from individual sales, such as the sale of plaintiffs' properties in this case, those proceeds are used to subsidize the costs for *all* foreclosure proceedings and sales for the year of the tax delinquency, as well as any years prior or subsequent to the delinquency.³⁴ Then, after the required statutory disbursements are made, surplus proceeds may be transferred to the county general fund in cases in which the county is the foreclosing governmental unit.³⁵ Of particular importance here, the GPTA does not provide for any disbursement of the surplus proceeds to the former property owner, nor does it provide former owners a right to make a claim for these surplus proceeds.

³¹ MCL 211.78m(8)(a). In fact, the GPTA requires the delinquent tax revolving fund to be reimbursed regardless of "whether or not all of the property was sold." *Id.*

³² MCL 211.78m(8)(b) and (c).

³³ MCL 211.78m(8)(e), (f)(ii), and (f)(iii).

³⁴ MCL 211.78m(8)(b) through (d); MCL 211.78m(8)(f)(i).

³⁵ MCL 211.78m(8)(h). In cases in which the state is the foreclosing governmental unit, "any remaining balance shall be transferred to the land reutilization fund created under [MCL 211.78n]." MCL 211.78m(8)(g).

Michigan is one of nine states with a statutory scheme that requires the foreclosing governmental unit to disburse the surplus proceeds to someone other than the former owner.³⁶ It is under this framework that we review plaintiffs’ takings claim.

III. STANDARD OF REVIEW

This Court reviews a circuit court’s decision regarding a motion for summary disposition, as well as any constitutional issues, *de novo*.³⁷

IV. ANALYSIS

A. “FORFEITURE” UNDER THE GPTA AND CIVIL-ASSET FORFEITURE

Before turning to plaintiffs’ takings claim, we first address why the trial court’s reliance on the term “forfeiture” in the GPTA was incorrect and why the panel majority erred by relying on *Bennis v Michigan*, a case involving civil-asset forfeiture, to conclude that no taking occurred in this case.

First, the GPTA makes clear that “forfeiture” simply permits defendants to seek a judgment of foreclosure.³⁸

³⁶ Comment, *State Theft In Real Property Tax Foreclosure Procedures*, 54 Real Prop Tr & Est L J 93, 101-102 & n 56 (2019) (explaining that Alabama, Arizona, Illinois, Indiana, Michigan, Minnesota, Mississippi, Montana, and Oregon all require the foreclosing governmental unit “to do something with the foreclosure sale surplus other than return it to the original owner”).

Recent legislation has been proposed requiring the foreclosing governmental unit, in instances in which sale of the property exceeds the minimum bid at auction, to “remit an amount equal to that excess” to the former property owner if the property was owned and occupied as a principal residence before the judgment of foreclosure was entered. See 2019 HB 4219.

³⁷ *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008).

³⁸ MCL 211.78(8)(b).

Forfeiture does not affect title, nor does it give the county treasurer (or the state if the state is the foreclosing governmental unit) any rights, titles, or interests to the forfeited property. Therefore, we reject the premise that plaintiffs “forfeited” all rights, titles, and interests they had in their properties by failing to pay their real-property taxes.

Second, *Bennis* is distinguishable because the purpose of civil-asset forfeiture is different than the purpose of the GPTA provisions at issue here. *Bennis* recognized that civil-asset forfeiture “serves, at least in part, to punish the owner” of property.³⁹ But the GPTA is not punitive in nature. Its aim is to encourage the timely payment of property taxes and to return tax-delinquent properties to their tax-generating status, not necessarily to punish property owners for failing to pay their property taxes.⁴⁰ *Bennis* also recognized that civil-asset forfeiture works as a deterrent, preventing property tainted with criminality from being further used for illicit purposes.⁴¹ To this end, the Supreme Court in *Bennis* stated that “[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under

³⁹ *Bennis*, 516 US at 451-453 (quotation marks and citation omitted).

⁴⁰ MCL 211.78(1) (“The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions.”).

⁴¹ *Bennis*, 516 US at 452 (“[F]orfeiture . . . serves a deterrent purpose distinct from any punitive purpose. Forfeiture of property prevents illegal uses both by preventing further illicit use of the property and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.”) (quotation marks, brackets, and citation omitted).

the exercise of governmental authority other than the power of eminent domain.”⁴² We conclude that *Bennis* is distinguishable and provides us little guidance as it relates to plaintiffs’ takings claim. The Court’s holding in *Bennis* focused narrowly on forfeited property that was used as an instrumentality for criminal activity and the government’s interest in deterring illegal activity.⁴³ In this case, plaintiffs did not use their properties for illicit purposes. They simply failed to pay their property taxes, which is not a criminal offense.⁴⁴ Accordingly, we conclude that the Court of Appeals improperly conflated the meaning of “forfeiture” in an unrelated area of law with the meaning of “forfeiture” as expressly described under the GPTA.

B. DUE PROCESS

We also reject defendants’ argument that no taking occurred in this case because plaintiffs were afforded

⁴² *Id.*

⁴³ *Id.* at 453 (explaining that the forfeiture of the petitioner’s car used in her husband’s criminal activity was consistent with longstanding punitive, deterrent, and remedial goals underlying civil-asset forfeiture); *id.* at 455 (Thomas, J., concurring) (holding that the forfeiture was permissible because the car was used as an instrumentality of crime and the petitioner did not argue otherwise); *id.* at 458 (Ginsburg, J., concurring) (“Michigan has decided to deter johns from using cars they own (or co-own) to contribute to neighborhood blight, and that abatement endeavor hardly warrants this Court’s disapprobation.”).

⁴⁴ As the Supreme Court of Appeals of Virginia in *Martin v Snowden*, 59 Va 100, 142-143 (1868), *aff’d sub nom Bennett v Hunter*, 76 US 326 (1869), stated:

This forfeiture cannot be sustained as a forfeiture for crime
In such cases, the thing forfeited is the instrument by which the offence was committed, or was the fruit of the offence, and is treated as being itself, in some sort, the offender. But the land of a delinquent tax-payer cannot be brought within the principle of this class of cases; it is neither the instrument nor the fruit of any

the minimal protections of due process. The United States and Michigan Constitutions dictate that before the government may take property for unpaid taxes, it must provide the property owner sufficient notice of the delinquency and foreclosure proceedings as well as an opportunity to contest those proceedings.⁴⁵ To this end, the GPTA explicitly states its intent to comply with minimum requirements of due process and not create new rights beyond those prescribed in the Constitutions of our nation or this state.⁴⁶ As long as defendants comply with these due-process considerations, plaintiffs may not contest the legitimacy of defendants' authority to foreclose on their properties for unpaid tax debts, nor may plaintiffs contest the sale of their properties to third-party purchasers.⁴⁷

A claim of an unconstitutional taking, however, is distinct from a claim of property deprivation without due process of law.⁴⁸ In *Lingle v Chevron USA Inc*, the

offence. Nor can we suppose that Congress intended to make it a criminal, or even a *quasi* criminal offence, for a man not to pay his taxes

⁴⁵ US Const, Am V (“[N]or shall private property be taken for public use, without just compensation.”); Const 1963, art 1, § 17 (“No person shall . . . be deprived of life, liberty or property, without due process of law.”).

⁴⁶ MCL 211.78(2).

⁴⁷ See *Jones v Flowers*, 547 US 220, 234; 126 S Ct 1708; 164 L Ed 2d 415 (2006) (“People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking.”); *Sidun*, 481 Mich at 509 (“Proceedings that seek to take property from its owner must comport with due process.”).

⁴⁸ Compare Const 1963, art 10, § 2 (Michigan’s Takings Clause) with Const 1963, art 1, § 17 (Michigan’s Due Process Clause); see also Peñalver & Strahilevitz, *Judicial Takings or Due Process?*, 97 Cornell L Rev 305, 317-318 (2012) (stating that the Takings Clause and the Due

United States Supreme Court discussed the difference between these two constitutional clauses:

The [Takings] Clause expressly requires compensation where government takes private property for public use. It does not bar government from interfering with property rights, but rather requires compensation in the event of otherwise proper interference amounting to a taking. Conversely, if a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.^{49]}

As *Lingle* suggests, each constitutional provision protects property owners against specific government action, offering different remedies for distinct constitutional violations. The remedy for a taking of private property is just compensation, while the remedy for being deprived of property without due process of law is the return of the property.⁵⁰ Notably, plaintiffs do not dispute the legitimacy of defendants' authority to fore-

Process Clause of the Fifth Amendment “have frequently been muddled together by courts and commentators alike,” but “grammatically they operate independently of one another and the Supreme Court understands them to protect owners against different kinds of government harms”) (citation omitted).

⁴⁹ *Lingle v Chevron USA Inc*, 544 US 528, 543; 125 S Ct 2074; 161 L Ed 2d 876 (2005) (quotation marks, citation, and emphasis omitted).

⁵⁰ *Id.*; see also *Judicial Takings*, 97 Cornell L Rev at 320 (“Distinguishing between the Takings and Due Process Clauses is consistent with the text of the Constitution, but it also provides a richer conceptual vocabulary for evaluating constitutional property claims . . .”). The GPTA, at one point, limited property owners to a damages action under MCL 211.78l whenever “he or she did not receive any notice required under [the GPTA] . . .” Once the judgment of foreclosure was entered and the former property owner’s interest in the property was extinguished, the former owner could not bring an action for possession. But, in *In re Petition By Treasurer of Wayne Co for Foreclosure*, 478 Mich 1; 732 NW2d 458 (2007), this Court held that limitation unconstitutional. Thus, property owners can now file a motion to set aside their judgment

close on their properties, nor do plaintiffs contest the adequacy of defendants' efforts to notify plaintiffs of the tax delinquency, forfeiture, and foreclosure. Instead, plaintiffs challenge defendants' retention of the surplus proceeds as an unconstitutional taking. Plaintiffs ask this Court to reverse the decision of the Court of Appeals and remand to the circuit court for a determination of just compensation. Plaintiffs' request for a determination of just compensation demonstrates that the nature of their claim is a taking without just compensation, not a deprivation of property without due process of law. Therefore, there is no legal basis to conclude that defendants' compliance with the GPTA's notice provisions justifies defendants' retention of the surplus proceeds.

C. OVERVIEW OF TAKINGS JURISPRUDENCE AND
PLAINTIFFS' TAKINGS CLAIM

The Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, provides, in relevant part: “[N]or shall private property be taken for public use, without just compensation.”⁵¹

Comparatively, Michigan's Takings Clause provides, in relevant part:

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken

of foreclosure if the foreclosing governmental unit failed to comply with due process when providing notice to owners.

⁵¹ US Const, Am V; US Const, Am XIV; see *AFT Mich v Michigan*, 497 Mich 197, 217; 866 NW2d 782 (2015) (“The Fifth Amendment is applied to the states through the Fourteenth Amendment.”), citing *Chicago, B & Q R Co v Chicago*, 166 US 226, 241; 17 S Ct 581; 41 L Ed 979 (1897).

for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. . . .

“Public use” does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.^[52]

While we draw on authority discussing and interpreting both clauses, we must keep in mind that Michigan's Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain.⁵³

Plaintiffs, as the aggrieved property owners, have filed this inverse-condemnation action alleging that defendants have taken plaintiffs' properties without just compensation. A “taking” for purposes of inverse condemnation means that the government has permanently deprived the property owner of any possession or use of the property without the commencement of formalized condemnation proceedings.⁵⁴ When such a

⁵² Const 1963, art 10, § 2.

⁵³ Compare *Kelo v New London, Conn.*, 545 US 469; 125 S Ct 2655; 162 L Ed 2d 439 (2005) (holding that the government's condemnation and transfer of private property to a private entity to facilitate economic development was a permissible “public use” under the Fifth Amendment's Takings Clause), with *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004) (holding that a similar condemnation and transfer was not a permissible “public use” under Michigan's Takings Clause).

⁵⁴ *United States v Clarke*, 445 US 253, 257; 100 S Ct 1127; 63 L Ed 2d 373 (1980) (explaining that the property owner's right to bring an

taking occurs, the property owner is entitled to just compensation for the value of the property taken.⁵⁵ The government's seizure of real property is the clearest form of a taking requiring just compensation.⁵⁶ But a taking can, and often does, encompass more than just the physical deprivation of real, tangible property; it also includes the government's interference with one's personal, intangible property.⁵⁷

In order to assert a takings claim of this nature, a claimant must first establish a vested property right under state law.⁵⁸ "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law."⁵⁹ Plaintiffs allege

inverse-condemnation action is derived from "the self-executing character of the constitutional provision with respect to compensation" (quotation marks and citation omitted).

⁵⁵ *Hart v Detroit*, 416 Mich 488, 494; 331 NW2d 438 (1982) (discussing inverse-condemnation actions under Michigan law).

⁵⁶ *Horne v Dep't of Agriculture*, 576 US 350, 357; 135 S Ct 2419; 2425-2426; 192 L Ed 2d 388 (2015) (explaining that a "classic" or per se taking occurs when the government directly appropriates private property for its own use).

⁵⁷ *AFT Mich*, 497 Mich at 218 ("The term 'taking' can encompass governmental interference with rights to both tangible and intangible property."), citing *Ruckelshaus v Monsanto Co*, 467 US 986, 1003; 104 S Ct 2862; 81 L Ed 2d 815 (1984) ("[I]ntangible property rights protected by state law are deserving of the protection of the Taking Clause . . ."); see also 1 Cooley, *General Principles of Constitutional Law in the United States* (1880), p 336 (explaining that the federal Takings Clause protects "anything of value which the law recognizes as such, and in respect to which the owner is entitled to a remedy against any one who may disturb him in its enjoyment," regardless of "whether the property be tangible or intangible").

⁵⁸ *In re Certified Question*, 447 Mich 765, 788; 527 NW2d 468 (1994) (*Fun 'N Sun RV, Inc v Michigan*).

⁵⁹ *Phillips v Washington Legal Foundation*, 524 US 156, 164; 118 S Ct 1925; 141 L Ed 2d 174 (1998) (quotation marks and citation omitted).

that they have a cognizable, vested property right to the surplus proceeds that result from the tax-foreclosure sale of their properties under Michigan law that is protected by Michigan's Takings Clause.

Our "primary objective" in interpreting a constitutional provision such as our state's Takings Clause is "to determine the text's original meaning to the ratifiers, the people, at the time of ratification."⁶⁰ This Court has held that "the *whole* of art 10, § 2 has a technical meaning that must be discerned by examining the 'purpose and history' of the power of eminent domain."⁶¹ Accordingly, we must canvass the body of law so that we may ascertain the "common understanding" of Article 10, § 2 and the property rights protected thereunder.⁶²

1. A HISTORICAL REVIEW OF CLAIMS FOR SURPLUS PROCEEDS
FOLLOWING A TAX-FORECLOSURE SALE

This is not the first time a former property owner has made a claim for the surplus proceeds that result from the tax-foreclosure sale of the owner's property. In *People ex rel Seaman v Hammond*, the plaintiff, referred to as the "relator," purchased land in October 1840 that was sold to satisfy the 1837 taxes.⁶³ The relator received the county treasurer's certificate of sale, which, according to statute, entitled the "purchaser" to the deed to the land within two years of the sale (October 1842) unless the land was redeemed. Before the relator became entitled to the deed, however, the land was sold again in August 1842 to satisfy

⁶⁰ *Hathcock*, 471 Mich at 468.

⁶¹ *Id.* at 471.

⁶² *Id.*

⁶³ *People ex rel Seaman v Hammond*, 1 Doug 276 (Mich, 1844).

the 1838 taxes, this time producing a surplus. According to the statute, the surplus was to be deposited in the state treasury to the credit of the “owner or claimant” of the land. After the redemption period expired for the first sale, the relator presented his deed for the land and demanded the surplus proceeds from the second sale, but he was refused. This Court held that the relator, as the *purchaser* of the land, was not entitled to receive the surplus proceeds because, under the statute, he was not the *owner* or *claimant* of the land at the time of the sale, explaining, in relevant part:

In that statute, whenever mention is made of the person who buys land at a tax sale, he is denominated the *purchaser*, and no title whatever to the land sold, vests in him, until, at the expiration of two years, he receives the treasurer’s deed, “which conveyance,” says the statute, “shall vest in the person who receives it, an absolute estate in fee simple.” Prior to that conveyance, he has only a lien upon the land for the repayment of the amount of the tax paid, with twenty per cent interest; he has no right to interfere with the possession of the owner; he cannot enter upon the land for any purpose whatever, nor can he control the rents and profits.

* * *

It is perfectly clear that the individual who has the legal title to the land at the time of the tax sale, is the owner, entitled, under the statute, to the surplus money, if any there be.^[64]

Thirty-seven years later, the United States Supreme Court, in *United States v Taylor*, addressed whether a federal statute, which permitted the federal government to conduct tax sales to recover delinquent federal

⁶⁴ *Id.* at 279-280.

tax debts, gave property owners a right to claim the surplus proceeds that resulted from the tax sales.⁶⁵ The Court in *Taylor* concluded that the statute allowed for the recovery of the surplus proceeds. Three years later, the Court followed *Taylor* in *United States v Lawton*.⁶⁶ In *Lawton*, the appellee's property was seized for a tax delinquency of \$88, which grew to \$170.50 after interest, penalties, and costs. The board of tax commissioners bought the land on behalf of the United States in satisfaction of the appellee's tax debt. The property was "struck off" for \$1,100, leaving a total of \$929.50 in excess of the tax debt. The tax debtor sought the surplus but was refused. The Court held that the tax debtor was entitled to the surplus proceeds, stating:

The land in the present case having been "struck off for" and "bid in" for the United States at the sum of \$1,100, we are of [the] opinion that the surplus of that sum, beyond the \$170.50 tax, penalty, interest, and costs, must be regarded as being in the treasury of the United States, under the provisions of section 36 of the act of 1861, for the use of the owner, in like manner as if it were the surplus of purchase money received by the United States from a third person on a sale of the land to such person for the non-payment of the tax. It was unnecessary to go through any form of paying money out of the treasury to any officer and then paying it in again to be held for the owner of the land. But, so far as such owner is concerned, the surplus money is set aside as his as fully as if it had come from a third person. If a third person had bid \$1,099 in this case, there would have been a surplus of \$928.50 paid into the treasury and held for the owner. It can make no difference that the United States acquired the property by bidding

⁶⁵ *United States v Taylor*, 104 US 216, 217-218; 26 L Ed 721 (1881). Although we decide this case based on our state Constitution, we can look for guidance in the decisions of the United States Supreme Court regarding surplus proceeds and the federal Takings Clause.

⁶⁶ *United States v Lawton*, 110 US 146; 3 S Ct 545; 28 L Ed 100 (1884).

one dollar more. *To withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and deprive him of his property without due process of law or take his property for public use without just compensation.* If he affirms the propriety of selling or taking more than enough of his land to pay the tax and penalty and interest and costs, and applies for the surplus money, he must receive at least that.^[67]

The Supreme Court later clarified the holding of *Lawton* in *Nelson v City of New York*.⁶⁸ In *Nelson*, the city of New York foreclosed on properties for water charges that went unpaid for four years. As in *Lawton*, the delinquencies were far lower than the value of the properties, yet the city kept the surplus proceeds after the properties were sold.⁶⁹ The property owners challenged the city's retention of these surplus proceeds under the city's tax-lien foreclosure statute. The Court concluded that it was undisputed that the statutory notice provisions were complied with and that the application of the statute did not deprive the plaintiffs of procedural due process.⁷⁰ The Court then turned to and rejected the plaintiffs' takings claim. The Court explained that the plaintiffs' reliance on *Lawton* was inappropriate because the takings claim asserted in

⁶⁷ *Id.* at 149-150 (emphasis added).

⁶⁸ *Nelson v City of New York*, 352 US 103; 77 S Ct 195; 1 L Ed 2d 171 (1956).

⁶⁹ The water charges for the first parcel amounted to \$65. The first parcel's property value was assessed at \$6,000, and it ultimately sold for \$7,000. The water charges for the second parcel amounted to \$814.50. The second parcel's property value was assessed at \$46,000, but the city acquired title to that parcel and retained it. *Id.* at 105-106.

⁷⁰ *Id.* at 108-109 ("We conclude . . . that the City having taken steps to notify appellants of the arrearages and the foreclosure proceedings and their agent having received such notices, its application of the statute did not deprive appellants of procedural due process."). The Court also rejected the plaintiffs' equal-protection challenge. *Id.* at 109.

Lawton was premised on a statutory right to the proceeds. The statute in *Lawton* required that the surplus proceeds be paid to the former property owner, thus rendering the government's failure to return those surplus proceeds an unconstitutional taking. The statute in *Nelson*, in contrast, did not require the surplus proceeds to be paid back to the property owner. Still, the city's statute provided a property owner a path to obtain the surplus proceeds from the sale. Specifically, the statute permitted a property owner to file a timely answer in the foreclosure proceeding asserting an interest in the property that exceeded the tax debt. Upon proof of the owner's allegation, a separate sale would be directed so that the owner could receive the surplus.⁷¹ Because the plaintiffs failed to avail themselves of this opportunity, the Court concluded that they were not entitled to relief. The Court explained:

What the City of New York has done is to foreclose real property for charges four years delinquent and, *in the absence of timely action* to redeem or *to recover any surplus*, retain the property *or the entire proceeds of its sale*. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.^[72]

Significantly, *Seaman*, *Lawton*, and *Nelson* all address a former property owner's *statutory* right to recover the surplus proceeds. *Seaman* recognized that the owner or claimant of the land at the time of the tax-foreclosure sale had a statutory right to recover the surplus. Consistent with *Seaman*, *Lawton* not only recognized this statutory right but also made it clear

⁷¹ *Id.* at 110 & n 10.

⁷² *Id.* at 110 (emphasis added).

that a Takings Clause violation will arise when a tax-sale statute grants a former owner an independent property interest in the surplus proceeds and the government fails to return that surplus. *Nelson*, on the other hand, informs us that no federal Takings Clause claim will exist when there is a statutory path to recover the surplus proceeds but the property owners fail to avail themselves of that procedure. Read together, *Lawton* and *Nelson* establish that the Takings Clause under the United States Constitution may afford former property owners a remedy when a tax-sale statute provides the divested property owner an interest in the surplus proceeds and the government does not honor that statutory interest. What *Seaman*, *Lawton*, and *Nelson* do not tell us, however, is what occurs when the statutes governing foreclosure make no mention of, or expressly preclude, a divested property owner's right to the surplus proceeds, but the divested property owner establishes a property right to the surplus proceeds through some other legal source, such as the common law.⁷³ In that instance, the failure to provide the divested property owner an avenue for recovering the surplus proceeds would produce an identical result to *Lawton*: "Property to which an individual is legally entitled has been taken without recourse."⁷⁴ Michigan's statutory scheme under the GPTA does not recognize a former property owner's

⁷³ And even if those cases had directly addressed the issue presented here, they would provide only helpful guidance; our decision interpreting Michigan's Constitution would not be bound by them.

⁷⁴ *Coleman v Dist of Columbia*, 70 F Supp 3d 58, 80 (D DC, 2014), citing *Lawton*, 110 US at 149; see also Clifford, *Massachusetts Has A Problem: The Unconstitutionality of the Tax Deed*, 13 U Mass L Rev 274, 287 (2018) ("In summary, the *Coleman* court recognized that once a state recognizes a property interest in the taxpayer, it cannot summarily remove that interest.").

statutory right to collect these surplus proceeds.⁷⁵ Therefore, we must determine whether plaintiffs have a vested property right to these surplus proceeds through some other legal source, such as the common law.

2. VESTED PROPERTY RIGHTS UNDER THE COMMON LAW

Like the founders of our nation, Michigan has historically held property rights in the highest regard. Former Michigan Supreme Court Justice Thomas M. Cooley, one of our nation's preeminent jurists and learned scholars, wrote that the "right to private property is a sacred right; . . . it was the old fundamental law, springing from the original frame and constitution of the realm."⁷⁶

[P]roperty . . . is recognized as such by the law, and nothing else is or can be. Property and law are born and must die together. Before the laws, there was no property; take away the laws, all property ceases.^[77]

Drawing on Sir William Blackstone, Justice Cooley further recognized that the Magna Carta "guaranteed" the protection of private property against government overreach.⁷⁸ Just as the Magna Carta guaranteed property owners due process of law, so too did the sacred text limit the King's ability to take his subject's property, real or personal, under principles of eminent

⁷⁵ See MCL 211.78m(8)(h) (directing that any surplus proceeds from the tax-foreclosure sale be transferred into the county's general fund).

⁷⁶ 2 Cooley, *Constitutional Limitations* (8th ed), p 745 (quotation marks and citation omitted).

⁷⁷ Cooley, *General Principles*, p 315 (quotation marks and citation omitted).

⁷⁸ Cooley, *Constitutional Limitations*, pp 733-734, citing 4 Blackstone, *Commentaries on the Laws of England*, p *424.

domain.⁷⁹ Thus, it is without surprise that private-property rights have been protected from unlawful government takings in every version of this state's Constitution.⁸⁰

“This state's common law is adopted from England, and to identify such law this Court may consider original English cases and authorities.”⁸¹ Our review of English common law supports the notion that an owner of real or personal property has a right to any surplus proceeds that remain after property is sold to satisfy a tax debt. Just as the Magna Carta protected property owners from uncompensated takings, it also recognized that tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess.⁸² In fact,

⁷⁹ See Magna Carta, Grant 39 (1215) (“No freeman shall be . . . dis-seised . . . unless by the lawful judgment of his peers, or by the law of the land.”); see also *Horne*, 576 US at 358 (discussing the history of the federal Takings Clause going as far back as the Magna Carta and making no distinction between real or personal private property); *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 373, 374 & n 6; 663 NW2d 436 (2003) (explaining that the sovereign's power of eminent domain and its “ancient provenance” dates back to the Magna Carta); *Peterman v Dep't of Natural Resources*, 446 Mich 177, 186-187 & 187 n 14; 521 NW2d 499 (1994) (discussing the history of eminent domain in America).

⁸⁰ See Const 1835, art 1, § 19; Const 1850, art 18, § 14; Const 1908, art 13, § 1; Const 1963, art 10, § 2.

⁸¹ *People v Woolfolk*, 497 Mich 23, 25; 857 NW2d 524 (2014) (citations omitted).

⁸² See Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 St Mary's L J 1, 47 (2015), citing McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (Glasgow: James Maclehose & Sons, 2d ed, 1914), p 322. Johnson explains that when a man died, officers would seek collection of the deceased's debts. *Ancient Magna Carta*, 47 St Mary's L J at 47. However, these officials would often seize everything, sell the decedent's property for an amount far in excess of the debt, and refuse to disgorge the surplus to the decedent's heirs. *Id.* As a protection against such abuse practices, Clause 26 of the Magna

although the “mode of collecting the land tax in England was by distress,” it was a well-recognized principle that any excess property sold to satisfy a tax debt would be paid back to the owner.⁸³ Further, Blackstone explained that in the context of bailments, whenever the government seized property for delinquent taxes, it did so subject to “an implied contract in law” to either return the property if the tax debt was paid or “to render back the overplus” if the property was sold to satisfy the delinquent taxes.⁸⁴

The right to collect the surplus proceeds was also firmly established in the early years of Michigan’s statehood. In his treatise on the Law of Taxation, Justice Cooley discusses the various methods that states used to save the surplus proceeds for the former owner when that owner’s land was sold for unpaid taxes.⁸⁵ The first of these methods was to sell the distressed land for payment of delinquent taxes, and if the accepted bid exceeded the delinquency, the surplus would be deposited with the local treasury “for the benefit of the party, who shall show his right.”⁸⁶ This is precisely what occurred in *Seaman*. While *Seaman*

Carta required that “the value of the goods seized had to approximate the value of the debt[,] and the process had to be superintended by worthy men whose function it was to form a check on the actions of the sheriff’s officers.” *Id.* (quotation marks and citation omitted); see also *Martin*, 59 Va at 136 (“The summary methods employed in England in early times for the collection of debts to the Crown seem to have been turned to purposes of oppression, and . . . [the] *Magna Charta* provided for their restraint.”).

⁸³ *Martin*, 59 Va at 136-137 (explaining that while land was typically only taken to satisfy tax debts when personal property was insufficient to satisfy the debt, any surplus resulting from the sale of the property taken, real or personal, would be paid back to the owner).

⁸⁴ 2 Blackstone, Commentaries on the Laws of England, p *452.

⁸⁵ Cooley, Law of Taxation (3d ed), p 952.

⁸⁶ *Id.* As support for this first method, Justice Cooley cites the Supreme Court’s decision in *Lawton* for the notion that if land was sold

was resolved on then-existing statutory authority, this Court’s discussion regarding a property owner’s right to collect surplus proceeds is valuable in defining the nature and scope of that right:

The surplus money produced by the tax sale, is the property of the person who has the legal title to the land at the time of the sale, and the moment the amount is ascertained and passed to his credit in the books of the treasurer, it is as absolutely his as though it were in his own keeping; and the right is personal—as unqualifiedly so as the ownership of any chattel; and although the surplus spoken of is produced by the sale of land, yet the right to receive and control it, no more follows the title to the land, than does the ownership of the cattle and farming utensils that a man may happen to have on his farm when it is sold for taxes, and the purchaser may, with as much propriety, claim a right to the latter as the former.^[87]

Notably, at the time *Seaman* was decided, a property owner’s right to redeem his property continued after the foreclosure sale. That is, it was commonly understood that the delinquent taxpayer would continue to be the legal owner of the property at the time of the foreclosure sale and thus would be entitled to any surplus proceeds produced from the sale as the “owner or claimant” of the land. This is vastly different from the current version of the GPTA, in which a property owner’s interest in the property is extinguished well before the tax-foreclosure sale. Thus, a fair reading of *Seaman* demonstrates that in the early years of this state, it was commonly understood that the delinquent taxpayer, not the foreclosing entity, continued to own

to the United States for unpaid federal taxes, the United States remained liable to the former owner for any surplus. *Id.* at 952 & n 1, citing *Lawton*, 110 US 146.

⁸⁷ *Seaman*, 1 Doug at 281.

the land at the time of the tax-foreclosure sale and would have been entitled to any surplus, which no more followed title to the land than the former owner's other personal property.

At the same time that it was common for any surplus proceeds to be returned to the former property owner, it was also generally understood that the government could only collect those taxes actually owed and nothing more. Justice Cooley explained that excessive tax levies were "beyond the jurisdiction of the officers" charged with collecting taxes and that even *de minimis* amounts in excess of the taxes owed were impermissible.⁸⁸ This Court recognized a similar principle in 1867, stating that "[n]o law of the land authorizes the sale of property for any amount in excess of the tax it is legally called upon to bear."⁸⁹ Indeed, any sale of property for unpaid taxes that was in excess of the taxes owed was often rendered voidable at the option of the landowner.⁹⁰ Rather than selling all of a person's land and risk the sale being voided, officers charged with selling land for unpaid taxes often only sold that portion of the land that was needed to satisfy the tax debt.⁹¹ That is, early in Michigan's statehood, it was commonly understood that the government could not collect more in

⁸⁸ Cooley, *Law of Taxation*, pp 590-591 ("If the line which the legislature has established be once passed, we know of no boundary to the discretion of the assessors.") (quotation marks and citation omitted).

⁸⁹ *Case v Dean*, 16 Mich 12, 19 (1867).

⁹⁰ Cooley, *Law of Taxation*, p 953 ("A sale of the whole when less would pay the tax would be such a fraud on the law as to render the sale voidable at the option of the land-owner . . .").

⁹¹ *Id.* at 952-958. Indeed, this was another method discussed by Justice Cooley to ensure that any "surplus moneys" remained with the landowner after the property was sold. *Id.* at 952-953. The other method was to require that a lien be placed on the land holding the purchaser accountable to pay the excess back to the original owner. *Id.* at 952.

taxes than what was owed, nor could it sell more land than necessary to collect unpaid taxes.

Further, in the context of eminent domain, it was axiomatic that the government shall take no more property than necessary for the particular public use for which the taking was done. As Justice Cooley stated:

The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made. When a part only of a man's premises is needed by the public, the necessity for the appropriation of that part will not justify the taking of the whole, even though compensation be made therefor. The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain.^[92]

This Court has consistently recognized this constitutional precept. Throughout this state's history, this Court has held that the government's takings power is limited to only that property which is necessary to serve the public.⁹³

⁹² Cooley, *Constitutional Limitations*, p 1147.

⁹³ See *Peterman*, 446 Mich at 201, 202 n 36 ("As an unnecessary taking of property, defendant's actions violated the strict dictates of the constitutional guarantee that private property may be taken only when necessary for public purposes."); *Livonia Twp Sch Dist v Wilson*, 339 Mich 454, 460; 64 NW2d 563 (1954) ("It is a general principle that the legislature cannot authorize the taking of property in excess of that required for public use."); *Cleveland v Detroit*, 322 Mich 172, 179; 33 NW2d 747 (1948) ("In acquiring property for public use it is not permissible for the city to take additional property not necessary for that public use for private purposes."); *Berrien Springs Water Power Co v Berrien Circuit Judge*, 133 Mich 48, 53; 94 NW 379 (1903) ("[O]nly so much [land] can be taken as is necessary to the public use."); *Bd of Health of Portage Twp v Van Hoesen*, 87 Mich 533, 537; 49 NW 894 (1891) ("It can never be just to take property, under pretence of public

Accordingly, these fundamental principles—that the government shall not collect more taxes than are owed, nor shall it take more property than is necessary to serve the public—protect taxpayers and property owners alike from government overreach. These principles have remained a staple in this state’s jurisprudence well after the most recent ratification of our Constitution in 1963.⁹⁴

A property owner’s right to collect the surplus proceeds from the tax-foreclosure sale of his or her property has also withstood the most recent ratification of our Constitution, as exemplified by our decision in *Dean v Dep’t of Natural Resources*, which recognized a right to collect those proceeds under the common-law claim of unjust enrichment.⁹⁵ In *Dean*, the plaintiff-property owner failed to pay her property taxes for both the city of Flint and Genesee County in the amount of \$230.68

benefit, which is not needed by the public . . .”), citing *Paul v Detroit*, 32 Mich 108, 114 (1875) (explaining that the 1850 Michigan Constitution added a provision requiring juries to determine the necessity of a taking of private property for public use, as well as the compensation owed for that taking, because there was “a well founded belief, founded on experience, that private property was often taken improperly and without any necessity”).

⁹⁴ *Detroit v Walker*, 445 Mich 682, 701-704; 520 NW2d 135 (1994) (explaining that citizens have a duty to pay their taxes and that the Legislature may enact procedural schemes “to secure taxes owed”); *Peterman*, 446 Mich at 184 (“[I]t can never be lawful to compel any man to give up his property, when it is not needed, or to lose it, whether needed or not, without being made whole.”), quoting *Paul*, 32 Mich at 119; see also *Fidlin v Collison*, 9 Mich App 157, 167; 156 NW2d 53 (1967) (holding that under the GPTA’s provision allowing seizure of personal property to satisfy unpaid taxes, the city treasurer’s seizure of the plaintiffs’ personal property valued at \$629.32 to satisfy a \$10,500 tax debt was “an excessive distraint” on their property, given that “[t]he amount of property distrained must not be excessive and, if it is, the seizure is illegal”), quoting 84 CJS, Taxation, § 694, p 1371.

⁹⁵ *Dean v Dep’t of Natural Resources*, 399 Mich 84; 247 NW2d 876 (1976).

and \$146.90, respectively. After the plaintiff failed to appear at the foreclosure hearing, the court issued a judgment authorizing the sale of the plaintiff's property at a tax sale and stating that if the property was sold to the state, the state's title would become absolute unless the plaintiff timely redeemed the property.⁹⁶ The state successfully bid on the plaintiff's property, starting the one-year redemption period for the plaintiff. During the redemption period, the plaintiff paid her delinquent city-property taxes in full but mistakenly failed to pay her delinquent county-property taxes. After she failed to timely redeem her property during the redemption period, the State Treasurer deeded the plaintiff's property to the state, which received absolute title to the property and then sold it to a private investor for \$10,000. The plaintiff filed an action against the state, alleging, in relevant part, that the state had been unjustly enriched by retaining the \$10,000 following the sale of her property. The circuit court granted summary disposition to the defendant, but this Court reversed, holding that the plaintiff could bring her suit for unjust enrichment:

In fact, the events out of which plaintiff's claim of unjust enrichment arises occurred subsequent to the default judgment entered by the Genesee County Circuit Court: the alleged good-faith attempt at redemption, the running of the redemption period after this attempt with plaintiff under the impression that she had in fact redeemed her home, the loss of her home, and the sale of the property by the state for a profit of close to \$10,000.^{97]}

Dean stands for more than just a recognition of the plaintiff's right to bring a claim under unjust enrich-

⁹⁶ Notice of the hearing was published in the newspaper as required under the former version of the GPTA. *Id.* at 88, citing MCL 211.66, repealed by 1999 PA 123.

⁹⁷ *Dean*, 399 Mich at 94-95.

ment for the surplus proceeds. Inherent in *Dean*'s holding is Michigan's protection under our common law of a property owner's right to collect the surplus proceeds that result from a tax-foreclosure sale. A viable claim for unjust enrichment requires the complaining party to show that the other party retained a *benefit* from the complaining party.⁹⁸ In concluding that the plaintiff in *Dean* stated an actionable claim for unjust enrichment, this Court did not rely on any statutory right that the plaintiff had to collect the surplus proceeds. As is the case here, title to the plaintiff's property in *Dean* had already vested with the state. Without a statutory right, the plaintiff must have had a common-law right to these surplus proceeds. Otherwise, her claim of unjust enrichment would not be actionable because it could not have been said that the state retained a *benefit* at her expense. In sum, *Dean* supports the proposition that a property owner has a recognized common-law property right to the surplus proceeds from a tax-foreclosure sale.⁹⁹

We conclude that our state's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property. Having originated as far back as the Magna Carta, having ingratiated itself into

⁹⁸ *Thachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260 (2010) ("Unjust enrichment is defined as the unjust retention of money or benefits which in justice and equity belong to another. No person is unjustly enriched unless the retention of the benefit would be unjust.") (quotation marks and citations omitted).

⁹⁹ While *Dean* stands for the proposition that a claim for the surplus proceeds may be asserted through unjust enrichment, the Court of Appeals concluded that plaintiffs abandoned their claim of unjust enrichment by failing to develop it in their briefing below. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (explaining that a party's failure to adequately brief an issue on appeal constitutes abandonment).

English common law, and having been recognized both early in our state’s jurisprudence and as late as our decision in *Dean* in 1976, a property owner’s right to collect the surplus proceeds from the tax-foreclosure sale of his or her property has deep roots in Michigan common law. We also recognize this right to be “vested” such that the right is to remain free from unlawful governmental interference. “To constitute a vested right, the interest must be something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property”¹⁰⁰ As demonstrated by the discussion earlier, the right to collect these proceeds was beyond a mere expectancy or claim of entitlement. It is as much an interest in property as our kitchen tables; television sets; and, as this Court observed in *Seaman*, our cattle and farming utensils.¹⁰¹

¹⁰⁰ *Fun ’N Sun*, 447 Mich at 788 (quotation marks and citation omitted); Cooley, *General Principles*, p 320 (“The test of unlawful interference with property is that *vested* rights are abridged or taken away.”) (emphasis added).

¹⁰¹ An often-used metaphor in property law further illustrates this point. Property rights are commonly referred to as a “bundle of sticks,” with each stick representing a distinct right defined by state law. *United States v Craft*, 535 US 274, 278; 122 S Ct 1414; 152 L Ed 2d 437 (2002) (“A common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property. State law determines only which sticks are in a person’s bundle.”) (citation omitted). These sticks range from a property owner’s right to use or enjoy the property, the right to eject others from the property, and the right to dispose of the property altogether. See *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 57; 602 NW2d 215 (1999) (“The general concept of ‘property’ comprises various rights—a ‘bundle of sticks,’ as it is often called—which is usually understood to include ‘[t]he exclusive right of possessing, enjoying, and disposing of a thing.’”), quoting *Black’s Law Dictionary* (6th ed), p 1216. Unlawful governmental interference with even one stick in that bundle constitutes a taking requiring

Further, the prohibitions against collecting excess taxes, selling more land than needed to collect such taxes, and taking more property than necessary to serve the public all underlie a property owner's right to collect the surplus proceeds and were well-established legal principles before 1963. Therefore, we hold that the ratifiers would have commonly understood this common-law property right to be protected under Michigan's Takings Clause at the time of the ratification of the Michigan Constitution in 1963.¹⁰²

Having recognized both the existence of this vested property right at common law and that the ratifiers of the 1963 Michigan Constitution would have commonly understood this right to be protected under Michigan's Takings Clause at that time, the question now becomes whether the amendments of the GPTA abrogated this common-law right.¹⁰³ If it did, there is no taking here.

The common law "is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just . . ." ¹⁰⁴ It is dynamic and flexible, not static or fixed like statutory law.¹⁰⁵ The

just compensation. Our holding today recognizes that the right to collect any surplus proceeds that result from the sale of a person's property for unpaid taxes is one stick in the owner's bundle of rights, entitled to as much protection as any other stick in that bundle.

¹⁰² *Hathcock*, 471 Mich at 471.

¹⁰³ While the bulk of the revisions to the GPTA took place in 1999, the provision allowing counties to transfer any surplus proceeds to their general funds, MCL 211.78m(8)(h), was not added until 2006. See 2006 PA 498.

¹⁰⁴ *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 242; 828 NW2d 660 (2013) (quotation marks and citation omitted).

¹⁰⁵ *Beech Grove Investment Co v Civil Rights Comm*, 380 Mich 405, 430; 157 NW2d 213 (1968) ("The common law does not consist of definite rules which are absolute, fixed, and immutable like the statute law . . .") (quotation marks and citation omitted).

common law is, however, incremental in adapting to society's changing circumstances, developing gradually to reflect our policies, customs, norms, and values.¹⁰⁶ Nonetheless, the Legislature may enact legislation that abrogates or alters the common law. Of course, both legislation and the common law are secondary to our Constitution. Article 3, § 7 of Michigan's Constitution provides:

The common law and the statute laws now in force, *not repugnant to this constitution*, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.^[107]

It is clear that our 1963 Constitution protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale under Article 10, § 2. This right existed at common law; was commonly understood to exist in the common law before the 1963 ratification of our Constitution; and continues to exist after 1963, as our decision in *Dean* demonstrates. Because this common-law property right is constitutionally protected by our state's Takings Clause, the Legislature's amendments of the GPTA could not abrogate it. While the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause.¹⁰⁸

¹⁰⁶ *Price*, 493 Mich at 243 ("The common law is always a work in progress and typically develops incrementally, i.e., gradually evolving as individual disputes are decided and existing common-law rules are considered and sometimes adapted to current needs in light of changing times and circumstances.").

¹⁰⁷ Const 1963, art 3, § 7 (emphasis added).

¹⁰⁸ Nothing in our holding today prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds. See, e.g., *Nelson*, 352 US at 110 & n 10. We only hold that the Legislature may not write this constitutionally protected vested prop-

V. APPLICATION

A. DEFENDANTS' RETENTION OF THE SURPLUS PROCEEDS WAS
AN UNCONSTITUTIONAL TAKING

As the foreclosing governmental unit under the GPTA, defendants were entitled to seize plaintiffs' properties to satisfy the unpaid delinquent real-property taxes as well as any interest, penalties, and fees associated with the foreclosure and sale of plaintiffs' properties. But defendants could only collect the amount plaintiffs owed and nothing more. Once defendants foreclosed on plaintiffs' properties, obtained title to those properties, and sold them to satisfy plaintiffs' unpaid taxes, interest, penalties, and fees related to the foreclosures, any surplus resulting from those sales belonged to plaintiffs. That is, after the sale proceeds are distributed in accordance with the GPTA's order of priority, any surplus that remains is the property of plaintiffs, and defendants were required to return that property to plaintiffs. Defendants' retention of those surplus proceeds under the GPTA amounts to a taking of a vested property right requiring just compensation. To the extent the GPTA permits defendants to retain

erty right out of existence. See *Munn v Illinois*, 94 US 113, 134; 24 L Ed 77 (1876) ("A person has no property, no vested interest, in any rule of the common law. . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, *unless prevented by constitutional limitations.*") (emphasis added); see also *Mackin v Detroit-Timkin Axle Co*, 187 Mich 8, 13; 153 NW 49 (1915) ("*Except as to vested rights*, the legislative power exists to change or abolish existing statutory and common-law remedies.") (emphasis added). Further, because this common-law property right existed well before 1963, it cannot be said that our Constitution created this property right; rather, this right was, and still is, commonly understood to be *protected* by Michigan's Takings Clause. See *Phillips*, 524 US at 164 ("[T]he Constitution protects rather than creates property interests . . .").

these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties.

Defendants rely on a line of Michigan cases to argue that plaintiffs held no rights, titles, or interests in their properties once foreclosure occurs and fee simple title vests with the state.¹⁰⁹ None of these decisions, however, involved a claim for the surplus proceeds after a foreclosure sale. Rather, these cases all addressed the former property owners' ability to retain or convey an interest in the land that had been foreclosed. Indeed, one of these cases even noted that the "primary and inducing purpose of the legislation was to secure *a portion of the unpaid taxes, rather than nothing*, and to restore lands to a taxpaying basis, instead of supinely allowing them to accumulate tax delinquencies with no hope of ever recovering them."¹¹⁰ In this case, defendants recovered the entire amount of plaintiffs' tax debts *and more* by way of a surplus. Plaintiffs had a cognizable, vested property right to collect those sur-

¹⁰⁹ *Krench v Michigan*, 277 Mich 168, 179; 269 NW 131 (1936) (holding that a tax-foreclosure sale divests the former owner of title and vests title with the state in fee simple with a new chain of title being formed); *James A Welch Co, Inc v State Land Office Bd*, 295 Mich 85, 93-95; 294 NW 377 (1940) (holding that after the state received absolute title to land that was sold for delinquent property taxes, the former owner held no greater interest in title to the land than any other stranger); *Meltzer v State Land Office Bd*, 301 Mich 541, 545; 3 NW2d 875 (1942) (affirming *Krench* and *Welch* and concluding that once absolute title to a tax-foreclosed property vests with the state, the former owners hold "no interest in the land at the time of the tax sale").

¹¹⁰ *Welch*, 295 Mich at 92 (quotation marks and citation omitted; emphasis added).

plus proceeds. This vested right did not simply “vanish[] into thin air.”¹¹¹ In the same way that the foreclosure process does not eliminate the former property owner’s interest in the personal property that sits on the foreclosed land, the vesting of fee simple title to the real property does not extinguish the property owner’s right to collect the surplus proceeds of the sale. This is a separate property right that survives the foreclosure process. Accordingly, like any other creditor, defendants were required to return the surplus.¹¹²

We see no reason to recharacterize these surplus proceeds as public money to be transferred into the county general fund and used for public purposes wholly independent of the GPTA without paying just compensation.¹¹³ While plaintiffs’ takings claim was not compensable until their properties sold for an amount in excess of their tax debts, that lack of an immediate right to collect the surplus proceeds does

¹¹¹ *Armstrong v United States*, 364 US 40, 48; 80 S Ct 1563; 4 L Ed 2d 1554 (1960) (holding that the government’s “total destruction” of the value of a lienholder’s lien against government-held property was an unconstitutional taking).

¹¹² See *Lawton*, 110 US at 150 (“[S]o far as such owner is concerned, the surplus money is set aside as his as fully as if it had come from a third person. . . . It can make no difference that the United States acquired the property by bidding one dollar more.”); *Armstrong*, 364 US at 48 (“[T]he Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done.”); see also *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 91; 878 NW2d 816 (2016) (“No one disputes that the mortgagee is entitled to recover only his debt. Any surplus value belongs to others, namely, the mortgagor or subsequent lienors.”) (quotation marks and citation omitted).

¹¹³ See *Webb’s Fabulous Pharmacies, Inc v Beckwith*, 449 US 155, 164; 101 S Ct 446; 66 L Ed 2 358 (1980) (“[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . .”).

not mean that plaintiffs had no right to collect the surplus proceeds at all.¹¹⁴ Indeed, a former property owner only has a right to collect the surplus proceeds from the tax-foreclosure sale; that is, a former property owner has a compensable takings claim if and only if the tax-foreclosure sale produces a surplus. Once the sale produces a surplus, the former owner may make a claim for the surplus proceeds. Again, this holds true even though the former owner no longer holds title to the property.

Moreover, we are unmoved by caselaw from other states that have addressed the disposition of surplus proceeds. Some courts that have confronted the issue whether a cognizable takings claim can be made for the surplus proceeds have only addressed the issue in the context of the federal Takings Clause.¹¹⁵ Unlike those courts, however, our holding speaks to Michigan's Takings Clause, which this Court has, on occasion, interpreted as offering broader protection to property owners.¹¹⁶ Other courts have limited the inquiry to whether there is statutory authority for a property owner to collect the surplus proceeds, not whether a

¹¹⁴ *Id.* at 162 (explaining that creditors of a deposit account, whose statutory right to collect a portion of the account's interest did not accrue until distribution of the account was ordered, had a cognizable property right despite that right not being immediately compensable).

¹¹⁵ See, e.g., *Ritter v Ross*, 207 Wis 2d 476, 484-485; 558 NW2d 909 (1996) (analyzing the former property owners' claim for the surplus proceeds under the federal Takings Clause and holding that no taking under that clause occurred), cert den 522 US 995 (1997); *Auburn v Mandarelli*, 320 A2d 22, 25 (Me, 1974) (same).

¹¹⁶ See *AFT Mich*, 497 Mich at 217 & n 9 ("Although the courts of this state have applied the state and federal Takings Clauses coextensively in many situations, this Court has found that [Michigan's Takings Clause] offers broader protection than [the federal Takings Clause].") (citation omitted), comparing *Kelo*, 545 US 469, with *Hathcock*, 471 Mich 445.

right existed within their states' common law.¹¹⁷ Moreover, a few courts have addressed the takings issue in the context of other areas of jurisprudence, including tax collection, forfeiture, and due process.¹¹⁸ That said, we note that two states, Vermont and New Hampshire, have recognized the government's obligation to return any surplus proceeds to the former owner after a tax-foreclosure sale and that the failure to return those proceeds is a taking under their state constitutions.¹¹⁹

¹¹⁷ See, e.g., *Kelly v Boston*, 348 Mass 385, 388; 204 NE2d 123 (1965) (“We think it is clear from the above history of the tax statutes that the Legislature intended the surplus from a sale of land taken for nonpayment of taxes, on which the right of redemption has been foreclosed in the Land Court, to belong to the municipality.”); *Automatic Art, LLC v Maricopa Co*, unpublished opinion of the United States District Court for the District of Arizona, issued March 18, 2010 (Case No. CV 08-1484-PHX-SRB), pp 5-7 (holding that, under Arizona’s statutory scheme governing tax foreclosures, the government’s retention of the surplus proceeds is not an unconstitutional taking because “Arizona law does not provide for the recovery of any funds by a previous owner after a tax sale”); *Reinmiller v Marion Co*, unpublished opinion of the United States District Court for the District of Oregon, issued October 16, 2006 (Case No. CV 05-1926-PK), pp 2-4 (holding the same under Oregon law).

¹¹⁸ See, e.g., *Balthazar v Mari Ltd*, 301 F Supp 103, 105 n 6 (ND Ill, 1969) (“Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue.”), *aff’d* 396 US 114 (1969); *Sheehan v Suffolk Co*, 67 NY2d 52, 60; 490 NE2d 523 (1986) (“There is no constitutional prohibition against such a full forfeiture.”); *Miner v Clinton Co*, 541 F3d 464, 475 (CA 2, 2008) (“The retention of any surplus from a tax auction is constitutional because there was no violation of plaintiffs’ right to due process related to the notices of foreclosure.”).

¹¹⁹ See *Bogie v Barnet*, 129 Vt 46, 55; 270 A2d 898 (1970) (“No justification for the withholding of this excess from the plaintiff, derived as it was from the compelled sale of his land, has been demonstrated. Its retention by the town amounts to an unlawful taking for public use without compensation, contrary to . . . the Vermont Constitution.”); *Polonsky v Bedford*, 173 NH 226, 239; 238 A3d 1102 (2020) (Case No. 2019-0339); slip op at 12 (holding that, under New Hampshire’s Takings Clause, “the taking of property without just compensation is unconsti-

Similarly, we hold that defendants were required to return the surplus proceeds to plaintiffs and that defendants' failure to do so constitutes a government taking under the Michigan Constitution entitling plaintiffs to just compensation.

B. DEFENDANTS CANNOT RELY ON THE TAXING POWER TO
JUSTIFY THEIR RETENTION OF THE SURPLUS PROCEEDS

Defendants also contend that their actions are simply a matter of tax collection and that “there can be no taking when a Michigan county forecloses on a property for the nonpayment of taxes.”¹²⁰ The Legislature undoubtedly has the inherent power to levy taxes, and cities and villages also have the authority to impose taxes for public purposes.¹²¹ We recognize that municipalities rely heavily on their citizens to timely pay real-property taxes so that local governments have a source of revenue for their operating costs.¹²² Nothing in this opinion impedes defendants' right to hold citi-

tutional, even when the municipality has taken the property by tax deed due to the former owner's failure to pay taxes,” and that the municipality's failure to return any excess proceeds to the former owner is an unconstitutional taking), citing *Thomas Tool Servs, Inc v Croydon*, 145 NH 218, 220; 761 A2d 439 (2000).

¹²⁰ Defendants' Brief on Appeal (April 3, 2019) at 14.

¹²¹ Const 1963, art 9, § 1 (“The legislature shall impose taxes sufficient with other resources to pay the expenses of state government.”); Const 1963, art 7, § 21 (“Each city and village is granted power to levy other taxes for public purposes, subject to limitations and prohibitions provided by this constitution or by law.”).

¹²² *Walker*, 445 Mich at 702 (“Traditionally, the property tax—and in particular, the tax on real property—has been the mainstay of municipal revenue-gathering—the largest single source of municipal revenue.”) (quotation marks and citation omitted); see also *Tax Liens*, 75 Ind L J at 756 (explaining that property taxes are the primary source of revenue for local governments and that “[t]he failure to collect even a small portion of property taxes can have a dramatic impact on local governments”).

zens accountable for failing to pay property taxes by taking citizens' properties in satisfaction of their tax debts. What defendants may not do under the guise of tax collection is seize property valued far in excess of the amount owed in unpaid taxes, penalties, interest, and fees and convert that surplus into a public benefit. The purpose of taxation is to assess and collect taxes *owed*, not appropriate property *in excess of what is owed*. Defendants' ability to take plaintiffs' properties was limited by what plaintiffs actually owed as a result of failing to pay their taxes. Thus, defendants' retention of the surplus proceeds amounts to a taking of plaintiffs' properties far in excess of plaintiffs' tax debts that cannot be justified as a valid form of tax collection.

Moreover, "the power of taxation should not be confused with the power of eminent domain . . ." ¹²³ As Justice Cooley has explained, whereas taxation requires citizens to bear the burden of public expenses equally and proportionally, "something exceptional" is taken under the government's exercise of eminent domain such that apportionment cannot be achieved, thus requiring compensation "of a pecuniary nature" to the property owner. ¹²⁴ By retaining the surplus proceeds and transferring them into the county general fund to be used for public purposes, defendants are forcing delinquent taxpayers to contribute to the general government revenues beyond their fair share. This is not simply an adjustment of "the benefits and burdens of economic life to promote the common good." ¹²⁵ Rather, this confiscation of the sale proceeds

¹²³ *Koontz v St Johns River Water Mgt Dist*, 570 US 595, 617; 133 S Ct 2586; 186 L Ed 2d 697 (2013) (quotation marks and citation omitted).

¹²⁴ Cooley, *General Principles*, pp 333-334.

¹²⁵ See *Penn Central Transp Co v City of New York*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978); see also *AFT Mich*, 497 Mich at 218

in excess of what is actually owed requires delinquent taxpayers “‘alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”¹²⁶ Michigan’s Takings Clause was “‘adopted for the protection of and security to the rights of the individual as against the government’”¹²⁷ To permit such forced contributions to stand would undermine the very rights our Takings Clause seeks to protect.

Put simply, defendants’ argument that the taxing power justifies their retention of the surplus proceeds from tax-foreclosure sales over and above property owners’ tax liabilities is an exceedingly poor attempt at disguising a physical taking of property requiring just compensation as an arbitrary and disproportionate tax.¹²⁸

C. JUST COMPENSATION IS EQUAL TO THE AMOUNT OF SURPLUS PROCEEDS GENERATED FROM THE TAX-FORECLOSURE SALE

Having found an unconstitutional taking, we must next decide the method by which just compensation

(“[G]overnmental action creating general burdens or liabilities, i.e., merely requiring citizens to expend monies for valid public purposes and expenditures, typically will not form the basis for a cognizable taking claim.”).

¹²⁶ *Webb’s Fabulous Pharmacies*, 449 US at 163, quoting *Armstrong*, 364 US at 49.

¹²⁷ *Bott v Natural Resources Comm*, 415 Mich 45, 81 n 43; 327 NW2d 838 (1982), quoting *Pearsall v Eaton Co Bd of Supervisors*, 74 Mich 558, 561; 42 NW 77 (1889).

¹²⁸ See *Acker v Comm’r of Internal Revenue*, 258 F2d 568, 574 (CA 6, 1958) (“[D]espite the breadth of the taxing power conferred by the Constitution, there might arise ‘a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is, a taking of the same in

may be determined. This Court has stated that the remedy for a government taking is “just compensation for the value of the property taken.”¹²⁹ As our holding today makes clear, the property “taken” is the surplus proceeds from the tax-foreclosure sale of plaintiffs’ properties to satisfy their tax debts. While it could be said that plaintiffs have received at least some compensation, given that they are no longer liable for their delinquent taxes,¹³⁰ satisfaction of plaintiffs’ tax debts cannot constitute just compensation for the value of the property taken, i.e., the surplus proceeds. Therefore, plaintiffs are entitled to the value of those surplus proceeds.

Defendants submit that if plaintiffs have, in fact, pleaded a viable takings claim, then the amount of compensation due could be more than the surplus proceeds from the tax-foreclosure sale. Plaintiffs make this point in their postargument briefing, arguing that a full remedy for an unconstitutional taking requires property owners to be put in as good of position had their properties not been taken at all. That is, while the surplus proceeds from a tax-foreclosure sale are some evidence of the value of the

violation of the 5th Amendment[.]’ ”), quoting *Brushaber v Union Pacific R Co*, 240 US 1, 24-25; 36 S Ct 236; 60 L Ed 493 (1916).

¹²⁹ *Hart*, 416 Mich at 494.

¹³⁰ See *State Theft*, 54 Real Prop Tr & Est L J at 124 & nn 219-220 (“In the case of property tax foreclosure, there is some compensation provided to the owner because the proceeds from the property sale are used to satisfy the amount that the property owner owes the government in taxes, interest, and fees. This is a form of compensation because after the property is sold the former owner’s debt is canceled.”), citing Comment, *Tax Foreclosure: A Drag On Community Vitality Or A Tool For Economic Growth?*, 81 U Cin L Rev 1615, 1617 (2013) (explaining that the collection of unpaid real-property taxes involves, among other things, “liquidation of the property by public sale in order to satisfy the debt owed”).

property and compensation due, plaintiffs contend that it may be less than just compensation and may instead constitute the fair market value of their properties.¹³¹

We reject the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good a position had their properties not been taken at all. First, this would run contrary to the general principle that just compensation is measured by the value of the property *taken*. In this case, the property improperly taken was the surplus proceeds, not plaintiffs' real properties.¹³² Second, plaintiffs are largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full. If plaintiffs were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency.¹³³

Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent

¹³¹ Plaintiffs' Supplemental Brief on Appeal (December 13, 2019) at 4 n 1, citing *United States v Miller*, 317 US 369, 373; 63 S Ct 276; 87 L Ed 336 (1943) (stating that just compensation for a takings claim requires that the property owner "be put in as good position pecuniarily as he would have occupied if his property had not been taken").

¹³² This distinction also explains why the Michigan Takings Clause's 125% requirement does not apply. That provision is triggered only when the property taken consists of an individual's principal residence. That is not the case here.

¹³³ *In re State Hwy Comm'r*, 249 Mich 530, 535; 229 NW 500 (1930) ("Just compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual.").

taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less.¹³⁴

VI. CONCLUSION

We hold that plaintiffs, former property owners whose properties were foreclosed and sold to satisfy delinquent real-property taxes, have a cognizable, vested property right to the surplus proceeds resulting from the tax-foreclosure sale of their properties. This right continued to exist even after fee simple title to plaintiffs' properties vested with defendants, and therefore, defendants' retention and subsequent transfer of those proceeds into the county general fund

¹³⁴ Plaintiffs suggest that they are entitled to the equity they held in their properties before foreclosure, but throughout their briefing they conflate equity with surplus proceeds, suggesting that they are one and the same. See Plaintiffs' Brief on Appeal (February 13, 2019) at 12 ("Equity is realized when property is sold. Thus, logically, common law and statutory law have traditionally treated the surplus proceeds from the sale of foreclosed property as representing the former owner's equity."). Similarly, the concurring opinion asserts that the property right taken is the equity a former property owner held in his or her property prior to foreclosure. The concurring opinion supports this assertion with scant caselaw, relying primarily on the "equity of redemption" as representing an owner's equity interest in property. Yet the concurring opinion acknowledges that equity of redemption and equity are distinct concepts, with the former serving to protect the latter. Further, we are unaware of any authority affirming a vested property right to equity held in property generally. Nor is it necessary for us to do so here. The question presented is whether a former property owner retains the ability to collect any surplus proceeds that might result after the government seizes title to real property for failure to pay taxes and then sells that property for more than the tax delinquency. The earlier discussion reaffirms a former property owner's vested common-law property right to the surplus proceeds resulting from a tax-foreclosure sale that is protected by our state's Takings Clause. Thus, plaintiffs have a compensable takings claim for the surplus proceeds, i.e., the value of the property taken.

amounted to a taking of plaintiffs' properties under Article 10, § 2 of our 1963 Constitution. Therefore, plaintiffs are entitled to just compensation, which in the context of a tax-foreclosure sale is commonly understood as the surplus proceeds. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the Oakland Circuit Court for proceedings consistent with this opinion.

MCCORMACK, C.J., and MARKMAN, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with ZAHRA, J.

VIVIANO, J. (*concurring*). At issue is whether defendant Oakland County's retention of the surplus proceeds from tax-foreclosure sales constitutes a taking under Article 10, § 2 of the 1963 Michigan Constitution. I concur with the majority's result but disagree with much of its reasoning.¹ In its zeal to adopt a pragmatic rule in order to provide limited relief to these plaintiffs and others similarly situated, the majority has made a number of doctrinal missteps. In particular, the majority has applied a flawed interpretive methodology and, even more fundamentally, has failed to identify the correct property right. These mistakes are not without consequences. The first trenches upon the Legislature's power to abrogate nonvested property rights. And the second—by defining plaintiffs' property right as the right to surplus proceeds, instead of the right to equity more generally—would seemingly encourage and endorse many takings of a person's equity without just compensation whenever a foreclosure sale does not yield surplus proceeds.

¹ I concur in all parts except Parts IV(C), V(A), V(C), and VI.

I would instead interpret the Constitution in the usual manner, discerning the ordinary meaning of “property” and applying it to the facts here. Doing so, I conclude that the property right that has been taken from the plaintiffs is their equity in their respective properties and not any independent interest in the surplus proceeds from the tax-foreclosure sale.

I. INTERPRETIVE ISSUES

The majority correctly notes that “a claimant must first establish a vested property right under state law” in order to have a takings claim and that “the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law.”² Then the majority recounts the familiar rule that “[o]ur ‘primary objective’ in interpreting a constitutional provision such as our state’s Takings Clause is ‘to determine the text’s original meaning to the ratifiers, the people, at the time of ratification.’”³

However, the majority does not explain which words in the Takings Clause are in need of interpretation.⁴ In fact, rather than go on to explain what the ratifiers would have understood any particular words in the Takings Clause to mean, the majority proceeds to recount historical claims for surplus and a menagerie of other past cases involving vested property rights more generally. Later, when considering whether the

² *Phillips v Washington Legal Foundation*, 524 US 156, 164; 118 S Ct 1925; 141 L Ed 2d 174 (1998) (quotation marks and citation omitted).

³ *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004).

⁴ The Takings Clause reads, in pertinent part: “Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.” Const 1963, art 10, § 2.

Legislature might have abrogated a common-law right to the surplus, the majority explains:

It is clear that our 1963 Constitution protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale under Article 10, § 2. This right existed at common law; was commonly understood to exist in the common law before the 1963 ratification of our Constitution; and continues to exist after 1963, as our decision in *Dean [v Dep't of Natural Resources]*, 399 Mich 84; 247 NW2d 876 (1976) demonstrates. Because this common-law property right is constitutionally protected by our state's Takings Clause, the Legislature's amendments of the [General Property Tax Act (GPTA), MCL 211.1 *et seq.*] could not abrogate it. While the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause.^[5]

Though the majority does not make it explicit, I understand its opinion as reasoning that because various past cases and other materials appear to recognize some interest on the part of the previous landowner in the surplus proceeds after a tax foreclosure, the ratifiers would have understood the term "property" in the Constitution to encompass such a property right to surplus proceeds. Consequently, that property right must be considered frozen and inviolable under our Takings Clause. And because it is enshrined in the Constitution, the Legislature may not abrogate that common-law right; to do so would run afoul of the Takings Clause.

I, of course, take no issue with the general rule that when interpreting a constitutional provision, we aim to "determine the text's original meaning to the ratifiers . . ."⁶ Consequently, under our rules of constitutional interpretation, the definition of "property" is

⁵ *Ante* at 473.

⁶ *Hathcock*, 471 Mich at 468.

determined by what the ratifiers understood “property” to mean. But the majority’s investigation of this concept ultimately rests on a flawed understanding of original meaning. Obviously, the majority cannot say that the constitutional term “property” *means* “surplus proceeds.”⁷ Rather, what the majority says, at least implicitly, is that the phrase “surplus proceeds” falls within the meaning of “property” because the ratifiers would have considered surplus proceeds to be property at the time of ratification. But the majority never defines the term “property.” Yet, this question—the semantic content of “property”—should be at the center of any interpretation of a legal term or phrase, and its absence here is telling.⁸ Compare this with how the United States Supreme Court has defined “property” in the Takings Clause: “The constitutional provision is addressed to every sort of interest the citizen may possess.”⁹ Whether right or wrong, this definition at least gives the term a meaning that can be applied.

By contrast, the majority here focuses on what res the ratifiers would have believed were encompassed by the term “property.”¹⁰ This treats the ratifiers’ expectations about the application of the constitutional text as

⁷ Cf. McGinnis & Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 Const Comment 371, 378 (2008) (“The original meaning of the words would not normally be defined by the expected applications, but instead by the meaning that people at the time would understand the words to have.”).

⁸ Cooley, *Constitutional Limitations* (5th ed), p 49 (explaining that the purpose of interpretation is to “find[] out the true sense of any form of words”).

⁹ *United States v Gen Motors Corp*, 323 US 373, 378; 65 S Ct 357; 89 L Ed 311 (1945).

¹⁰ “Res” is Latin for “thing; event, business; fact; cause; property[.]” University of Notre Dame, *William Whitaker’s Words* <<http://archives.nd.edu/cgi-bin/wordz.pl?keyword=res>> (accessed June 26, 2020) [<https://>

binding. Such an approach has been rejected by those who, like myself, consider courts to be bound by the Constitution's original textual meaning—it is the publicly accessible meaning of the text, rather than its intended or expected applications, that binds the courts.¹¹

perma.cc/5HEJ-RHSD]. *Black's Law Dictionary* (11th ed) now defines it as “n. [Latin ‘thing’] (17c) **1.** An object, interest, or status, as opposed to a person”

¹¹ See McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's “Moral Reading” of the Constitution*, 65 *Fordham L Rev* 1269, 1284 (1997) (“Mainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong. . . . [T]hey believe that ‘[w]e are governed by what our lawmakers said—by the principles they laid down—not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases.’”) (citation omitted); Balkin, *Living Originalism* (Cambridge: The Belknap Press of Harvard University Press, 2011), p 13 (“Fidelity to original meaning as original semantic content does not require that we must apply [for example] the equal protection clause the same way that people at the time of enactment would have expected it would be applied.”); Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999), p 178 (“An expectation, in and of itself, is derived from the text and as a prediction about its effects in the future is only contingently related to the text. . . . [T]he author has no special authority relative to expectations about effects.”); Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), p 144 (“I agree with the distinction . . . between . . . ‘semantic intention’ and the concrete expectations of lawgivers. It is indeed the former rather than the latter that I follow.”); Rosenthal, *Originalism in Practice*, 87 *Ind L J* 1183, 1209 (2012) (“Most originalists draw a distinction between the original meaning of constitutional text and its originally intended applications, arguing that only the former is interpretively binding.”) (collecting sources); Barnett, *An Originalism for Nonoriginalists*, 45 *Loy L Rev* 611, 622 (1999) (“While some originalists still search for how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases, original meaning originalists need not concern themselves with this, except as circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener.”).

The ratifiers' understanding thus establishes the general meaning of "property" but not necessarily which things fall within that concept. In other words, the meaning of "property," as defined at the time of ratification, establishes the parameters by which we determine the things denoted by "property."¹² It does not necessarily establish, for all time, what those

The majority's emphasis on expected applications rather than the semantic content of the text itself fundamentally misperceives the object of interpretation as the ratifiers' intentions rather than the original public meaning of the text. As Robert Bork described the larger interpretive principle, the search for the "understanding of the ratifiers . . . is actually a shorthand formulation" for what courts must interpret "because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. It is important to be clear about this. The search is not for a subjective intention." Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster Inc, 1990), p 144. See also Calabresi & Fine, *Two Cheers for Professor Balkin's Originalism*, 103 Nw U L Rev 663, 669 (2009) ("What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law. . . . The enactment into law of these texts was an open democratic process, and every citizen was entitled to think that the words in the texts that were enacted meant what a good dictionary in use at the time said they meant.").

Contemporaneous expectations about how the constitutional text applied in a case are useful only to the extent they shed light on the original public meaning. Whittington, *Originalism: A Critical Introduction*, 82 Fordham L Rev 375, 385 (2013) ("[E]xpected applications might be helpful to later interpreters in clarifying the substantive content of the embodied constitutional rule. The Founders could be mistaken or disingenuous about the implications of adopting a proposed rule, but the rule itself must be publicly understandable. If examples of likely applications of the rule are regularly offered and there is widespread agreement on such applications, then they may be reflective of the content of the rule in question."); *Original Interpretive Principles*, 24 Const Comment at 378 (noting that expected applications are not tantamount to original meaning but can provide evidence of that meaning).

¹² See Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (Chicago: University of Chicago Press, 2015), p 222.

things were.¹³ This is particularly the case with a broad concept like property, which covers various classes of things that can be redefined by the Legislature.¹⁴

For these reasons, the ratifiers' understanding of which particular res were included in the definition of property at a particular moment in time does not dictate which res we must recognize as "property" under the Takings Clause today. Instead, I would define the term "property" according to its ordinary meaning at the time the Constitution was ratified. Because this case does not turn on fine distinctions in the definitions—but it does turn on having *some* definition rather than a mere example—it is sufficient for present purposes to employ a common definition of "property" from the relevant

¹³ Justice Thomas Cooley recognized, for example, that the same text bearing the same meaning could, over time, come to take on a different significance because changing circumstances (e.g., technology) could change the objects that fell within the unchanged textual meaning: "The bounds of [constitutional] power remain the same, but the new creations that come within its compass give it an importance which those who devised it never dreamed of." Cooley, *The Comparative Merits of Written and Prescriptive Constitutions*, 2 Harv L Rev 341, 355 (1889); see also *Dist of Columbia v Heller*, 554 US 570, 582; 128 S Ct 2738; 171 L Ed 2d 637 (2008) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, . . . and the Fourth Amendment applies to modern forms of search, . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 86 ("The meaning of rules is constant. Only their application to new situations presents a novelty. . . . Broad language can encompass the onward march of science and technology[.]").

¹⁴ See *Black's Law Dictionary* (11th ed) (defining "property" as, "[c]ollectively, the rights in a valued resource such as land, chattel, or an intangible" or "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised").

period: “something owned or possessed; *specif*: a piece of real estate”; “the exclusive right to possess, enjoy, and dispose of a thing : OWNERSHIP”; “something to which a person has a legal title.”¹⁵

Defining property using this traditional approach to constitutional interpretation avoids other problems raised by the majority’s reading. One such problem is that any property rights extant when the Constitution was ratified would be insulated from legislative change, whereas later-developed property rights would presumably be subject to change. Though the majority might conclude that the Legislature could expand the res in which citizens may have property interests, the majority’s broad position would not allow the Legislature to repeal rights in the res that were recognized property rights at the time of ratification and thereby preserved in the protective amber of the Takings Clause.¹⁶ That is not problematic if the rights the Legislature sought to abrogate were vested. The troubling sweep of the majority’s opinion, however, would extend its prohibition even to legislation that prospectively modified or abrogated nonvested property rights—i.e., rights to property that individuals might acquire in the future.¹⁷

¹⁵ *Webster’s Seventh New Collegiate Dictionary* (1963); see also *The American Heritage Dictionary of the English Language* (1969) (“1. Ownership. 2. A possession, or possessions collectively. 3. Something tangible or intangible to which its owner has legal title.”); 8 *Oxford English Dictionary* (1933) (“That which one owns; a thing or things belonging to or owned by some person or persons; . . . [a] piece of land owned[.]”).

¹⁶ Cf. *PruneYard Shopping Ctr v Robins*, 447 US 74, 93; 100 S Ct 2035; 64 L Ed 2d 741 (1980) (Marshall, J., concurring) (“Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance.”).

¹⁷ The breadth of the opinion stems, in part, from the majority’s misunderstanding about what it means for a right to be “vested.” The

This would be a novel approach to legislative power over property. We have stated, for example, that the right of redemption—which we have recognized is a property right in the context of tax-foreclosure

majority suggests that the right to surplus proceeds is “vested” because “the right to collect these proceeds was beyond a mere expectancy or claim of entitlement,” apparently because the proceeds can be owned. *Ante* at 471. In other words, the right is somehow vested irrespective of any individual circumstances—it is vested in the ether. But that is not how it works. “To constitute a vested right, the interest must be something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property . . .” *In re Certified Question*, 447 Mich 765, 788; 527 NW2d 468 (1994) (quotation marks and citation omitted). “Vested” means “[h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute . . .” *Black’s Law Dictionary* (11th ed). This requires a real person or entity and a real property right, not simply a property right in the abstract. See *Wylie v City Comm of Grand Rapids*, 293 Mich 571, 586; 292 NW 668 (1940) (noting, in the related context of due process, that “[r]ights are ‘vested’ when the right of enjoyment, present or prospective, has become the property of some particular person or persons as a present interest’”) (citation omitted); Cooley, *Constitutional Limitations*, p 438 (describing vested rights in the context of an individual’s rights and interests); 5 Smith & Philbin, *Michigan Civil Jurisprudence, Constitutional Law* (May 2020 update), § 300 (noting this definition).

For instance, I do not have a vested property right in a wild fox simply because, if I captured one, the law would recognize my ownership of it. Cf. *Pierson v Post*, 3 Cai R 175; 2 Am Dec 264 (1805). If, before I even don my hunting cap, the Legislature proscribes or limits ownership of foxes, no one would say I have been deprived of a vested property right in the fox I never owned or caught. At best, I had an expectation or hope. In the same way, someone who does not now own a home but would like to own one in the future does not have any vested property right in a home. As Justice Cooley stated, “[A] mere expectation of property in the future is not considered a vested right . . .” Cooley, *Constitutional Limitations*, p 440. And as discussed below, there is no vested right in a mere common-law rule. See notes 20-21 of this opinion and the accompanying text. Thus, although the majority purports to cabin its opinion to vested rights, its misconception of those rights leads to a wider application that encompasses nonvested rights as well.

sales¹⁸—“is not a constitutional right but exists only as permitted by statute, that such rights . . . are subject to abridgement by the legislature for the reason they are remedial in nature, and that no vested rights arise”¹⁹ Other courts, too, have recognized that the Legislature’s role in defining property rights extends to removing items from the category of property, if done prospectively, i.e., without affecting vested rights.²⁰ And, of course, even the majority recognizes that the

¹⁸ See *Cobleigh v State Land Office Bd*, 305 Mich 434, 436-437; 9 NW2d 665 (1943).

¹⁹ *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630, 639; 178 NW2d 476 (1970) (discussing *Baker v State Land Office Bd*, 294 Mich 587; 293 NW 763 (1940)); see also *Dumphey v Hilton*, 121 Mich 315, 317; 80 NW 1 (1899) (“It was held by the United States Supreme Court that the right of redemption from tax sales, although it is to be regarded favorably, does not exist, except as permitted by statute. . . . ‘While it may well be doubted whether the legislature could enact an immediate bar to any existing right, yet it is clearly settled that to prescribe the period within which any right may be enforced is within their power.’”) (citations omitted). We had earlier said that “the equity of redemption”—which was the redemption right at common law—“appertains to and goes with the title to the real estate, and is in law the property of the owner of the fee. It is an interest in land” *Case v Ranney*, 174 Mich 673, 681; 140 NW 943 (1913).

²⁰ The New York Court of Appeals held, for example, that the legislature could “extinguish [a] property right by the simple expedient of repealing the provision which gives rise to it,” but only prospectively and not as to property already vested. *Alliance of American Insurers v Chu*, 77 NY2d 573, 585-586; 571 NE2d 672 (1991); *id.* at 589 (“Nothing in our decision prevents the State from changing the law as it affects future contributions.”); 29A CJS, Eminent Domain (June 2020 update), § 72 (“It has also been held that, just as a state legislature has the power to statutorily create property interests, so too may it legislatively alter or take away those same property interests, though its power to alter the rights and obligations that attach to completed transactions is not as broad as its power to regulate future transactions.”). It is true that these sources refer to statutorily created property rights rather than those that arose from the common law. But this distinction is immaterial because, as explained below, the Legislature can abrogate the common law.

Legislature may, at times, abrogate the common law.²¹
As the United States Supreme Court has explained:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.^[22]

A vested right, therefore, cannot be divested without just compensation.²³ But the Legislature has greater scope to prospectively reshape laws establishing property rights as long as those laws function in a way that leaves vested rights untouched.²⁴ Such actions are not

²¹ Const 1963, art 3, § 7 (“The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.”).

²² *Munn v Illinois*, 94 US 113, 134; 24 L Ed 77 (1876) (discussing due process).

²³ Cf. *Bank Markazi v Peterson*, 578 US 212, 228-229; 136 S Ct 1310; 194 L Ed 2d 463 (2016) (“The Fifth Amendment’s Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a ‘public use’ and upon payment of ‘just compensation.’”) (quotation marks and citation omitted); *In re Certified Question*, 447 Mich at 787-788 (“One who asserts an uncompensated taking claim must first establish that a *vested* property right is affected.”) (emphasis added).

²⁴ See Cooley, *Constitutional Limitations*, p 440 (“Acts of the legislature . . . cannot be regarded as opposed to fundamental axioms of legislation, ‘unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint.’”) (citation omitted).

prohibited by the Takings Clause.²⁵ Thus, for example, the United States Supreme Court has held that the expectation of future child-support benefits is not protected because it is a “prospective right . . . clearly subject to modification by law, be it through judicial decree, state legislation, or congressional enactment.”²⁶

Moreover, as the United States Supreme Court and numerous state supreme courts have established, “the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source *such as state law*.”²⁷ In other words, “the Constitution protects rather than creates property interests”²⁸ Citing this rule, one federal

²⁵ There is no need to decide in this case whether other constitutional provisions may limit the Legislature’s ability to define property. My point is only that no such limitation may be found in the Takings Clause.

²⁶ *Bowen v Gilliard*, 483 US 587, 607; 107 S Ct 3008; 97 L Ed 2d 485 (1987); see also Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 Calif L Rev 1299, 1313 (1989) (“In a number of other takings cases, the Court has said that unless a right created by positive law is a ‘vested right,’ it is not property within the meaning of the takings clause. The Court’s reasoning is that when the government grants A a legal right, it normally retains the power to change the law to promote the general welfare, and thus no taking occurs when the government exercises its retained power, even though the change in the law eliminates A’s rights under the prior law. As the Court expresses it, A has not lost any ‘vested rights.’”).

²⁷ *Phillips*, 524 US at 164 (quotation marks and citation omitted; emphasis added).

²⁸ *Id.* See also *Kafka v Montana Dep’t of Fish, Wildlife & Parks*, 348 Mont 80, 93; 2008 MT 460; 201 P3d 8 (2008) (“Property interests themselves are not defined by the [federal] Takings Clause, or for that matter by [the state’s taking clause]” but by “‘background principles’ and ‘rules and understandings’ [that] focus on the nature of the citizen’s relationship to the alleged property, such as whether the citizen had the rights to exclude, use, transfer, or dispose of the property.’”) (citations omitted); *Cheatham v Pohle*, 789 NE2d 467, 473 (Ind, 2003) (“The plaintiff has no property to be taken except to the extent state law creates a property right.”); *Mayor & City Council of Baltimore v Bregenzer*, 125 Md

court has reasoned that the nature of the “property” at issue in the tax-foreclosure context would be found in local law, not the Constitution itself.²⁹ Yet by reasoning that “property” must be defined at least as the particular types the ratifiers had in mind, the majority interprets the Takings Clause as exalting those interests above the Legislature’s authority to modify them.³⁰

I believe that such a reading raises serious concerns regarding the separation of powers. The Constitution

78; 93 A 425, 426 (1915) (“The section of the Constitution quoted does not define property, nor does it declare what shall be a taking. It leaves those questions to the determination of the courts upon the facts of each particular case.”).

²⁹ *Coleman v Dist of Columbia*, 70 F Supp 3d 58, 80 (D DC, 2014).

³⁰ This result goes well beyond what the United States Supreme Court has done. Even with regard to vested property rights, the United States Supreme Court has recognized that “the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; [a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.” *Lucas v South Carolina Coastal Council*, 505 US 1003, 1027; 112 S Ct 2886; 120 L Ed 2d 798 (1992), quoting *Pennsylvania Coal Co v Mahon*, 260 US 393, 413; 43 S Ct 158; 67 L Ed 322 (1922). “And in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale).” *Lucas*, 505 US at 1027-1028. Elaborating on these points in his *Lucas* dissent, Justice Stevens observed that “[a]rresting the development of the common law” would be “a departure from our prior decisions[.]” *Id.* at 1069 (Stevens, J., dissenting). Legislatures, he explained, “often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined ‘property.’ ” *Id.* All of this—in both the majority and dissent—referred to the legislature’s expansive power over property a person already owned. In this case, the majority goes in the opposite direction and ties the Legislature’s hands in regulating property that does not yet exist and that *no one* yet owns.

provides that “the legislative power of the State of Michigan is vested in a senate and a house of representatives.”³¹ This Court has recognized that the legislative power includes the power to abrogate the common law.³² In fact, the Constitution specifically allows the common law to be changed: Const 1963, art 3, § 7 states, “The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, *or are changed*, amended or repealed.”³³ It is true that this Court has applied the principle that statutes in derogation of the common law must be strictly construed.³⁴ But the majority now significantly limits that power by reasoning that any attempt to prospectively abrogate a common-law property right in a particular object that existed in 1963, without providing just compensation, is unconstitutional.³⁵

II. THE PROPERTY RIGHT AT ISSUE

The majority’s flawed interpretive methodology has led it to characterize the “property” at issue as merely

³¹ Const 1963, art 4, § 1.

³² E.g., *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (“The Legislature has the authority to abrogate the common law.”).

³³ Emphasis added.

³⁴ E.g., *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508; 309 NW2d 163 (1981) (“[S]tatutes in derogation of the common law must be strictly construed . . .”).

³⁵ Additionally, I believe that the majority’s approach has broad implications in the realm of regulatory takings. If the ratifiers’ understanding of which particular objects an individual may have property rights in is now set in stone in the Constitution, I see no reason why the ratifiers’ understanding of the scope of their property rights is also not set in stone. In other words, under the majority’s approach, if the ratifiers believed that their property interest entitled them to use a resin a variety of ways,

the surplus proceeds from the foreclosure sale. But the existence and scope of these proceeds are contingent upon the foreclosure sale—the proceeds spring to life only at the end of that process. The majority does not consider the property interests that exist before the sale or how these interests affect the taxpayer’s entitlement to anything resulting from the sale. In starting its analysis at the end of the process, the majority ignores the laws and history of real-property ownership and creates problematic gaps in the process that fail to respect takings law. My analysis, by contrast, starts at the beginning: the property owners’ preexisting interest in the real estate, or their equity.

A. THE MAJORITY’S MISTAKEN APPROACH

It is important, at the outset, to note the questionable basis for the majority’s conclusion that “our state’s common law recognizes a former property owner’s property right to collect the surplus proceeds” The majority relies, first, on the Magna Carta, saying, “Just as the Magna Carta protected property owners from uncompensated takings, it also recognized that tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess.”³⁶ But the provision of the Magna Carta to which the majority refers concerns collecting debts by seizing only movable property.³⁷ It is

each of those ways must be read into the definition of “property” under the Takings Clause. Consequently, it would be unconstitutional for a regulation to take away any use of a res that the ratifiers would have understood their property rights to include.

³⁶ *Ante* at 463.

³⁷ *Ante* at 463-464 n 82. Clause 26 of the Magna Carta reads:

If at the death of a man who holds a lay ‘fee’ of the Crown, a sheriff or royal official produces royal letters patent of summons

much more understandable to have a rule discouraging the government from needlessly taking property in excess of the tax debt when the government is seizing various movable goods rather than real estate—it is easier to take the chair and leave the table than it is to take the kitchen and leave the living room. Thus, although many of our rights can be traced to the Magna Carta, I question whether Clause 26 has much bearing on the seizure of real property.³⁸ Additionally, it is not quite true that tax collectors could only seize property to satisfy the debt—as “the value of the goods seized had to approximate the value of the debt[.]”³⁹ Such a rule falls short of one that demands any surplus be returned to the previous owner.

Next, the majority turns to *People ex rel Seaman v Hammond*, 1 Doug 276 (Mich, 1844), noting that though *Seaman* held that the previous landowner was

for a debt due to the Crown, *it shall be lawful for them to seize and list movable goods found in the lay ‘fee’ of the dead man to the value of the debt, as assessed by worthy men. Nothing shall be removed until the whole debt is paid, when the residue shall be given over to the executors to carry out the dead man’s will. If no debt is due to the Crown, all the movable goods shall be regarded as the property of the dead man, except the reasonable shares of his wife and children.* [Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 St Mary’s L J 1, 47 (2015) (emphasis added).]

³⁸ See Baker, *An Introduction to English Legal History* (Dayton: LexisNexis, 2002), p 223 (“The most fundamental distinction in the English law of property was between real property (realty) and personal property (personalty).”). Indeed, the conception of ownership of land—real property—was only just emerging in the thirteenth century from innovations within the feudal system. *Id.* at 223-237; see also Turner, *The Equity of Redemption: Its Nature, History and Connection with Equitable Estates Generally* (Cambridge: Cambridge University Press, 1931), pp 1-3. The majority’s resort to Blackstone is similarly unavailing because Blackstone’s discussion of bailments deals with goods rather than real property. See *ante* at 463-464, citing 2 Blackstone, *Commentaries on the Laws of England*, p *452.

³⁹ *Ancient Magna Carta*, 47 St Mary’s L J at 47.

entitled to the surplus, the statutory scheme at the time was different than the GPTA. Specifically, the statute specified that the excess proceeds must be returned to the owner.⁴⁰ The majority appears to recognize that *Seaman*, and other cases involving statutes, are not particularly instructive.⁴¹ Nevertheless, the majority concludes that “a fair reading of *Seaman* demonstrates that in the early years of this state, it was commonly understood that the delinquent taxpayer, not the foreclosing entity, continued to own the land at the time of the tax-foreclosure sale and would have been entitled to any surplus, which no more followed title to the land than the former owner’s other personal property.”⁴² But this is a misreading of *Seaman*. To the extent that the owner’s entitlement to the surplus was “commonly understood,” it no doubt resulted from the statute that expressly provided such a right. If the majority means this common understanding somehow reflected a common-law right to the surplus, I do not see how. It is just as possible that the statutory scheme provided for a right in the surplus because the Legislature did not believe the common law recognized such a right. Speculations on what the Legislature thought it was doing are thus unfruitful and far afield from establishing a common-law right to

⁴⁰ *Seaman*, 1 Doug at 278.

⁴¹ The majority also cites *United States v Lawton*, 110 US 146; 3 S Ct 545; 28 L Ed 100 (1884), and *Nelson v City of New York*, 352 US 103; 77 S Ct 195; 1 L Ed 2d 171 (1956). See *ante* at 460 (“Significantly, *Seaman*, *Lawton*, and *Nelson* all address a former property owner’s statutory right to recover the surplus proceeds.”). See also *ante* at 461 (“*Lawton* and *Nelson* establish that the Takings Clause under the United States Constitution may afford former property owners a remedy when a tax-sale statute provides the divested property owner an interest in the surplus proceeds and the government does not honor that statutory interest.”).

⁴² *Ante* at 465-466.

the proceeds. In sum, it is far from clear what implications the former existence of a statutory right to surplus proceeds has in determining the application of the constitutional right in this case.

And *Dean*, 399 Mich 84, can hardly be read as recognizing a longstanding vested property right in the surplus. That case considered an unjust-enrichment claim. The key determination in that cause of action is whether retention of the benefit is inequitable, not which party has the property right.⁴³ In other words, *Dean* involved an equitable decision based on the specific facts of the case. Those facts, which involved “the alleged good-faith attempt at redemption, the running of the redemption period after this attempt with plaintiff under the impression that she had in fact redeemed her home, the loss of her home, and the sale of the property by the State for a profit of close to \$10,000,” are very different than those here.⁴⁴ *Dean* does not indicate that all former property owners have a property right to the surplus as a matter of course.⁴⁵

B. EQUITY

In contrast to the majority’s approach, I would turn to the law of property and the development of property

⁴³ See also *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260 (2010) (“Unjust enrichment is defined as the unjust retention of ‘money or benefits which in justice and equity belong to another.’”), quoting *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (citation omitted).

⁴⁴ *Dean*, 399 Mich at 94-95.

⁴⁵ The majority also cites the brief discussion on surplus proceeds in Cooley, *Law of Taxation* (3d ed), p 952. See *ante* at 464. But Cooley never stated the right to surplus was of common-law origin. Instead, the treatise explained that “[v]arious methods are *adopted* in different states

interests in real estate to determine the rights at issue. The history of equity in real estate is particularly illuminating because this property right formed in response to foreclosure practices that raised concerns like those in the present case. Until mortgages came into widespread use, creditors generally obtained a “gage of land” as security in the debtor’s land, but the creditor could not recover possession of the land from the debtor.⁴⁶ That defect, from the creditor’s perspective, likely led to the creation of the predominant form of common-law mortgage, in which the mortgagor conveyed the land, usually in fee simple, to the mortgagee on the condition subsequent that it would be reconveyed to the mortgagor when the debt was repaid at the appointed time.⁴⁷

to save, *if possible*, something to the owner when his land is sold.” Cooley, *Law of Taxation*, p 952 (emphasis added). As the majority notes, Cooley found support in *Lawton*, 110 US 146, but that is another case dealing with a statutory scheme rather than the common law. See *ante* at 464-465 n 86.

⁴⁶ Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973), pp 12, 138; see also Hazeltine, *General Preface*, in Turner, *The Equity of Redemption*, pp xxiv-xxx (describing the gage as a conveyance on condition precedent); 3 Holdsworth, *A History of English Law* (3d ed), pp 128-129 (calling the interest a mortgage but differentiating it from later practices and explaining that the creditor could not dispossess the debtor if the latter had possession).

⁴⁷ See *An Introduction to English Legal History*, pp 311-312 (“[T]he mortgagor conveyed the fee to the mortgagee forthwith, on condition that he might re-enter (and regain the fee) if he paid by a certain date. . . . [This] gave the mortgagee a fee simple defeasible by condition subsequent (that is, payment).”); Simpson, *An Introduction to the History of the Land Law* (London: Oxford University Press, 1961), p 225 (“[T]he mortgagor conveyed his lands outright in fee simple to the mortgagee, with a covenant for re-conveyance if the debt was repaid on time; this is the classical common law mortgage”); 3 Holdsworth, p 129 (“It was probably due chiefly to the latter cause [i.e., the creditor’s inability to recover the land from a debtor in possession] that the peculiar interest of the mortgagee . . . disappeared. He ceased to take a

The harshness of this procedure was evident to many at the time and is similar to harshness involved in the present case, namely that it automatically led to the full loss of the mortgagor's interest in the property no matter how much debt was owed—no surplus was owed or paid to the mortgagor.⁴⁸ Equity courts ad-

peculiar interest as mortgagee, and took instead some one of the recognized estates or interests in the land—a fee simple, a life estate, or a term. . . . The debtor might convey the land to the creditor in fee, with a proviso that if the debt was paid by a fixed date the land should be reconveyed[.]”); Turner, *The English Mortgage of Land as a Security*, 20 Va L Rev 729, 729 (1934) (“The English mortgage has developed from a form of conveyance in use in the 16th century comprising an absolute conveyance to the lender with a proviso that, on the borrower repaying the principal with interest and costs by a fixed day, the lender would reconvey the property to him.”); Lloyd, *Mortgages—The Genesis of the Lien Theory*, 32 Yale L J 233, 234 (1923) (“If the debt was not paid on the day named, the estate of the creditor became absolute. After default no right of redemption was admitted.”).

⁴⁸ See Restatement Property, 3d, Mortgages, § 3.1, comment a (“The consequences of payment default were especially harsh on the mortgagor. If for any reason the payment was not made on law day, the borrower forfeited all interest in [the property].”); 5 Tiffany, *Real Property* (3d ed, November 2019 update), § 1518 (noting that equity intervened out of justice because “no foreclosure was necessary [under the common-law mortgage], since the mere breach of the condition vested an absolute estate in the mortgagee”); *An Introduction to English Legal History*, p 313 (explaining that equity courts began granting relief in this situation because “[t]he moneylender was morally entitled only to the debt, and perhaps some reasonable profit, but ought not to profit unconscionably from a penal arrangement”); *An Introduction to the History of the Land Law*, pp 226-227 (“The common law courts construed mortgage transactions strictly and unsympathetically. If the mortgage provided that the mortgagor was to lose his land through defaulting in payment upon a fixed day then that was that; it mattered nothing that he defaulted by a single day, or that the property was worth infinitely more than the debt.”); 5 Holdsworth, *A History of English Law* (1924), pp 330-331 (noting that equity granted relief because of the penal character of the forfeiture); Sugarman & Warrington, *Land Law, Citizenship, and the Invention of “Englishness”: The Strange World of the Equity of Redemption, in Early Modern Conceptions of Property* (Brewer & Staves eds, 1995), p 113 (“A single day’s delay in tendering

dressed these concerns—in part because the transaction functioned as an extension of a security interest in

repayment could result in the borrower losing the entire property to the lender, even though the amount of the loan might be far less than the value of the land.”); Burkhart, *Fixing Foreclosure*, 36 Yale L & Pol’y Rev 315, 320 (2018) (noting that this “process,” as incorporated in the American colonies, “often gave lenders an especially large windfall because land values were increasing at a greater rate than had previously occurred anywhere”); Weinberger, *Tools of Ignorance: An Appraisal of Deficiency Judgments*, 72 Wash & Lee L Rev 829, 849-850 (2015) (noting that the borrower was not entitled to any surplus and lost title and all interest in the property); Mattingly, *The Shift From Power to Process: A Functional Approach to Foreclosure Law*, 80 Marq L Rev 77, 90 (1996) (“The pendulum of power swung towards the borrower with the intervention of the Equity Courts, which viewed the borrower’s forfeiture of any interest in the property as unduly harsh.”); Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 Cornell L Rev 850, 856 (1985) (“Equity soon recognized the injustice of the forfeiture inherent in this situation.”).

The same points are true regarding strict foreclosures, which developed along with the changes in mortgage law described above and, as in the present case, transfers title by court decree rather than automatically by extinguishment of the condition subsequent or by foreclosure sale. In strict foreclosure, as under the common-law mortgage or the statutes at issue here, the homeowner loses his or her equity in the property. Ghent, *How Do Case Law and Statute Differ? Lessons from the Evolution of Mortgage Law*, 57 J L & Econ 1085, 1094 (2014) (“Strict foreclosure involved the lender going to an equity court and asking it to terminate the borrower’s equity of redemption; foreclosure by sale of the property was not permitted, and any equity the borrower had in the property would be lost in the foreclosure.”); Tracht, *Renegotiation and Secured Credit: Explaining the Equity of Redemption*, 52 Vand L Rev 599, 607 (1999) (“Under strict foreclosure (where foreclosure vests title in the lender), there will be a forfeiture by the borrower and a windfall to the lender if the property is worth more than the debt.”); Brabner-Smith, *Economic Aspects of the Deficiency Judgment*, 20 Va L Rev 719, 720-721 n 2 (1934) (Strict foreclosure “is a proceeding in which the decree finds that the mortgagee debt is due and has not been paid, that title to the property therefore is absolute in the mortgagee, and that the mortgagor is entirely divested of whatever interest he had in the premises at the time of the execution of the mortgage. There is no sale and no resulting deficiency or surplus.”).

the property rather than a true transfer of the fee—by creating the “equity of redemption,” under which the mortgagor could redeem the property by paying off the debt after defaulting.⁴⁹ The “equity of redemption” was considered—including by this Court—a property right and came to represent the homeowner’s interest in the property, known as “equity.”⁵⁰

⁴⁹ See 1 Coote, *A Treatise on the Law of Mortgages* (2d ed), pp 19-20 (“[Equity courts] declared it unreasonable that [the mortgagee] should retain for his own benefit, what was intended as a mere pledge; and they adjudged that the breach of the condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest, and costs”); Sugarman & Warrington, *Equity of Redemption*, p 113 (“Dating from at least the turn of the seventeenth century, the courts of equity determined that the strict date for repayment was somewhat irrelevant. Accordingly, the lender’s claim to the property became subject ‘to a right called the equity of redemption, which arose from the court’s consideration that the real object of the transaction was the creation of a security for the debt. This entitled the [borrower] to redeem (or recover the property), even though he had failed to repay by the appointed time.’”) (citation omitted; brackets in original); Waddilove, *The “Mendacious” Common-Law Mortgage*, 107 Ky L J 425, 457 (2019) (“The equity of redemption . . . looked to what it deemed to be underlying substance of the mortgage agreement and gave effect to that over legal interpretation.”).

The mortgagor’s specific right to redeem property after foreclosure has been codified in Michigan, and the foreclosure sale purchaser’s deed does not vest until the redemption period ends. See MCL 600.3240(1) and (2); MCL 600.3236. See also *People v March*, 499 Mich 389, 416-421; 886 NW2d 396 (2016).

⁵⁰ As described in the Restatement Property, 3d, Mortgages, § 3.1, comment a, the “concept [of equitable redemption] evolved from simply a late payment rule to connote, in addition, the mortgagor’s ownership interest in the land prior to the satisfaction of the mortgage. The term ‘equity’ became and is today the pervasively used term to describe this interest.” See also *Case*, 174 Mich at 681 (“As a general proposition, the equity of redemption appertains to and goes with the title to the real estate, and is in law the property of the owner of the fee. It is an interest in land”); *An Introduction to English Legal History*, p 314 (“The equity of redemption had thus become a right inherent in the land [T]he great landowner of the seventeenth, eighteenth and nineteenth

Thereafter, the equity courts “developed the decree of foreclosure,” which a mortgagee could seek in order

centuries was commonly in possession of his land (or some of it) only as the owner of an equity of redemption. The equity could be bought and sold, settled in tail, and even mortgaged. . . . [I]t had become an equitable estate[.]”); *An Introduction to the History of the Land Law*, pp 227-228 (“[T]he equity of redemption [was] a peculiar form of property which could be dealt with by the debtor like other forms of equitable property. . . . In the eighteenth century the final touches were put upon the conception; the equity of redemption is spoken of as an estate in the land, and the mortgagor is regarded as the owner in equity of the land.”); Turner, *The Equity of Redemption*, pp 66-67 (“An equity of redemption is considered as an estate in land[.] . . . The person having the equity of redemption is considered as the owner of the land An equity of redemption, . . . un-foreclosed, is the ownership of the land, or the real estate in equity[.]”) (citation omitted); 6 Holdsworth, *A History of English Law* (1924), p 663 (“The result had been to make the mortgagor’s equity to redeem a right of property. He had an equitable estate in the land; and, subject to the legal rights of the mortgagee, was, in equity, regarded as its owner.”); 5 Holdsworth, p 332 (“[I]t became clear that this equitable right to redeem was in substance an equitable estate in the land which could be conveyed or settled like any other estate.”); Waddilove, *Why the Equity of Redemption?*, in *Land and Credit: Mortgages in the Medieval and Early Modern European Countryside* (Briggs & Zuiderduijn eds, 2018), § 5.1, pp 1-2 (“According to the equity of redemption, a mortgagor remained the true owner of mortgaged property throughout a mortgage despite lacking legal title; a mortgagee’s interest was mere security for a debt; and a mortgagor was thus entitled to redeem the property at any time . . . until his or her equity of redemption was declared foreclosed by a court.”); Sugarman & Warrington, *Equity of Redemption*, pp 115-116 (noting the “shift of the equity of redemption from a ‘thing’ to an ‘estate’ in equity, that is, in conceptualizing the equity of redemption as a kind of real property rather than as a kind of chattel property,” and noting further that it was “characterized . . . as a title in equity” and “was proprietorial”); *Mortgages*, 32 *Yale L J* at 236 (noting that chancery “treats the equity of redemption not as a mere right but as an estate which the mortgagor may deal with in any way consistent with the rights of the mortgagee in his security”).

Although the terms “equity” and “equity of redemption” now are “interchangeable,” they were “not equivalent” at common law because the equity of redemption originally could not be sold. Sabella, *When Enough is Too Much: Overcollateralization as a Fraudulent Conveyance*, 9 *Cardozo L Rev* 773, 780 n 32 (1987). Once it could be alienated, “the concept changed in meaning to one much closer to today’s notion of

to end the mortgagor's period of equitable redemption; when foreclosure by sale was permitted, "the mortgagee [took] the money owed to her/him, the remainder going to the mortgagor."⁵¹ Thus the creation of "equity" led to the homeowner's right to surplus proceeds from foreclosure sales. Indeed, as stated in Restatement Property, 3d, Mortgages, § 7.4, comment *a*, "[W]hen a surplus occurs, it represents what remains of the

'equity.'" *Id.* Still, a distinction exists. In discussing the mortgagor's interest in the property, one treatise states, "[T]he term 'equity of redemption' which had previously and appropriately been applied to the mortgagor's right to get back his property after default was applied somewhat inappropriately to this entirely distinct equitable ownership before default." 1 Nelson, Real Estate Finance Law (6th ed.), § 1:3. Compare *Black's Law Dictionary* (11th ed) (defining "equity" as "[a]n ownership interest in property"), with *id.* (defining "equity of redemption" as "[t]he right of a mortgagor in default to recover property before a foreclosure sale by paying the principal, interest, and other costs that are due"). Thus, perhaps it is more accurate to say a redemption right functions to protect a homeowner's equity interest. See, e.g., Note, *The Big Chill: Applicability of Section 548(a)(2) of the Bankruptcy Code to Noncollusive Foreclosure Sales*, 53 Fordham L Rev 813, 817 n 22, 834 (1985) (observing that the equity interest was originally called the equity of redemption but noting that the "debtor can protect his equity interest in the property by paying the sale price plus costs," i.e., exercise the redemption right, and that the equity of redemption "ordinarily would serve to preserve his equity interest").

⁵¹ Sugarman & Warrington, *Equity of Redemption*, pp 113-114; see also 2 Dunaway, Law of Distressed Real Estate (December 2019 update), § 26:29 (noting that any surplus over the foreclosing mortgagee's debt is paid to other liens and "[a]ny balance is distributed to the holder of the equity of redemption"); 5 Holdsworth, p 331 ("About the same period therefore we get the foreclosure decree . . ."); *Fixing Foreclosure*, 36 Yale L & Pol'y Rev at 319-320 (discussing the transition from strict foreclosure to foreclosure by public auction); *How Do Case Law and Statute Differ*, 57 J L & Econ at 1094-1095 (discussing the transition from strict foreclosure to foreclosure by sale, which protected the debtor's equity); *Through the Looking Glass*, 70 Cornell L Rev at 859 ("Foreclosure by sale was viewed as a logical way of protecting the debtor's equity in the property . . ."); *The English Mortgage*, p 730 ("Almost as soon as the equity of redemption became established the mortgagee was given an equitable right of foreclosure[.]").

equity of redemption and is, as such, a substitute *res*. The surplus stands in the place of the foreclosed real estate”⁵²

⁵² As the Missouri Court of Appeals stated:

[A] foreclosure sale surplus “retains the character of real estate for the purpose of determining who is entitled to receive it, and goes to the person to whom the real estate would have gone but for the conversion.” *Roy v. Roy*, 233 Ala. 440, 172 So. 253, 254 (1937). Such surplus represents the owner’s equity in the real estate. *Dodson v. Farm & Home Sav. Ass’n*, 208 Ga.App. 568, 430 S.E.2d 880, 881 (1993). It stands in place of the foreclosed property, subject to the same liens and interests that were attached to the land. *Timm v. Dewsnup*, 86 P.3d 699, 703 (Utah 2003). Surplus “usually arises because more land is sold . . . than is necessary to satisfy the mortgage debt. . . . [T]he money stands for the land and the rights therein are determined as though the court were dealing with the land itself.” *Morris v. Glaser*, 106 N.J. Eq. 585, 151 A. 766, 771 (N.J.Ch.1930) *aff’d mem.*, 110 N.J. Eq. 661, 160 A. 578 (N.J.Err. & App.1932). See also *First Fed. Sav. & Loan Ass’n v. Brown*, 78 A.D.2d 119, 434 N.Y.S.2d 306, 310 (1980) (foreclosure surplus “stands in place of the land for all purposes of distribution among persons having vested interests or liens upon the land”); *East Atlanta Bank v. Limbert*, 191 Ga. 486, 12 S.E.2d 865, 867 (1941) (quoting *Morris*)^[.] [*Grand Teton Mountain Investments, LLC v Beach Props, LLC*, 385 SW3d 499, 502-503 (Mo App, 2012).]

See also Nelson, § 7:32 (“The major underlying principle is that the surplus represents the remnant of the equity of redemption and the security that the foreclosure eliminated. Consequently, the surplus stands in the place of the foreclosed real estate”); Tiffany, § 1529 (“Any surplus proceeds of sale remaining after the payment of the debt secured by the mortgage are paid to the mortgagor or, if there are subsequent purchasers or incumbrancers, such surplus proceeds belong to them, in the order of priority in which their rights against the land could have been asserted. In other words, the proceeds of sale are substituted for the land itself, and become subject to outstanding liens and claims to the same extent and in the same order as the land itself was subject thereto.”) (citations omitted); Nelson & Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 Duke L J 1399, 1483 (2004) (“Sometimes a foreclosure sale yields a surplus amount in excess of what is needed to satisfy the mortgage obligation and the expenses of sale. In essence, when a surplus results, it

Given this history and caselaw, I would characterize the property right at issue here as the taxpayer's equity in the property. This conclusion best fits the development of ownership rights in property laden with debts or liens. The majority's belief that a property right in the surplus proceeds exists apart from the interest in the equity finds no support in the historical record. Indeed, equity formed in response to practices like those at issue here, albeit in the private realm, and gives rise to any right in surplus proceeds. It thus constitutes a disposable property right to the value of land above any liens or other interests in the property.⁵³ And it is a vested right—at least with regard to

represents what remains of the debtor's ownership or 'equity of redemption' and is conceptually a substitute res.”).

It is true that some courts have found that the surplus proceeds are the property owner's general funds rather than the real estate. See *In re Schiphof*, 192 NC App 696, 702; 666 SE2d 497 (2008) (“This Court stated that, ‘the surplus funds . . . did not constitute real estate. The surplus funds represented the general funds of the plaintiffs, the owners of the premises and the grantors in the deed of trust which was foreclosed.’”), quoting *Smith v Clerk of Superior Court*, 5 NC App 67, 73-74; 168 SE2d 1 (1969). This does not, however, have any bearing on a homeowner's entitlement to the proceeds by virtue of his or her equity in the home. As stated, “[E]quity” is defined as ‘the value of a property * * * above the total of the liens.’” *Crane*, 331 US at 7. Whether that value, realized in the surplus proceeds after a tax foreclosure, is thought of as representing the real estate or general funds, it is still a result of the right to equity.

⁵³ *Black's Law Dictionary* (11th ed) defines “equity” as “[a]n ownership interest in property, esp. in a business.” See also *Crane*, 331 US at 7 (“[E]quity” is defined as ‘the value of a property * * * above the total of the liens.’”). Of course, there might be other liens on the property such that a landowner's equity is less than the property value minus what was owed in taxes. It is also true that equity may fluctuate as market values change. But I see no reason why a fluctuation in equity would affect whether the right is vested. Though a property owner is not guaranteed that real property will sell for a particular amount, the owner's interest still comes from his title and is more than a “mere expectation.” *In re Certified Question*, 447 Mich at 788.

an individual who owns property with equity value—because it represents an estate in the land providing immediate and future benefit.⁵⁴ It thus fits the general definition of “property” at the time our Constitution was ratified.⁵⁵ If more proof were needed that “equity” is routinely considered the relevant property right in the nondebt value of a house, one need look no further than divorce proceedings, in which home equity is part of the property split between the parties.⁵⁶

Perhaps for these reasons, numerous courts, parties, and commentators who have addressed similar cases in the tax-foreclosure context discuss the right to a surplus as related to the homeowner’s equity—and none that I have found (nor any the majority cites) holds that the right to surplus proceeds is a freestanding property interest independent of the underlying equity interest.⁵⁷

⁵⁴ See *In re Certified Question*, 447 Mich at 788 (“To constitute a vested right, the interest must be something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property”) (quotation marks and citation omitted).

⁵⁵ See note 15 of this opinion.

⁵⁶ See, e.g., *Rogner v Rogner*, 179 Mich App 326; 445 NW2d 232 (1989) (reviewing an award of equity in the marital home).

⁵⁷ See *Dorce v City of New York*, 460 F Supp 3d 327 (SD NY, 2020) (discussing the plaintiffs’ loss of “equity” in their properties in the context of a takings challenge); *Polonsky v Bedford*, 173 NH 226, 234-235; 238 A3d 1102 (2020) (referring to the excess “equity” owed to the taxpayer and holding that when a tax deed is issued, a taking occurs “requiring that [the government] provide just compensation to the former owner when, as here, the equity in the property exceeds the amount owed”); *Automatic Art, LLC v Maricopa Co*, unpublished opinion of the United States District Court for the District of Arizona, issued March 18, 2010 (Case No. CV 08-1484-PHX-SRB), pp 2, 3, 6 (discussing the statutes and constitutional challenges to them as affecting the property owner’s equity in the real property); *Thomas Tool Servs, Inc v Croydon*, 145 NH 218, 220; 761 A2d 439 (2000) (“Assuming that the

The right to equity is, in fact, the very right that plaintiffs rely on here to support their claim

property is worth substantially more than the \$370.26 that the defendant paid for it, the defendant has realized an enormous surplus.”); *Syntax, Inc v Hall*, 899 SW2d 189, 190 n 1 (Tex, 1995) (“The claim for excess proceeds concedes the loss of ownership and simply seeks a return of the excess value that was received at the sale.”); *First NH Bank v Windham*, 138 NH 319, 327; 639 A2d 1089 (1994) (holding that the state constitution required notice of the tax deeding because, in part, the “tax deeding irreversibly deprives the owner of any equity in the property,” given that no surplus proceeds were then available); *Anchorage v Thomas*, 624 P2d 271, 273 (Alas, 1981) (finding a statutory right to surplus proceeds and noting “the basic injustice inherent in requiring delinquent taxpayers to forfeit the total value of their property far in excess of taxes due”); *Auburn v Mandarelli*, 320 A2d 22, 32 (Me, 1974) (“In the absence of contrary provision by statute or constitution, a municipality’s title to property acquired under the tax-lien-mortgage-foreclosure statute is absolute, and the city or town has no power to part with, nor duty to account for, any surplus value on any” equitable theory.); *Bogie v Barnet*, 129 Vt 46, 48, 54; 270 A2d 898 (1970) (finding a taking of the property to the extent of the difference between the tax sale bid “and the demonstrated far greater value of the property” evidenced by a later sale); *Balthazar v Mari Ltd*, 301 F Supp 103, 106 (ND Ill, 1969) (“[T]he Illinois tax delinquency statutes allow all real estate owners to recover the surplus value of their land.”), aff’d 396 US 114 (1969); Note, *Someone to Lien On: Privatization of Delinquent Property Tax Liens and Tax Sale Surplus in Massachusetts*, 61 BC L Rev 667, 670, 691-694 (2020) (noting that “[e]normously inequitable outcomes occur as a result [of Massachusetts’s similar tax-foreclosure law] because property owners can lose all equity in their home” and describing caselaw as addressing whether the government must return “surplus equity” left after the foreclosure sale); Note, *State Theft in Real Property Tax Foreclosure Procedures*, 54 Real Prop Tr & Est L J 93, 105 (2019) (noting that a surplus-retention system like ours “destroys property owners’ home equity and leaves them with nothing”); Bartell, *Tax Foreclosures as Fraudulent Transfers—Are Auctions Really Necessary?*, 93 Am Bankr L J 681, 706 (2019) (arguing that owners concerned about the price obtainable at a tax sale should preemptively “conduct a private sale that may generate enough proceeds to pay the taxes in full and provide the owner any extant equity”); Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U Mass L Rev 274, 286-287 (2018) (discussing caselaw that addresses the proceeds as “surplus equity”) (citation and quotation marks omitted); Kelly, Jr., *Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Internet Age*, 77 U Cin L Rev 63, 72 (2008) (“The vast majority of

jurisdictions rely on a combined sale and foreclosure process to make sure both that the taxes due are paid in full and that any *surplus value in the property* is made available to the stakeholders whose interests have been liquidated.”) (emphasis added).

Courts and parties in Takings Clause challenges to Michigan’s foreclosure system have focused on the homeowner’s deprivation of equity. See *Rafaeli, LLC v Wayne Co*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued June 4, 2015 (Case No. 14-13958), p 8 (“Plaintiffs also claim that the excess equity in their property was taken without just compensation, in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.”); Petition for Writ of Certiorari at 14, *Wayside Church v Van Buren Co*, 138 S Ct 380 (2017) (No. 17-88) (“The property interest at issue here is privately generated and owned equity.”); cf. *Freed v Thomas*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued November 7, 2018 (Case No. 17-CV-13519), p 2 (“The heart of plaintiff’s complaint is that this statutory scheme is unconstitutional because it provides no mechanism for the return to the delinquent taxpayer of the ‘surplus equity’ (i.e., the difference between the equity and the tax bill) or, in the event that the property is sold for less than fair market value, for the return to the delinquent taxpayer of the difference between the sale proceeds and the tax bill.”).

A few cases addressing whether a statute provides for surplus to the homeowner do not mention “equity,” but these cases are not deciding whether a nonstatutory basis exists for the property right in surplus proceeds; thus, they do not contradict the regnant interpretation of “surplus” as stemming from equity. See, e.g., *Lake Co Auditor v Burks*, 802 NE2d 896 (Ind, 2004) (finding statutory avenues for recovering surplus); *Kelly v Boston*, 348 Mass 385; 204 NE2d 123 (1965) (finding no statutory right to surplus). In addition, a handful of opinions rejecting constitutional challenges to tax-foreclosure statutes like the one here have not mentioned “equity,” but they did not examine in any detail the potential sources of the property right at issue. See *Miner v Clinton Co*, 541 F3d 464, 474-475 (CA 2, 2008) (rejecting a due-process claim because the notices were adequate and an equal-protection claim because no discrimination occurred); *Reinmiller v Marion Co*, unpublished opinion of the United States District Court for the District of Oregon, issued October 16, 2006 (Case No. CV 05-1926-PK) (rejecting a takings claim and stating that Oregon law did not provide any property right entitling the homeowner to the proceeds, but only discussing the relevant tax-foreclosure statutes rather than common law). In a few

under the Takings Clause.⁵⁸ One federal district court provided an insightful discussion on the topic, first summing up the United States Supreme Court's caselaw—the same cases the majority here discusses—as “mak[ing] clear that a Takings Clause violation regarding the retention of *equity* will not arise when a tax-sale statute provides an avenue for recovery of the surplus equity.”⁵⁹ The question in that case was, as here, “[w]hat if the tax-sale statute does

cases with more detailed constitutional analyses, surplus or excess proceeds are mentioned without regard to the homeowner's equity; nonetheless, the cases do not hold that these proceeds are property without regard to equity. See *Sheehan v Suffolk Co*, 67 NY2d 52, 59, 60; 490 NE2d 523 (1986) (“There is no constitutional prohibition against such a full forfeiture” of the “surplus.”); *Ritter v Ross*, 207 Wis 2d 476, 484; 558 NW2d 909 (App, 1996) (“We thus consider whether the Ritters had a property interest in the excess proceeds of the foreclosure sale”); *Oosterwyk v Milwaukee Co*, 31 Wis 2d 513, 517; 143 NW2d 497 (1966) (rejecting an unjust-enrichment claim for surplus proceeds).

⁵⁸ Plaintiffs' brief states, “The private property interest at issue in this case is privately generated and owned equity.” Plaintiffs' Brief on Appeal (February 13, 2019) at 11. The majority dismisses this argument, saying that plaintiffs “conflate equity with surplus proceeds, suggesting that they are one in the same.” Further, the majority criticizes my analysis as stating both that the equity of redemption represents an owner's equity and also acknowledging that the two are distinct. I see nothing inconsistent with noting the fact that, on one hand, the “equity of redemption” came to represent the homeowner's interest in the property, i.e., the equity, but, on the other hand, that there were and are certain distinctions between the two concepts, such as alienability, see note 50 of this opinion.

The majority goes on to say that it is unnecessary to discuss whether a property right to equity exists here because the question is whether the former property owner may collect surplus proceeds. However, it is necessary to begin the analysis with a vested right in the equity because, as explained above, there is no such thing as a vested right in surplus proceeds independent of the right to equity. Additionally, for the reasons we discuss below, even taken on its own terms, the right to surplus proceeds set forth in the majority's opinion is evanescent given that it can be so easily taken away.

⁵⁹ *Coleman*, 70 F Supp 3d at 80 (emphasis added).

not provide a right to the surplus” or an “avenue for recover[ing]” it?⁶⁰ The court continued, “A property interest in equity could conceivably be created by some other legal source,” including caselaw—although not the Takings Clause itself.⁶¹ Throughout the opinion, the property right was characterized as “surplus equity.”⁶²

In short, the relevant property right in this case is the taxpayers’ equity interest, not some contingent right to proceeds if there is a foreclosure sale. Equity has better historical grounding than any novel and freestanding right to proceeds—indeed, it is the reason entitlement to proceeds may exist—and is a common enough concept that I cannot comprehend the majority’s efforts to avoid it.

C. CONSEQUENCES

My difference of opinion with the majority on this point is no small matter. Characterizing the property right at issue as equity has very real consequences here. For one thing, the GPTA does not clearly abrogate any of a person’s property rights in their real estate or in their equity generally. Instead, the GPTA simply allocates the surplus proceeds after the tax-foreclosure sale. Accordingly, it cannot be said to have abrogated the common-law right to equity.⁶³

⁶⁰ *Id.*

⁶¹ *Id.* at 80-81.

⁶² See, e.g., *id.*

⁶³ Defendants have not raised the argument that the Legislature abrogated the common-law right to equity. See *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 709-710; 918 NW2d 756 (2018) (noting that parties raise the arguments in our adversary system). Under the regnant interpretive principle noted above, “legislative amendment of the common law is not lightly presumed,” and the

In addition, the statute contemplates—and indeed, expressly provides for—a number of scenarios in which there will be no surplus proceeds. For our purposes, the first key point in the process occurs when the court enters the foreclosure judgment. This must occur before March 30, and the judgment must become effective on March 31.⁶⁴ When it becomes effective, the taxpayer loses his or her redemption rights and absolute title vests in the government.⁶⁵ The following day, April 1, the foreclosing governmental unit obtains the right to possession.⁶⁶

Afterward, the state has until the first Tuesday in July to buy the property from the foreclosing governmental unit for the greater of either the minimum bid—which equals the debt and various additional costs⁶⁷—or the “fair market value.”⁶⁸ This protects the

“Legislature ‘should speak in no uncertain terms’ when it exercises its authority to modify the common law.” *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010) (citation omitted). Like the majority’s view that the Legislature cannot abrogate common-law property rights extant before 1963, this principle raises separation-of-powers concerns as well. See *A Matter of Interpretation*, pp 27-28. But it is longstanding, and no party has challenged it here. Under this canon, it is reasonably apparent that the Legislature left untouched the taxpayer’s common-law right to equity. Nothing in the statute clearly displaces that right. The same could not be said, however, for the majority’s separate right to surplus proceeds, which the Legislature very clearly attempted to extinguish in the GPTA. In any event, the parties’ failure to address this argument means that it should not be resolved in this case.

⁶⁴ MCL 211.78k(5). These dates are for uncontested cases. The judgment in contested cases becomes effective 10 days after the hearing, and 21 days after entry of the judgment the taxpayer loses his or her redemption rights and absolute title vests in the government. MCL 211.78k(5) and(6). In contested cases, the government obtains the right to possession 22 days after judgment enters. MCL 211.78g(1).

⁶⁵ MCL 211.78k(5) and (6).

⁶⁶ MCL 211.78g(1).

⁶⁷ MCL 211.78m(16)(a).

⁶⁸ MCL 211.78m(1).

foreclosing unit, which would be certain to recoup the debt and costs if the state exercises its right to purchase. And under this option the property might sell for a price reflecting the debt and the equity. But if the state declines, the next series of options ensures that no surplus will occur. Next, the “city, village, or township” where the property is located can purchase the property “for a public purpose” at the minimum bid, meaning that no surplus would result.⁶⁹ If they pass on the purchase, then the county has the chance to buy it (without being required to have a “public purpose” for doing so), again for the minimum bid.⁷⁰ If any of these last few governmental units—city, village, township, or county—buys the property and subsequently sells it, any excess proceeds (less additional costs) are distributed in various funds.⁷¹

If the property goes unpurchased after all this, the foreclosing unit holds one or more auctions from July to November.⁷² Although the statute prescribes notice requirements, it allows the foreclosing unit to “adopt procedures governing the conduct of the sale”⁷³ To sell the property, the foreclosing unit must receive at least the “minimum bid.”⁷⁴ If the property goes unpurchased after an auction, the city, village, township, or county can buy it for the minimum bid without needing a public purpose to do so.⁷⁵ At the final auction, there is

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² MCL 211.78m(2).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ MCL 211.78m(3).

no minimum bid.⁷⁶ Property that is not purchased is transferred to the city, village, or township where it is located unless the unit objects, in which case the property goes to the foreclosing unit.⁷⁷

In light of this statutory framework, the majority's focus on the surplus proceeds as the relevant property, and thus the postsale retention as the taking, produces puzzling results. Because "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it,"⁷⁸ under the majority's theory, no constitutional issues occur until the surplus proceeds are retained. It does not matter that once title has vested in the government without chance of redemption, the taxpayer's property—his or her equity—has been taken. Consequently, the majority's view of the case would seemingly be that if the property does not sell at auction and is simply transferred to a governmental unit, the taxpayer is out of luck: no proceeds, let alone a surplus, have been produced or retained by the government.⁷⁹ Perhaps worse still, governmental units have numerous opportunities to purchase the property for the minimum bid, i.e., for the debt (and costs), and thus obtain it for an amount that will usually be much less than fair market value. Yet in those cases, too,

⁷⁶ MCL 211.78m(5).

⁷⁷ MCL 211.78m(6) and (7).

⁷⁸ *Knick v Scott Twp*, 588 US __, __; 139 S Ct 2162, 2170; 204 L Ed 2d 558 (2019).

⁷⁹ Of course, the majority might counter that this is a question for another day because the properties here were sold. But it is hard to imagine what the majority would do in such a case besides either denying the takings claim under the theory it adopts here or reconsidering whether it is based on the taxpayer's right to the equity in his or her property.

because no surplus would result, the majority leaves the taxpayer without a remedy.

The better view, under the law described above, is that the property taken is the taxpayer's equity and that this occurs when title vests in the government with no opportunity for redemption. In that circumstance, if the government retains the property, the taxpayer would be able to seek compensation for the deprivation of his or her equity.⁸⁰ If the property is sold, any surplus represents the remaining equity in the property and is owed as the just compensation due the taxpayer.⁸¹ Returning the surplus would usually satisfy the Takings Clause by "leav[ing the property owner] 'in as good as position as if his lands had not been taken,'"⁸² i.e., by leaving the property owner with the representation of what was taken.

To elaborate on this last point, awarding the surplus as "just compensation" only makes sense in light of the underlying principle that the surplus represents the owner's equity.⁸³ It is, of course, possible that the surplus might not capture the value of a taxpayer's property.⁸⁴ But the "just compensation" requirement does not require local governments to impoverish

⁸⁰ See *Polonsky*, 173 NH at 235 (noting that the statutory scheme did not require the government to sell the foreclosed property but that, in those cases, the government has conflicts with the Takings Clause by failing to pay over the equity).

⁸¹ See note 52 of this opinion and accompanying text.

⁸² *Dep't of Transp v Tomkins*, 481 Mich 184, 198; 749 NW2d 716 (2008) (citation omitted).

⁸³ See note 52 of this opinion.

⁸⁴ See *State Theft*, 54 Real Prop Tr & Est L J at 126 (noting that limiting the taxpayer to the surplus might cause him or her to lose some equity but arguing that this result might be consistent with the "just compensation" requirement).

themselves.⁸⁵ Thus, taxpayers seeking some speculative value beyond the surplus realized in the tax sale might often lack meritorious claims. It is also worth noting, in this regard, that the taxpayers would be free to conduct a private sale of the property during the redemption period prior to title vesting in the government and, by failing to do so, might be considered to have agreed to the value produced by the tax-foreclosure sale.⁸⁶

On the other hand, by limiting the compensation to the surplus (when one exists), the majority risks depriving taxpayers of “just compensation.” As demonstrated above, the statute gives governmental units the option to ensure that there will be no surplus. Under the majority’s regime, a rational governmental actor is incentivized to buy properties that have a market value above the minimum bid amount that must be paid or to take other steps to limit or eliminate surpluses. For example, both the Legislature in constructing the statutory framework and the foreclosing

⁸⁵ See *United States v Commodities Trading Corp*, 339 US 121, 123; 70 S Ct 547; 94 L Ed 707 (1950) (“Fair market value has normally been accepted as a just standard. But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. . . . [T]he dominant consideration always remains the same: What compensation is ‘just’ both to an owner whose property is taken and to the public that must pay the bill?”) (citation omitted); *In re State Hwy Comm’r*, 249 Mich 530, 535; 229 NW 500 (1930) (“Just compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual.”).

⁸⁶ See *Tax Foreclosures*, 93 Am Bankr L J at 706-707 (arguing that courts reviewing whether foreclosure laws protect the debtor’s “equity” should consider that the debtor’s “right of redemption provides to the owner of the property the opportunity to realize the full fair market value of the property” less the taxes owed, and the debtor’s failure to avail themselves of this relief constitutes agreement to the “price obtained by the state foreclosure process”).

unit in prescribing sale procedures could design rules that diminish the probability of obtaining fair market value in the tax-foreclosure sale. Indeed, while it might be true that most sale prices now do not even cover the taxes owed, the foreclosing unit would have little incentive to conduct a sale that earns anything more than the delinquent tax sum.⁸⁷ Consequently, I would not now rule out the possibility that “just compensation” might require something greater than the surplus in a particular case, especially in cases in which the government purchased the property for the minimum bid.

But we have no reason to decide that issue in this case because, although plaintiffs nominally distinguish equity and surplus, they have offered no argument suggesting that the tax foreclosures here failed to obtain a fair price for their properties.

III. CONCLUSION

Although I agree with the majority as to the ultimate disposition of this case, I disagree with its reasoning. I would not define the constitutional term “property” by merely citing an example of what the ratifiers might have thought would fall within the meaning of that term. Instead, I would give the word its ordinary meaning at the time the Constitution was ratified and then apply that meaning to the case at hand. In addition, I would examine the relevant property right: the taxpayers’ equity in the real property. Equity falls within the semantic scope of “property”

⁸⁷ The majority seems untroubled by the possibility that what it might have taken away with one hand—i.e., the Legislature’s authority to prospectively abrogate the supposed common-law right to surplus proceeds—it has given with the other by defining the right so that the Legislature can shrink or erase those surplus proceeds.

under our Constitution. And the Legislature did not purport to abrogate the taxpayer's equity. Therefore, a taking occurred when title to plaintiffs' property was vested in the government without any possibility of redemption. In this case, I agree with the majority that plaintiffs are owed the surplus proceeds from the tax-foreclosure sales.

ORDERS IN CASES

**ORDERS ENTERED IN
CASES BEFORE THE
SUPREME COURT***Summary Disposition November 1, 2019:*

PEOPLE V VAN BUREN, No. 159291; Court of Appeals No. 339119. Pursuant to MCR 7.305(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 Wayne Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), for a determination of whether the defendant was denied the effective assistance of trial counsel. We do not retain jurisdiction.

PEOPLE V FRANK KING, No. 159442; Court of Appeals No. 346559. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted to address: (1) whether the defendant's waiver of his Sixth Amendment right to counsel was constitutionally valid; and (2) if so, what effect, if any, the defendant's subsequent no contest plea had on that waiver. We do not retain jurisdiction.

Order to Pay Costs Entered November 1, 2019:

In re THERESA M BRENNAN, JUDGE 53RD DISTRICT COURT, No. 157930. On order of the Court, the Judicial Tenure Commission's Bill of Costs is considered, and the respondent, Theresa M. Brennan, is ordered to pay costs of \$16,500.00 to the Commission.

CAVANAGH, J. (*dissenting*). I respectfully dissent. I disagree with the Judicial Tenure Commission's position that the costs, fees, and expenses requested by the Commission and imposed by the majority under MCR 9.202(B)¹ are not a sanction. I believe they are, and I do not believe that this Court possesses the authority to impose sanctions beyond those specified in Const 1963, art 6, § 30(2). In light of the fact that a majority of this Court rejected this position when it adopted the amendment of MCR 9.202(B) in 2005 and, more importantly, given that respondent here has not challenged the constitutionality of this sanction, I agree with the majority that the costs, fees, and expenses requested by the Commission should be imposed under MCR 9.202(B). I disagree, however, with the Court's decision to impose less than the amount requested and substantiated by the Commission. While it is unclear from the language of MCR 9.202(B) whether the costs, fees, and expenses imposed must be directly attributable to fraudulent, deceitful, and intentionally misrepresentative conduct, I am persuaded by the Com-

¹ Prior to September 1, 2019, this provision was located in MCR 9.205(B).

mission that even if that were the case, respondent's deceitful conduct permeated all aspects of the proceedings and further apportionment cannot be more narrowly tailored based on the record in this case. Given this conclusion, and because respondent offers no factual or legal basis for rejecting any of the requested costs, fees, and expenses or for otherwise reducing the amount requested, I would impose the full amount requested by the Commission.

I. CONSTITUTIONAL AUTHORITY

In 2005, the Court amended then MCR 9.205 to include the following:

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. [MCR 9.202(B).]

The constitutionality of this amendment was contested from its inception. Justice WEAVER authored a dissent,² arguing that the amendment was unconstitutional, and Justice CORRIGAN authored a concurrence,³ arguing the opposite. I write today because I question the propriety of this amendment to the court rule.

The Michigan Constitution provides:

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. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings. [Const 1963, art 6, § 30(2) (emphasis added).]

The Constitution, therefore, contemplates four specific types of discipline: (1) censure, (2) suspension (with or without pay), (3) retirement, or (4) removal. That the Constitution provides for only these four types of discipline suggests the exclusion of all others under the well-known

² MCR 9.205, 474 Mich ccli (2005) (WEAVER, J., dissenting). Justice M. F. CAVANAGH also dissented from the decision to adopt the amendment, but he did not provide an explanation for his dissent. See *id.* (CAVANAGH, J., dissenting).

³ *Id.* at ccxlix (CORRIGAN, J., concurring).

doctrine of *expressio unius est exclusio alterius*. See *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712 (2003) (“[T]he expression of one thing suggests the exclusion of all others . . .”).

The imposition of costs provided for in MCR 9.202(B) goes beyond the discipline contemplated in our Constitution and authorizes this Court to impose an additional form of punishment on a respondent who has engaged in certain types of dishonest conduct. Imposing costs is plainly not a censure, suspension, compelled retirement, or removal. And the fact that MCR 9.202(B) provides that costs may be imposed “[i]n addition to any other sanction” strongly suggests that the costs themselves are *a type of*, or “another,” sanction. The only contrary assertion offered by the Commission is that the assessment of costs is not a sanction, but “simply a recognition that there is an actual expense to the taxpayers of the State of Michigan to prosecute ethical violations involving deceit perpetrated by a respondent judge.” While this observation is undoubtedly true, I fail to see how it justifies an expansion of this Court’s constitutional authority.

I am also not persuaded that, whether or not the costs, fees, and expenses are a “sanction,” they are legitimately imposed by way of this Court’s authority to make rules “implementing” Const 1963, art 6, § 30 under Subsection (2) of that provision. Expanding the forms of discipline beyond that envisioned by that section of the Constitution is not simply “implementing” that section. Furthermore, I would not conclude that the Court’s general power to “establish, modify, amend and simplify the practice and procedure in all courts of this state,” Const 1963, art 6, § 5, overrides the specific instruction in § 30(2) to “implement[]” the section.

These observations aside, I recognize that a majority of this Court deemed the court rule amendment constitutional when it was adopted in 2005. Moreover, respondent does not present an argument to the contrary. In fact, in respondent’s briefing she specifically indicated agreement with Justice CORRIGAN’s position that the amendment of MCR 9.202 was a legitimate exercise of this Court’s constitutional authority. Accordingly, although I feel compelled to raise these concerns, I recognize that the Court need not address this argument in this matter.

II. APPORTIONMENT OF COSTS

Assuming the Court has the constitutional authority to impose costs, fees, and expenses incurred in prosecuting the complaint, I do not believe that it is clear, from the language of MCR 9.202(B), whether those costs, fees, and expenses are required to be directly apportioned to costs attributable to the fraudulent, deceitful, and intentionally misrepresentative conduct of the respondent and, if so, how that apportionment should be made in a particular case.⁴ Since the court rule’s amendment, this Court has yet to offer meaningful guidance on how to

⁴ It can be argued that, because the costs are only triggered by fraud, deceit, and intentional misrepresentation, they should be directly tied to the conduct that prompted their assessment. Indeed, in her statement

properly apportion costs, fees, and expenses under MCR 9.202(B). The majority's decision in this case continues this practice. I believe that the Commission and respondents alike deserve such guidance from this Court. At a minimum, I would hold that any costs imposed because of a respondent's deceitful conduct must be (a) incurred postcomplaint, and (b) actually incurred by the Commission. This rule is supported by the clear language of court rule, which indicates that costs based on a respondent's deceitful conduct must be incurred by the Commission in prosecuting the complaint.

While I recognize that the above provides only minimum guidance, this case provides a poor vehicle for outlining any further guidance on how to apportion costs, given the fact that respondent's deceit and intentional misrepresentation ran throughout the prosecution of the multicount complaint in this case. Here, the Commission persuasively argues that costs, fees, and expenses incurred as a result of respondent's deceit throughout the entirety of the prosecution cannot be more narrowly apportioned because her deceitful conduct permeated all aspects of the proceedings. Therefore, it asks that the Court impose 100% of the costs requested. Respondent fails to offer any legitimate argument to the contrary and provides no legal or factual basis for this Court to reject the Commission's requested amount.⁵ Accordingly, I would grant the Commission's request for the full amount of costs in the amount of \$35,501.68.

concurring in the decision to adopt the amendment of MCR 9.202(B), Justice CORRIGAN stated that, rather than authorizing an additional form of discipline, "assessing costs in a [Judicial Tenure Commission (JTC)] proceeding provides a procedural mechanism to protect governmental resources, especially when a JTC investigation requires the expenditure of additional resources *because of a judge's acts of misrepresentation.*" MCR 9.205, 474 Mich at ccl (CORRIGAN, J., concurring) (emphasis added).

⁵ Respondent's arguments in dispute of the costs, fees, and expenses requested by the Commission rest on statutory schemes that are inapplicable. Respondent relies on the Revised Judicature Act (RJA), MCL 600.101 *et seq.*, to argue that the Commission is not entitled to reimbursement for the master's services because a master is not a person listed in that statute whose fees can be taxed or awarded. However, the RJA pertains to what may be taxed as costs in the context of court proceedings, not judicial discipline proceedings. Furthermore, MCL 600.2405(2) specifically states that costs may be taxed for "[m]atters specially made taxable elsewhere in the statutes or rules." The costs imposed by MCR 9.202(B) fall into this category. Respondent makes similar arguments regarding the amount of expenses related to the master's compensation, MCL 600.226, and the cost of transcript fees prepared by court reporters, MCL 600.2543. Again, these statutory limitations are not applicable to judicial discipline proceedings. The compensation schedule for "retired judge[s] . . . perform[ing] judicial

III. CONCLUSION

Operating under the assumption that imposition of fees, costs, and expenses under MCR 9.202(B) is within this Court's constitutional authority, I would impose 100% of the Commission's requested costs because respondent provides this Court with no factual or legal basis to question that \$35,501.68 was in fact incurred by the Commission in prosecuting the complaint and was attributable to respondent's deceitful conduct. Because the Court imposes less than this amount, I respectfully dissent.

CLEMENT, J., joins the statement of CAVANAGH, J.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered November 1, 2019:

PEOPLE V KRISTOPHER HUGHES, No. 158652; Court of Appeals No. 338030. The appellant shall file a supplemental brief within 42 days of the date of the order appointing counsel, addressing: (1) whether the probable cause underlying the search warrant issued during the prior criminal investigation authorized police to obtain all of the defendant's cell phone data; (2) whether the defendant's reasonable expectation of privacy in his cell phone data was extinguished when the police obtained the cell phone data in a prior criminal investigation; (3) if not, whether the search of the cell phone data in the instant case was within the scope of the probable cause underlying the search warrant issued during the prior criminal investigation; (4) if not, whether the search of the cell phone data in the instant case was lawful; and (5) whether trial counsel was ineffective for failing to challenge the search of the cell phone data in the instant case on Fourth Amendment grounds. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days

duties in any court in the state," MCL 600.226(1), is different from a master's fee for conducting an investigation on behalf of the Commission. Similarly, MCL 600.2543 specifically refers to "circuit court reporters," but this proceeding did not occur in a circuit court. Instead, the Commission used freelance court reporters whose fees are not set by statute. Finally, respondent argues that the cost of copies should be governed by the RJA, specifically MCL 600.2543 and MCL 600.2549. Beyond the fact that the RJA is inapplicable to the instant proceeding for the above stated reasons, the Commission's explanation regarding how electronically "converting" is different from "copying" is convincing.

of being served with the appellee's brief. 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 November 1, 2019:

PEOPLE V CEDRIC SIMPSON, No. 159327; Court of Appeals No. 345898.

In re WRIGHT, MINORS, No. 160233; Court of Appeals No. 346194.

In re IV MELENDEZ, MINOR, No. 160250; Court of Appeals No. 346849.

BAUER V WAIDELICH, No. 160253; Court of Appeals No. 345756.

Summary Disposition November 8, 2019:

PEOPLE V HOLMES, No. 156332; Court of Appeals No. 337417. By order of July 3, 2018, the application for leave to appeal the July 6, 2017 order of the Court of Appeals was held in abeyance pending the decision in *People v Straughter* (Docket No. 156198). On order of the Court, leave to appeal having been denied in *Straughter* on July 19, 2019, 504 Mich 930 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the February 9, 2017 order of the Wayne Circuit Court denying the defendant's motion for relief from judgment, and we remand this case to the trial court for reconsideration of that motion. The trial court's stated basis for denying the motion was that "Defendant has failed to demonstrate good cause and actual prejudice under MCR 6.508(D). Furthermore, defendant's claims have no merit." However, the order failed to "include a concise statement of the reasons for the denial," as required by MCR 6.504(B)(2). We do not retain jurisdiction.

MARKMAN, J. (*dissenting*). For the reasons stated in my dissent in *People v Finnie*, 504 Mich 968, 968 (2019) (MARKMAN, J., *dissenting*), I respectfully dissent from this Court's order vacating the judgment of the trial court and remanding for reconsideration of Holmes's motion for relief from judgment. I offer two further observations. First, unlike in *Finnie*, the trial court below specifically cited the rule governing Holmes's motion and further identified the threshold showings for entitlement to relief that Holmes failed to satisfy. Thus, today's order almost certainly suggests the invalidity of a far greater number of trial court orders denying motions for relief from judgment than did our order in *Finnie*. Any perusal of the applications for leave to appeal filed in this Court should make this clear. Second, the majority continues to eschew providing any guidance regarding what satisfies the "concise statement of the reasons for the denial" requirement in MCR 6.504(B)(2). If, for

example, the court on remand provides a citation to a published case from the Court of Appeals that forecloses Holmes's argument, would this be sufficient? We do not know because our order summarily cites a court rule without more, thus setting forth no greater "reasoning" than does the trial court in its order. Const 1963, art 6, § 6 requires this Court to supply a "concise statement of the facts and reasons," just as MCR 6.504(B)(2) requires trial courts to supply a "concise statement of the reasons for the denial." And in failing to supply greater guidance to trial courts across this state that review thousands of motions for relief from judgment each year, the majority continues to hold trial courts to a higher standard than that to which we hold ourselves by giving distinctive meanings to "reason[ing]" in similar contexts. Exactly as the "analysis" of this Court's order communicates: (1) the court rule governing the obligation of the trial court, (2) the standard required to be satisfied by the trial court, and (3) the conclusion that such standard was not satisfied, the trial court's order communicates: (1) the court rule governing Holmes's motion, (2) the standard required to be satisfied by Holmes, and (3) the conclusion that such standard was not satisfied. I would deny leave to appeal.

ZAHRA, J., joins the statement of MARKMAN, J.

PEOPLE V KESIA MALONE, No. 159279; Court of Appeals No. 333852. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the sentence of the Kent Circuit Court, and remand this case to the trial court for resentencing. The trial court did not justify its sentence with appropriate reasons. Sentencing courts must consult the applicable guidelines range and take it into account when imposing a sentence and justify the sentence imposed, see *People v Lockridge*, 498 Mich 358, 392 (2015), but nothing in the record suggests the trial court considered the defendant's applicable range. We do not retain jurisdiction.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order peremptorily reversing the judgment of the Court of Appeals and remanding Kesia Dionna Malone's case for resentencing. The trial court, in support of imposing a sentence tied to the statutory maximum for first-degree retail fraud, cited Malone's criminal history and the fact that she was serving two probation sentences when she committed her instant offense. Malone's criminal record—21 convictions, 11 of which are for various degrees of retail fraud—speaks for itself. That shortly before her instant offense Malone received lenient sentences on a pair of convictions for first-degree retail fraud as a fourth-offense habitual offender and that she was on probation at the time of her instant offense also speaks for itself. Additionally, although not relied upon by the trial court, the then 35-year-old Malone involved a 16-year-old in her theft of over a thousand dollars' worth of alcohol. Considering Malone's offense history and the facts of her instant offense, Malone fits exactly the profile of an offender the Legislature likely envisioned in setting the maximum term of imprisonment for the offense of first-degree retail fraud. Although the trial court should have expressly laid out and assessed defendant's guidelines minimum sentence range, defendant failed to object, thus subjecting the error to "plain error" review. *People v Carines*, 460 Mich 750, 763-764 (1999). And because of defendant's

record of extreme recidivism and the need to better protect the public by her incapacitation, defendant simply cannot satisfy the prejudice prong of plain-error review, and I would not expend further judicial resources by remanding this case for resentencing. But although I dissent from this Court's order, I do encourage the trial court on remand to engage in a more focused and specific explanation of its sentence.

ZAHRA, J., joins the statement of MARKMAN, J.

Leave to Appeal Denied November 8, 2019:

In re MCGEE/SPENCER, MINORS, No. 160220; Court of Appeals No. 347441.

In re MCGEE/SPENCER, MINORS, No. 160222; Court of Appeals No. 347442.

In re ALTANTAWI, MINORS, No. 160254; Court of Appeals No. 345779.

Summary Disposition November 15, 2019:

MENARD v IMIG, No. 158563; Court of Appeals No. 336220. On November 7, 2019, the Court heard oral argument on the application for leave to appeal the September 6, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. As noted by Judge METER in his dissent, when viewed in a light most favorable to the plaintiff, the "plaintiff presented sufficient evidence that the defective road was a proximate cause of" the injuries in this case. *Menard v Imig*, unpublished per curiam opinion of the Court of Appeals, issued September 6, 2018 (Docket No. 336220) (METER, J., dissenting), p 1. Specifically, there is evidence that the defective road was more than the "condition or occasion affording opportunity for the other event to produce the injury"; rather, it "put in motion the agency by which the injuries [were] inflicted . . ." *Singerman v Muni Serv Bureau, Inc.*, 455 Mich 135, 145 (1997) (quotation marks and citation omitted). We remand this case to the Court of Appeals for consideration of the issues raised by the defendants but not addressed by that court during its initial review of this case.

In re AFFLECK/KUTZLEB/SIMPSON, MINORS, No. 160235; Court of Appeals No. 347045. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals addressing the trial court's best-interest determinations, and we remand this case to the Oakland Circuit Court for reconsideration of whether terminating respondent's parental rights is in the best interests of each child. MCL 712A.19b(5). Petitioner did not consider recommending a guardianship for KPA and BEK with respondent's mother because of a purported departmental policy against recommending guardianship for children under the age of 10. Absent contrary statutory language, such a generalized policy is inappropriate. On remand, the

trial court shall address whether guardianship is appropriate for KPA and BEK as part of its best-interest determinations without regard to a generalized policy disfavoring guardianship for children under the age of 10. See *In re Timon*, 501 Mich 867, 867 (2017) (“On remand, the trial court shall make an individualized determination as to whether terminating respondent’s parental rights is in the best interests of respondent’s youngest child without regard to a generalized policy disfavoring guardianship for children under the age of 14.”). In addition, as part of its best-interest determinations, the court shall consider the sibling relationships, although the court shall decide the best interests of each child individually. See *In re Olive/Metts Minors*, 297 Mich App 35, 42 (2012). 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 Denied November 15, 2019:

PEOPLE V BENSCH, No. 159834; reported below: 328 Mich App 1.

VIVIANO, J. (*concurring*). I concur in the Court’s denial order and write separately to explain my decision. This Court may exercise its discretion to deny leave when we determine that, despite the obvious and significant impact of the case on the parties, the Court does not believe that the legal issues raised in the appeal are of sufficient statewide import for the Court to intervene. See MCR 7.305(B)(3) (including as one alternative ground for granting leave that the application “show[s] that . . . the issue involves a legal principle of major significance to the state’s jurisprudence.”). The prosecutor here concedes something that I also know to be true from my time as a trial judge: criminal defendants very rarely prefer jail time or a prison sentence over probation. And when that rare circumstance occurs, trial judges routinely oblige the defendant—after all, why would a trial judge sentence the defendant to a probationary sentence when the defendant has already indicated that he or she is unable or unwilling to comply with the terms and conditions of probation? Probation is an alternative to incarceration that “is granted in the hope of rehabilitating the defendant” *People v Gallagher*, 55 Mich App 613, 619 (1974) (cleaned up). There would appear to be little hope of rehabilitating a defendant who refuses in advance to comply with the terms and conditions of his probation, especially since the only sanction left for the court to impose is the very term of incarceration already requested by the defendant. This is all another way of saying that, even if the dissenting justices’ legal analysis is correct—a conclusion subject to debate—why spend considerable judicial resources resolving the issue when it arises so infrequently and in such strange circumstances?

I am not inclined to intervene here for yet another reason: the sentence imposed by the trial judge appears to be an effort to evade our rule requiring concurrent sentences in the absence of statutory authority for consecutive sentences. See *People v Sawyer*, 410 Mich 531, 534 (1981). See also *In re Petition of Bloom*, 53 Mich 597, 598 (1884). Here, although no statute authorized consecutive sentencing, the trial judge

crafted a sentence that would essentially allow for at least the possibility of a consecutive sentence by imposing a jail sentence in the first case and a probationary sentence in the second. Rather than the defendant receiving the maximum term of incarceration (one year) in both cases and having those terms run concurrently, he received the maximum term only in the first case. He then faces the same term again in the second case if he fails to complete his term of probation successfully. Because the sentence in the second case may be imposed after completion of the defendant's first sentence, the two sentences would be, in essence, consecutive sentences. Thus, even if the dissenting justices' analysis were correct and the legal issue were significant enough to be vindicated in an appropriate case, I also would not intervene here because it would sanction the trial judge's end run around our long-standing rule regarding concurrent sentencing.

For these reasons, I concur in the Court's denial order.

CLEMENT, J. (*concurring*). I concur in the Court's order denying leave to appeal. Regardless of what one thinks of the Court of Appeals' attention to its own precedents interpreting the law of probation, I believe that the text and structure of the Code of Criminal Procedure indicate that a defendant must consent to a sentence of probation. First, MCL 771.4 says that "probation is a matter of grace," and a "matter of grace" is defined as "[a] situation in which a decision-maker uses a high degree of discretion in deciding whether to grant *some form of relief*," *Black's Law Dictionary* (11th ed) (emphasis added). It is difficult for me to see how something involuntarily imposed on a party is a "form of relief," especially since "relief" is defined as "[t]he redress or benefit . . . that a party *asks of a court*." *Id.* (emphasis added). Second, the structure of the probation system suggests that a defendant must agree to be placed on probation. Because MCL 771.3(2)(b) allows the trial court to impose a fine (but without limits), the trial court is not bound by the sentencing restrictions otherwise provided by the Michigan Penal Code. See, e.g., *People v Oswald*, 208 Mich App 444, 445-446 (1995) (allowing a fine of \$1500 as a condition of probation for a crime which the Michigan Penal Code caps the allowable fine at \$1000). Indeed, MCL 771.3(3) allows a trial court to "impose [any] other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper," under which "judges have great discretion . . . limited only by the requirement that conditions be lawful," keeping in mind that "[t]here is no ultimate catalogue of legal or illegal terms." *People v Johnson*, 92 Mich App 766, 768 (1979). The manner in which a probationary sentence can deviate from the restrictions the Legislature has otherwise placed on a court's sentencing power and discretion is a structural indication that a sentence of probation requires the consent of the defendant; if it could be involuntarily imposed, the Michigan Penal Code would only limit a sentencing court to the extent that a court chose to be limited, which does not seem to me to be any real limit at all.¹

¹ The dissent correctly notes that unlawful conditions of probation can be appealed. I still maintain that the broad flexibility the trial court has

For these reasons, I concur in the Court's order denying leave to appeal.

MARKMAN, J. (*dissenting*). I respectfully dissent and instead would affirm the unremarkable proposition that within our state's justice system, it is the trial court that determines criminal sentences and not the defendant. And in dissenting from this order, I would also affirm the equally unremarkable proposition that in reviewing criminal sentences, the appellate courts of this state, including this Court, must affirm criminal sentences in the absence of unconstitutionality, unlawfulness, or abuse of discretion. Despite these commonplace propositions, the district court here has imposed a probationary sentence—one within the scope of its legal judgment—only to have the circuit court strike down that sentence and the Court of Appeals to affirm, on the grounds that the defendant must be allowed to “waive” his sentence and demand instead a sentence more to his liking—oddly, to be sure, a sentence of incarceration in lieu of a sentence of probation but, perhaps more rationally understood, a sentence allowing defendant to serve less cumulative time under state supervision for concurrent convictions of operating while intoxicated. Indisputably, criminal defendants are entitled to argue for punishments in what they view as their best interest, and they are entitled to urge these views upon the trial court, and they are entitled even to apprise the court that, if given a probationary sentence, they would violate a condition of probation and thus compel the court to reincarcerate them. However, where the defendant fails in these pursuits to persuade the trial court as to an appropriate sentence, it is the *court* that determines a criminal sentence, not the defendant himself,

under MCL 771.3(3), when contrasted with the constrained sentencing discretion trial courts possess under the Michigan Penal Code, suggests that a defendant must accept being placed on probation, with appeals from unlawful conditions of probation available when a defendant wants probation (and thus to avoid incarceration), but believes a particular term of probation is unduly onerous. See, e.g., *People v Higgins*, 22 Mich App 479 (1970) (probationary term requiring defendant not to play college or professional basketball held unlawful). In any event, however, what apparently *cannot* be appealed, as a condition of probation, is a penal fine in excess of the maximum authorized by the Michigan Penal Code. See *Oswald*, 208 Mich App at 445-446. Even assuming that any such fine must still be reasonable—presumably a \$100,000 assessment in *Oswald* would not have passed muster—I believe the trial court's ability to exceed the clearly delineated boundaries for fines expressed in the Michigan Penal Code when a defendant is sentenced to probation is a structural indication that the defendant must agree to be placed on probation. If the trial court can impose probation without the defendant's consent, it would seem to have the unilateral ability to exceed the caps on fines expressed in the Michigan Penal Code, which appears to me to defeat the purpose of establishing a cap in the first place.

and it is the obligation of appellate courts, including this Court, absent some legal defect, to abide by that sentence.

The Court of Appeals' dissent correctly identifies the issue involved in the instant case—"[i]s there any circumstance under which a criminal defendant may veto a sentence that the trial judge intends to impose and demand a sentence more to the defendant's liking?"—and the dissent equally correctly answers this query—No. *People v Bensch*, 328 Mich App 1, 14 (2019) (TUKEL, J., dissenting). Moreover, the dissent correctly understands everything else that matters about this case—(1) that it is of no consequence, as the Court of Appeals majority seemed to think, that the prosecutor allegedly failed to "identif[y] any difficulties" with defendant's assertion of authority to determine his own sentence since, as the dissent avers, "[t]he correct resolution [of this case] turns on legislative intent" as expressed in the language of MCL 771.1 and not on "policy determinations," *id.* at 16; (2) that the availability of probation as a sentencing option "rests in the sound discretion of the trial court," *id.* at 17 (quotation marks and citation omitted); (3) that there is no language in our probation statute providing that a defendant must consent to, or may veto, a court's decision; (4) that probation being understood as a "matter of grace" does not confer discretion upon the *defendant* but upon the *trial court* either to grant or to revoke probation; and (5) that (at least until today) there has not been the slightest indication in any case of this Court that the probationary decisions of the trial court are either "dependent on a defendant's approval" or "subject to [his] veto," *id.* at 23.

Concerning Justice CLEMENT's concurring statement, first, I respectfully disagree that a defendant "must consent to a sentence of probation" because such a sentence is "a matter of grace" under MCL 771.4. Indeed, under the concurrence's *own* definition, "matter of grace" is defined as "[a] situation in which a *decision-maker* uses a high degree of discretion in deciding whether to grant some form of relief." *Black's Law Dictionary* (11th ed) (emphasis added). Thus, it is obviously the court, and not the defendant, who possesses discretion in deciding whether to allow probation. And equally obviously, a probationary sentence in lieu of incarceration is most commonly understood as constituting "relief" in the context of MCL 771.4. Second, I respectfully disagree that the "structure of the probation system suggests that a defendant must agree to be placed on probation" on the grounds that a court can deviate from the restrictions the Legislature has placed on its sentencing power without "any real limit at all." That is simply not so. Rather, a trial court may only render a sentence that imposes "lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper," MCL 771.3(3). Indeed, even if an *unlawful* condition was imposed, the remedy would be to remove the condition, not to allow the defendant to choose whether he wished to continue with a sentence of probation or not.

I would reverse the Court of Appeals and instead adopt the analysis and conclusion of the dissenting judge in the Court of Appeals.

ZAHRA, J., joins the statement of MARKMAN, J.

In re E PADELSKY, MINOR, No. 160309; Court of Appeals No. 347293.

In re SL RUSSELL, MINOR, No. 160352; Court of Appeals No. 347340.

Leave to Appeal Denied November 19, 2019:

WHITE V DETROIT EAST COMMUNITY MENTAL HEALTH, No. 160201; Court of Appeals No. 348605.

Summary Disposition November 20, 2019:

LOGAN V CHARTER TOWNSHIP OF WEST BLOOMFIELD, No. 157493; Court of Appeals No. 333452. By order of October 2, 2018, the application for leave to appeal the January 11, 2018 judgment of the Court of Appeals was held in abeyance pending the decisions in *Michigan Ass'n of Home Bldrs v Troy* (Docket No. 156737) and *Genesee Co Drain Comm'r Jeffrey Wright v Genesee Co* (Docket No. 156579). On order of the Court, the cases having been decided on July 11, 2019, 504 Mich 204 (2019) and on July 18, 2019, 504 Mich 410 (2019), the application is again considered and, pursuant to MCR 7.305(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 these decisions. We do not retain jurisdiction.

PEOPLE V GEORGE MULLINS, No. 158358; Court of Appeals No. 341506. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the June 14, 2017 opinion of the Wayne Circuit Court denying the defendant's motion for relief from judgment, and we remand this case to the Wayne Circuit Court for reconsideration of the defendant's motion under MCR 6.504(B). The record does not support the trial court's conclusion that five witnesses presented testimony identifying the defendant as the shooter. On remand, the trial court shall determine whether the new evidence is credible and whether the impact of the new evidence, in conjunction with the evidence that would be presented on retrial, would make a different result probable on retrial. *People v Johnson*, 502 Mich 541, 566-567 (2018).

In re CONTEMPT OF NICHOLAS SOMBERG, No. 158782; Court of Appeals No. 344041. Pursuant to MCR 7.305(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 LAVELLE SEARCY, No. 159387; Court of Appeals No. 346866. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. On remand, that court shall address whether a prosecuting attorney's office may unilaterally block an individual seeking placement in a mental health court from the "preadmission screening and evaluation assessment" required by MCL 600.1093(3), which, pursuant to subsection (3)(c) of that statute, must include "[a] mental health assessment,

clinical in nature, and using standardized instruments that have acceptable reliability and validity, meeting diagnostic criteria for a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.”

PEOPLE V VARNEY, No. 159699; Court of Appeals No. 347908. Pursuant to MCR 7.305(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 BRYAN THOMPSON, No. 159751; Court of Appeals No. 348017. Pursuant to MCR 7.305(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 direct the Court of Appeals to expedite its consideration of this case.

BELL V CITY OF SAGINAW, No. 159813; Court of Appeals No. 341858. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Workers’ Compensation Board of Magistrates for further consideration. The magistrate concluded that, although the plaintiff had suffered a work-related injury, a determination of his residual wage-earning capacity in 2012 and in 2014 was moot because he had failed to make a good-faith effort to look for work within his qualifications and training in those years. However, the magistrate failed to address “what jobs, if any, [the plaintiff] is qualified and trained to perform *within the same salary range as his maximum earning capacity* at the time of the injury.” See *Stokes v Chrysler, LLC*, 481 Mich 266, 282 (2008) (emphasis added). On remand, the magistrate shall make findings regarding this component of a prima facie case of disability. On the basis of those findings, the magistrate shall then make findings as to whether the plaintiff successfully bore his burden of proving the remaining components of a prima facie case of disability, specifically, “that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages” and that “if the [plaintiff] is capable of performing any of the jobs identified . . . that he cannot obtain any of these jobs.” *Id.* at 283; see also *id.* (stating that “[t]he claimant must make a good-faith attempt to procure post-injury employment *if there are jobs at the same salary or higher that he is qualified and trained to perform and the claimant’s work-related injury does not preclude performance*”) (emphasis added).

NABRO HOLDINGS, INC V SUBWAY REAL ESTATE, LLC, No. 160388; Court of Appeals No. 350571. Pursuant to MCR 7.305(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 stay entered by this Court on October 18, 2019 remains in effect until 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. The Court of Appeals shall expedite its consideration of this case. The motion for leave to supplement record on appeal is denied. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered November 20, 2019:

2 CROOKED CREEK LLC v CASS COUNTY TREASURER, No. 159856; reported below: 329 Mich App 22. The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether 2 Crooked Creek LLC (“2CC”) (an owner of a property interest that was extinguished by tax foreclosure after being accorded notice sufficient to satisfy minimum due process requirements) can sustain an action to recover monetary damages pursuant to MCL 211.78(1) by claiming that it “did not receive any notice required under this act” due to a lack of actual notice and, specifically, whether constructive notice is sufficient to fall within the confines of “any notice” under MCL 211.78(1) such that 2CC can be charged with knowledge of the notice that was posted to the subject property during a time when 2CC was exercising control and dominion over it. See *In re Treasurer of Wayne Co for Foreclosure (Perfecting Church)*, 478 Mich 1 (2007). In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellants’ brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee’s brief. The parties should not submit mere restatements of their application papers.

Michigan Association of County Treasurers is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 20, 2019:

PEOPLE v WALAS, No. 156022; Court of Appeals No. 337436.

AUTO-OWNERS INSURANCE COMPANY v COMPASS HEALTHCARE PLC, No. 159038; reported below: 326 Mich App 595.

PEOPLE v SAVAGE, No. 159527; reported below: 327 Mich App 604.

PEOPLE v NEFF, No. 159594; Court of Appeals No. 347270.

Summary Disposition November 22, 2019:

PEOPLE v TOWNE, No. 157210; Court of Appeals No. 322820. On November 6, 2019, the Court heard oral argument on the application for leave to appeal the December 19, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and vacate the Livingston Circuit Court order

denying the defendant's motion to suppress. The police officers violated the defendant's constitutional right to be free from an unreasonable search and seizure when they exceeded the proper scope of a knock and talk by approaching and securing the defendant's home without sufficient reason to believe that the subject of the arrest warrant was inside the home. US Const, Am IV; Const 1963, art 1, § 11. See *People v Frederick*, 500 Mich 228 (2017); *Payton v New York*, 445 US 573 (1980); *Steagald v United States*, 451 US 204 (1981). The evidence obtained during the search of the defendant's home must be suppressed because the warrantless entry was the direct result of the Fourth Amendment violation, and in this case the benefit of deterring future police misconduct outweighs the cost of exclusion. See *Wong Sun v United States*, 371 US 471 (1963); *Mapp v Ohio*, 367 US 643 (1961). We remand this case to the Livingston Circuit Court for further proceedings not inconsistent with this order.

PEOPLE V PARKMALLORY, No. 159915; reported below: 328 Mich App 289. Pursuant to MCR 7.305(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 Saginaw Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). The record, as expanded by the Court of Appeals, demonstrates that there is an issue of fact whether the defendant would have been able to show, as to his 2009 felony conviction, that he had "paid all fines imposed for the violation," MCL 750.224f(1)(a), or that he "successfully completed all conditions of probation or parole imposed for the violation," MCL 750.224f(1)(c), due to the May 20, 2011 bench warrant for his "failure to pay the balance of his Court Assessments," including probation supervision fees. It was premature for the Court of Appeals to reverse the defendant's convictions when it is possible that the defendant was unable to demonstrate fulfillment of MCL 750.224f(1). We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered November 22, 2019:

PUNTURO V KERN, Nos. 158749, 158755, and 158756; Court of Appeals Nos. 338727, 338728, and 338732. The appellants shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether, as a threshold matter, the fair reporting privilege, MCL 600.2911(3)—which can only be invoked "in a libel action"—applies in a case in which the appellants are not the media companies that published the allegedly defamatory statements, but are instead the persons who furnished the oral statements to the media; (2) whether the Court of Appeals erred in holding that the appellants' allegedly defamatory statements to the media regarding the pending litigation were not protected under the fair reporting privilege; (3) whether *Bedford v Witte*, 318 Mich App 60 (2016), was wrongly decided; and (4) whether the standards for application of the statutory fair reporting privilege are different for statements made by an attorney or by a layperson-litigant. In addition to the brief, the appellants shall electronically file appendices conforming to

MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' briefs. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendices filed by the appellants. Replies, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

The time allowed for oral argument shall be 30 minutes: 15 minutes for appellants, to be divided at their discretion, and 15 minutes for appellees. MCR 7.314(B)(1).

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. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Punturo v Kern*, Docket No. 158749, only and served on the parties in both cases.

CITY OF DEARBORN V BANK OF AMERICA, No. 159691; Court of Appeals No. 339704. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the federal bankruptcy court's October 5, 2011 order extinguished the appellant's interest in Parcel C; (2) whether Bank of America's filing of a discharge of the mortgage in 2015 impacted any interest the appellant had in Parcel C at that time; and (3) whether the equitable arguments raised by the appellant require the reversal of the Court of Appeals opinion. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). Appellee City of Dearborn shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Summary Disposition November 26, 2019:

PEOPLE V BOAK, No. 156929; Court of Appeals No. 340201. By order of July 27, 2018, the application for leave to appeal the November 9, 2017 order of the Court of Appeals was held in abeyance pending the decision in *People v Dixon-Bey* (Docket No. 156746). On order of the Court, leave to appeal having been denied in *Dixon-Bey* on July 29, 2019, 504 Mich 939 (2019), the application is again considered and, pursuant to MCR 7.305(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 WILLIE BROOKS, No. 157516; Court of Appeals No. 333279. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part V.A. of the Court of Appeals judgment addressing offense

variable (OV) 11, and we remand this case to the Court of Appeals to determine whether *People v Beck*, 504 Mich 605 (2019), is applicable to the defendant's challenge to OV 11 and, if so, to reconsider that issue in light of *Beck*. 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 FRANK TYSON, No. 158225; Court of Appeals No. 338299. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment declining to consider the defendant's challenge to the proportionality of his departure sentence. Under *People v Steanhouse*, 500 Mich 453, 476 (2017), that court must review the departure sentence for an abuse of discretion, i.e., engage in a reasonableness review for an abuse of discretion informed by the "principle of proportionality." We remand this case to the Court of Appeals for plenary review of the defendant's claim that his sentence was not reasonable and proportionate. We do not retain jurisdiction.

PEOPLE V REYNOLDS, No. 159047; Court of Appeals No. 345813. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

Leave to Appeal Denied November 26, 2019:

PEOPLE V McFOLLEY, No. 156355; Court of Appeals No. 338080.

PEOPLE V MATTHEWS, No. 156529; Court of Appeals No. 331177.

PEOPLE V GASTON, No. 156892; Court of Appeals No. 334380.

PEOPLE V HULBERT, No. 157248; Court of Appeals No. 341137.

PEOPLE V JOSEPH, No. 157579; Court of Appeals No. 342148.

PEOPLE V YASMEEN TAYLOR, No. 157768; Court of Appeals No. 329849.

PEOPLE V FREDERICK BRADFORD, No. 157981; Court of Appeals No. 342840.

PEOPLE V DOWNS, No. 158223; Court of Appeals No. 343652.

PEOPLE V McCANTS, No. 158382; Court of Appeals No. 331248.

PEOPLE V ARNETT JACKSON, No. 158803; Court of Appeals No. 345357.

PEOPLE V TROY JOHNSON, No. 158824; Court of Appeals No. 337999.

PEOPLE V HENDERSHOTT, No. 158876; Court of Appeals No. 343427.

PEOPLE V CARL PERRY, No. 158923; Court of Appeals No. 345497.

PEOPLE V McCREE, No. 158931; Court of Appeals No. 339802.

PEOPLE V BOWSER, No. 158949; Court of Appeals No. 344224.

HAMILTON V NORTHERN IMAGING ASSOCIATES, PC, No. 159333; Court of Appeals No. 345191.

PEOPLE V BARHAM, No. 159353; Court of Appeals No. 340196.

PEOPLE V DURDEN, No. 159431; Court of Appeals No. 341949.

PEOPLE V EZELL, No. 159441; Court of Appeals No. 341947.

In re PROCTOR, Nos. 159498 and 159499; Court of Appeals Nos. 342029 and 342676.

MEADOWLARK BUILDERS, LLC V EVANS, No. 159538; Court of Appeals No. 341492.

PEOPLE V DENAZ RICHARDSON, No. 159546; Court of Appeals No. 347714.

ESQUIRE DEVELOPMENT AND CONSTRUCTION, INC V CITY OF MASON, No. 159549; Court of Appeals No. 343173.

PELC V NORTH STAR RANCH, INC, No. 159590; Court of Appeals No. 339635.

PEOPLE V LES JONES, No. 159620; Court of Appeals No. 340417.

PEOPLE V POTTS, No. 159622; Court of Appeals No. 347500.

PEOPLE V WILLIAM HALL, No. 159644; Court of Appeals No. 346934.

AULD V MCLAREN REGIONAL MEDICAL CENTER, No. 159646; Court of Appeals No. 341335.

BOU-MELHEM V TRUMBULL-COMMONWEALTH LLC, No. 159651; Court of Appeals No. 340581.

PEOPLE V JONES-BUTLER, No. 159672; Court of Appeals No. 347715.

PEOPLE V CHEATHAM, No. 159693; Court of Appeals No. 348007.

PEOPLE V CLARK, No. 159695; Court of Appeals No. 342635.

PEOPLE V FORSYTH, No. 159706; Court of Appeals No. 346991.

PEOPLE V MCGRUDER, No. 159712; Court of Appeals No. 347566.

PEOPLE V BAKER, No. 159722; Court of Appeals No. 342109.

PEOPLE V DIXON, No. 159734; Court of Appeals No. 348169.

LIVONIA GATEWAY INVESTMENTS, LLC V BROOK PROPERTY HOLDING, LLC, No. 159749; Court of Appeals No. 340439.

PEOPLE V WILLIAM WARREN, No. 159765; Court of Appeals No. 335934.

PEOPLE V JOHNATHON MARTIN, No. 159775; Court of Appeals No. 342253.

PEOPLE V BURTON, No. 159799; Court of Appeals No. 348052.

PEOPLE V LORENZO BROWN, No. 159809; Court of Appeals No. 344796.

- PEOPLE V MCFARLAND, No. 159821; Court of Appeals No. 343143.
PEOPLE V SCHOENING, No. 159827; Court of Appeals No. 348062.
PEOPLE V RIVERA, No. 159830; Court of Appeals No. 343429.
PODEWELL V PODEWELL, No. 159837; Court of Appeals No. 341580.
PEOPLE V DONTAYE JONES, No. 159844; Court of Appeals No. 346604.
SHAREEF V DEUTSCHE BANK NATIONAL TRUST COMPANY, No. 159861; Court of Appeals No. 341015.
PEOPLE V ERROL SMITH, No. 156869; Court of Appeals No. 341977.
PEOPLE V MONTOYA-SANCEN, No. 159872; Court of Appeals No. 348401.
PEOPLE V WILLIAM SCHOLTES, No. 159881; Court of Appeals No. 341614.
PEOPLE V GOMEZ, No. 159891; Court of Appeals No. 341422.
PEOPLE V FOSTER, No. 159893; Court of Appeals No. 346717.
PEOPLE V EDDIE BROWN, No. 159897; reported below: 326 Mich App 185.
PEOPLE V SMALLEY, No. 159910; Court of Appeals No. 347860.
PEOPLE V RODGERS, No. 159916; Court of Appeals No. 342456.
PEOPLE V REGINALD WILLIAMS, No. 159920; Court of Appeals No. 348654.
PEOPLE V JAVON CARTER, No. 159923; Court of Appeals No. 348486.
PEOPLE V ROBERT KENNEDY, No. 159932; Court of Appeals No. 347095.
PEOPLE V ERNEST GORDON, No. 159934; Court of Appeals No. 346695.
PEOPLE V FIELDS, No. 159949; Court of Appeals No. 348528.
PEOPLE V KIERELLE BURNS, No. 159952; Court of Appeals No. 341863.
In re JUAREZ, No. 159968; Court of Appeals No. 347916.
PEOPLE V LORIMER JONES, No. 159983; Court of Appeals No. 348523.
PEOPLE V JASPER, No. 159990; Court of Appeals No. 348695.
PEOPLE V HARDY, No. 160003; Court of Appeals No. 347303.
PEOPLE V GURLEY, No. 160004; Court of Appeals No. 348848.
PEOPLE V DEMETRIS YOUNG, No. 160011; Court of Appeals No. 342632.
PEOPLE V LAWSON, No. 160013; Court of Appeals No. 342213.
PEOPLE V WARNER, No. 160014; Court of Appeals No. 341724.
PEOPLE V WILLIE GRAHAM, No. 160015; Court of Appeals No. 348397.

PEOPLE V TETT, No. 160023; Court of Appeals No. 348691.
PEOPLE V BURRELL, No. 160039; Court of Appeals No. 347776.
PEOPLE V GADOMSKI, No. 160040; Court of Appeals No. 347875.
PEOPLE V CARROLL, No. 160041; Court of Appeals No. 342014.
PEOPLE V ESSEX, No. 160043; Court of Appeals No. 348797.
PEOPLE V LARRY WILLIAMS, No. 160051; Court of Appeals No. 348375.
PEOPLE V HAINES, No. 160057; Court of Appeals No. 349057.
PEOPLE V MICHAEL BROWN, No. 160065; Court of Appeals No. 344704.
PEOPLE V MARTIN-LEVIER, No. 160066; Court of Appeals No. 342095.
PEOPLE V DEANDRE KING, No. 160069; Court of Appeals No. 349269.
PEOPLE V MARQUIS MOORE, No. 160070; Court of Appeals No. 342160.
PEOPLE V RONALD EDWARDS, No. 160072; Court of Appeals No. 341974.
PEOPLE V KEVIN RICHARDS, No. 160081; Court of Appeals No. 347352.
PEOPLE V CHAD JOHNSON, No. 160086; Court of Appeals No. 348988.
PEOPLE V AMEN HOUSTON, No. 160095; Court of Appeals No. 348525.
PEOPLE V HANNIBAL CLEMONS, No. 160097; Court of Appeals No. 343531.
In re PETITION OF WAYNE COUNTY TREASURER FOR FORECLOSURE, No. 160115; Court of Appeals No. 349409.
WILLIAMS V CITY OF EASTPOINTE, No. 160138; Court of Appeals No. 344942.
PEOPLE V ROBERT THOMPSON, No. 160157; Court of Appeals No. 349719.
PEOPLE V MICHAEL THOMAS, No. 160165; Court of Appeals No. 340545.
PEOPLE V SALINAS, No. 160190; Court of Appeals No. 349644.

Reconsideration Denied November 26, 2019:

LANSING PARKVIEW, LLC V K2M GROUP, LLC, Nos. 159017 and 159018; Court of Appeals Nos. 338284 and 339030. Leave to appeal denied at 504 Mich 901.

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES, No. 159092; Court of Appeals No. 338592. Leave to appeal denied at 504 Mich 945.

In re APPLICATION OF DTE ELECTRIC COMPANY TO INCREASE RATES, No. 159096; Court of Appeals No. 338378. Leave to appeal denied at 504 Mich 945.

DAVIS V GENERAL MOTORS CORPORATION, No. 159149; Court of Appeals No. 345137. Leave to appeal denied at 504 Mich 945.

TAYLOR V OLYMPIA ENTERTAINMENT, INC, No. 159343; Court of Appeals No. 346172. Leave to appeal denied at 504 Mich 947.

Summary Disposition November 27, 2019:

PEOPLE V GRANDERSON, No. 154552; Court of Appeals No. 325313. By order of September 27, 2018, the application for leave to appeal the September 13, 2016 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Swilley* (Docket No. 154684). On order of the Court, the case having been decided on July 17, 2019, 504 Mich 350 (2019), the motion for leave to file supplemental brief is granted. The application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration in light of *Swilley*.

PEOPLE V TERRANCE THOMAS, No. 154656; Court of Appeals No. 325530. By order of September 27, 2018, the application for leave to appeal the September 13, 2016 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Swilley* (Docket No. 154684). On order of the Court, the case having been decided on July 17, 2019, 504 Mich 350 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration in light of *Swilley*.

PEOPLE V SCHURZ, No. 157032; Court of Appeals No. 340420. By order of July 3, 2018, the application for leave to appeal the November 28, 2017 order of the Court of Appeals was held in abeyance pending the decision in *People v Dixon-Bey* (Docket No. 156746). On order of the Court, leave to appeal having been denied in *Dixon-Bey* on July 29, 2019, 504 Mich 939 (2019), the application is again considered and, pursuant to MCR 7.305(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 KEITH HARVEY, No. 157053; Court of Appeals No. 340700. By order of July 27, 2018, the application for leave to appeal the November 30, 2017 order of the Court of Appeals was held in abeyance pending the decision in *People v Dixon-Bey* (Docket No. 156746). On order of the Court, leave to appeal having been denied in *Dixon-Bey* on July 29, 2019, 504 Mich 939 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration in light of *People v Dixon-Bey*, 321 Mich App 490 (2017).

PEOPLE V AARON ROBINSON, No. 157134; Court of Appeals No. 335193. By order of October 2, 2018, the application for leave to appeal the December 28, 2017 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Beck* (Docket No. 152934) and *People v Dixon-Bey* (Docket No. 156746). On order of the Court, *Beck*

having been decided on July 29, 2019, 504 Mich 605 (2019), and leave to appeal having been denied in *Dixon-Bey* on July 29, 2019, 504 Mich 939 (2019), the application is again considered and, pursuant to MCR 7.305(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 *Beck*. In addition, the Court of Appeals shall analyze: (1) whether defendant's argument pertaining to the consecutive nature of his sentences is outside the scope of the remand for "resentencing"; and (2) if not, whether the trial court articulated an appropriate basis for imposing consecutive sentences. See *People v Norfleet*, 317 Mich App 649 (2016). 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 JERMAINE JACKSON, No. 157164; Court of Appeals No. 333722. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment holding that the trial court failed to adequately support its departure sentence and remanding this case to the trial court for resentencing. The Court of Appeals clearly erred in concluding that the trial court's justifications for the departure were entirely encapsulated by the offense variables. Taken as a whole, the trial court's justifications were addressed not only to the seriousness of the offense, but also to the danger posed by this particular offender, who intentionally and needlessly created an exceptionally dangerous situation and whose criminal behavior was escalating. The Court of Appeals failed to note and account for the trial court's express statement that the departure was a fair and proportionate sentence for the protection of society in these circumstances. The trial court did not abuse its discretion by violating the principle of proportionality when it imposed a modest departure for the reasons provided.

PEOPLE V ELLEN, No. 157370; Court of Appeals No. 325627. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment finding that the trial court failed to explain why the extent of the guidelines departure was warranted and remanding this case to the trial court for resentencing. The trial court adequately described the circumstances surrounding the offense as being at the most serious end of the spectrum of manslaughter cases and the defendant's efforts to silence witnesses, thereby warranting the most severe sentence permitted. The principle of proportionality was satisfied and the trial court did not abuse its discretion.

PEOPLE V JOHNATHAN BURKS, No. 157838; Court of Appeals No. 335955. By order of October 30, 2018, the application for leave to appeal the April 3, 2018 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Beck* (Docket No. 152934) and *People v Dixon-Bey* (Docket No. 156746). On order of the Court, *Beck* having been decided on July 29, 2019, 504 Mich 605 (2019), and leave to appeal having been denied in *Dixon-Bey* on July 29, 2019, 504 Mich 939 (2019), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals addressing the defendant's sentence for home invasion,

and we remand this case to that court for reconsideration in light of *Beck*. 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 JAIR HARRIS, No. 158124; Court of Appeals No. 343632. Pursuant to MCR 7.305(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 ANTONIO JACKSON, No. 158654; Court of Appeals No. 344242. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. See *People v Beck*, 504 Mich 605 (2019).

PEOPLE V JOSHUA DAVIS, No. 159465; Court of Appeals No. 347326. Pursuant to MCR 7.305(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 BUNCH, No. 159820; Court of Appeals No. 348280. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Gladwin Circuit Court. The trial court recited the general purposes of sentencing presented in *People v Cervantes*, 448 Mich 620 (1995), without providing an explanation for how the defendant's sentence served those purposes. On remand, the trial court shall either issue an order articulating why the defendant's sentence is warranted, including the extent of the departure, or resentence the defendant. *People v Lockridge*, 498 Mich 358 (2015); *People v Smith*, 482 Mich 292 (2008).

Leave to Appeal Granted November 27, 2019:

TURNER V FARMERS INSURANCE EXCHANGE, No. 159660; reported below: 327 Mich App 481. The parties shall address whether a self-insured vehicle owner is subject to the priority provision in the former MCL 500.3114(4)(a) as “[t]he insurer of the owner or registrant of the vehicle occupied” if the self-insured entity's vehicle involved in the accident was not subject to the security provisions of the no-fault act because it was registered in another state, did not need to be registered in this state, and was not operated in this state for more than 30 days during the applicable year. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

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, 2019:

HUNT V DRIELICK, HUBER V DRIELICK, and LUCZAK V DRIELICK, Nos. 157476, 157477, and 157478; reported below: 322 Mich App 318. On

order of the Court, the application for leave to appeal the December 14, 2017 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants are considered. The application for leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court. We direct the Clerk to schedule oral argument on the application for leave to appeal as cross-appellants. MCR 7.305(H)(1).

The parties shall file supplemental briefs within 42 days of the date of this order addressing the period of time for which garnishee-defendant Empire Fire and Marine Insurance Company, as the Drieliick defendants' insurer, is liable for the payment of judgment interest pursuant to MCL 600.6013 or any postjudgment interest, and the proper method of calculation, see *Matich v Modern Research Corp*, 430 Mich 1 (1988).

In addition, the cross-appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). Each party may file a response brief within 14 days of being served with the other party's initial supplemental brief. Additionally, at this time, the cross-appellees shall electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the cross-appellants. The parties should not submit mere restatements of their application papers.

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.

CAVANAGH, J., not participating due to her prior relationship with Garan Lucow Miller, P.C.

LAKESHORE GROUP V DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 159524 and 159525; Court of Appeals Nos. 340623 and 340647. The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether appellants Jane Underwood and Charles Zolper, as "owner[s] of [] property immediately adjacent to the proposed use" at the time of their intervention in these contested cases, satisfy the statutory standard for standing under MCL 324.35305(1), notwithstanding the developer's subsequent sales of land located between each appellant's respective property and the property being developed. In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file supplemental briefs within 21 days of being served with the appellants' brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. Replies, if any, must be filed by the appellants within 14 days of being served with the appellees' briefs. The parties should not submit mere restatements of their application papers.

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.

REAUME V TOWNSHIP OF SPRING LAKE, No. 159874; reported below: 328 Mich App 321. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the Court of Appeals improperly relied on the character of the relationship that defines the term “family” in the zoning ordinance in order to conclude that the permitted use of a “Dwelling, Single Family” in the R-1 district does not include short-term rentals; and (2) whether, aside from the definition of “family,” the appellant met her burden of proof to establish that her actual use of 18190 Lovell Road as a short-term rental complied with the permitted use of the property as a “Dwelling, Single Family” before the township adopted Ordinance 255 and Ordinance 257. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant’s brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee’s brief. The parties should not submit mere restatements of their application papers.

The Michigan Townships Association and the Michigan Municipal League, and the Real Property Law and Government Law Sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 27, 2019:

PEOPLE V CLARENCE McMILLEN, No. 156647; Court of Appeals No. 332089.

In re IM LONG, MINOR, No. 158854; reported below: 326 Mich App 455. On October 3, 2019, the Court heard oral argument on the application for leave to appeal the November 20, 2018 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.

PEOPLE V BYERS, No. 159512; Court of Appeals No. 343806.

PIKE V NORTHERN MICHIGAN UNIVERSITY, No. 159719; reported below: 327 Mich App 683.

MARKMAN, J. (*concurring*). The state of Michigan in its amicus brief is correct, in my judgment, that the Court of Appeals misstated that MCL 600.6431 applies only to claims against the state and not also to claims

against its subdivisions. See *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 179 (2019); *Fairley v Dep't of Corrections*, 497 Mich 290, 298 (2015).

In re OSENBAUGH, MINORS, No. 160377; Court of Appeals No. 348331.

Motion to Waive Fees Denied November 27, 2019:

GREAT LAKES CAPITAL FUND FOR HOUSING LIMITED PARTNERSHIP XII V ERWIN COMPANIES, LLC, No. 160569; Court of Appeals No. 349916. On order of the Chief Justice, the motion to waive fees is denied. The corporate appellant is not eligible for a waiver of fees. MCR 2.002(A)(1). The filing fee shall be paid within 21 days of the date of this order or else the application for leave to appeal will be administratively dismissed.

Joint Motion to Vacate the Court of Appeals Opinion Denied December 4, 2019:

PROGRESS MICHIGAN V ATTORNEY GENERAL, Nos. 158150 and 158151; Court of Appeals Nos. 340921 and 340956. By order of September 25, 2019, the parties were directed to file supplemental briefs addressing their Joint Motion to Vacate the Court of Appeals Opinion and Remand to the Court of Claims for Entry of a Stipulated Order of Dismissal with Prejudice. On order of the Court, the briefs having been received, the joint motion is again considered, and it is denied. We direct the Clerk to schedule this case for oral argument. At oral argument, the parties shall address the issues set forth in this Court's March 20, 2019 order granting leave to appeal.

Summary Disposition December 6, 2019:

PEOPLE V NACCARATO, No. 158006; Court of Appeals No. 334824. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment finding that the trial court failed to explain why the extent of the guidelines departure was warranted and remanding this case to the trial court for resentencing. The trial court adequately explained why, in light of mitigating circumstances surrounding the offense and the offender, a sentence of probation would be more proportionate than a sentence of incarceration. The principle of proportionality was satisfied and the trial court did not abuse its discretion.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order reversing the Court of Appeals judgment and reinstating defendant's sentence of three years of probation. Defendant here pleaded no contest to four counts of burning a dwellinghouse, burning insured property, and burning personal property valued at more than \$1,000 but less than \$20,000. The trial court departed downwardly from the applicable guidelines range (51 to 85 months) and sentenced defendant

to three years of probation. On two previous occasions, the Court of Appeals vacated defendant's sentence and remanded to the trial court for resentencing, and each time the trial court reimposed the same sentence (three years of probation). The Court of Appeals has once again vacated defendant's sentence and remanded for resentencing.

The trial court's reasons for the departure were: defendant's age (41 at the time of the offense); his college education; his engineering career; his volunteer work in the community, his lack of prior criminal history, his good behavior subsequent to the fire; his compliance with conditions of probation; his satisfaction of his restitution obligation; character letters submitted by family, friends, and former tenants; his efforts to evacuate the building before setting it ablaze; and the fact that he himself suffered third-degree burns that hospitalized him for six weeks.

While the reasons cited by the trial court, in my judgment, justify *some* departure, the question before this Court is whether they justify the *specific* departure imposed by the trial court. The guidelines called for a prison sentence of 51 to 85 months, and the trial court imposed three years of probation. Defendant started an apartment building that he owned on fire so that he could collect the insurance money. This was a serious crime and, although defendant attempted to ensure that the building was empty before he started the fire, he nevertheless placed a number of people in danger of harm and a firefighter was, in fact, injured. He also lied to the firefighters arriving on the scene and sought to blame the fire on a "black man" he had supposedly seen fleeing from the building. The trial court here did not adequately explain why these facts alone did not justify at least some period of incarceration. Because I do not believe the Court of Appeals abused its discretion in vacating defendant's sentence and remanding for resentencing, I would deny leave to appeal.

CLEMENT, J., joins the statement of MARKMAN, J.

Leave to Appeal Denied December 6, 2019:

MCCALLUM V MID-MICHIGAN PHYSICIANS, PC, No. 159400; Court of Appeals No. 345695.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. The appeal in this medical malpractice case centers on whether plaintiff William McCallum timely filed his action. In September 2010, plaintiff visited an emergency room and underwent a CT scan that revealed a possible metastatic mass in his liver. Plaintiff visited defendant Mid-Michigan Physicians PC for follow-up care. In late 2010, plaintiff underwent an ultrasound, which was read as evidencing no liver lesion but signs of gallbladder disease. In February 2016, plaintiff underwent an MRI, which revealed a neuroendocrine carcinoma in his liver, and instituted the instant action, alleging error in the reading of the ultrasound and in the follow-up care provided by defendant.

In the course of discovery, defendant William Jordan, a physicians' assistant at Mid-Michigan Physicians, testified that, upon receiving the

ultrasound results in 2010, he: (a) called plaintiff, (b) referred plaintiff for gallbladder surgery, and (c) instructed plaintiff there was still cause to be concerned about the liver mass on the CT scan and that the gallbladder surgeon could visually assess his liver during surgery. A notation in plaintiff's medical chart corroborates Jordan's testimony that he called plaintiff and referred him to a gallbladder surgeon, but plaintiff never scheduled such an appointment. And in his deposition in 2017, plaintiff professed a lack of memory concerning: (a) his follow-up appointment at Mid-Michigan Physicians, (b) having undergone an ultrasound procedure, (c) Jordan having called him following the ultrasound procedure, or (d) Jordan having referring him to the gallbladder surgeon. Defendants moved for summary disposition, contending that plaintiff's claim was untimely because he should have discovered the claim in late 2010.

"In general, a plaintiff in a medical malpractice case must bring his claim within two years of when the claim accrued, or within six months of when he discovered or should have discovered his claim." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219 (1997), citing MCL 600.5805 and 600.5838. Because plaintiff instituted this action more than two years after the ultrasound, he must rely upon the six-month discovery rule to satisfy the statute of limitations. The six-month discovery rule states in pertinent part:

[A]n action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or *within 6 months after the plaintiff discovers or should have discovered the existence of the claim*, whichever is later. *The plaintiff has the burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim.* [MCL 600.5838(2) (emphasis added).]

The "six-month discovery rule period begins to run in medical malpractice cases when the plaintiff, on the basis of objective facts, is aware of a possible cause of action." *Solowy*, 454 Mich at 232. "This occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician." *Id.*

Defendants argue that plaintiff has not sustained his burden of advancing evidence supporting the conclusion that the six-month discovery rule did not commence in 2010 after the conflicting results from the CT and ultrasound procedures. The trial court rejected this argument, relying upon plaintiff's deposition testimony to conclude there was a dispute of fact as to whether Jordan called plaintiff following the ultrasound. For two reasons, I would remand to the Court of Appeals as on leave granted to consider the reasonableness of that conclusion. First, in order to dispute Jordan's testimony and the partially corroborating medical chart notation, plaintiff relies exclusively upon his testimony that he lacks memory regarding the events surrounding his healthcare in late 2010. But a lack of memory, however genuine, does not constitute affirmative evidence of anything. This is particularly true

where plaintiff bore the burden of establishing that he had not discovered his claim in 2010. Second, even assuming that plaintiff did affirmatively testify that Jordan did not call him (or even that he did not remember the call but that he would have followed Jordan's advice and scheduled an appointment with the gallbladder surgeon had he received such a call), the lack of follow-up after the ultrasound should have placed plaintiff reasonably on notice of a possible medical malpractice claim.

This, in my judgment, constitutes the Court's third recent denial of leave in a case in which serious questions surround the proper application of the six-month discovery rule. See also *Jendrusina v Mishra*, 501 Mich 958 (2018); *Hemphill v Suleiman*, 502 Mich 910 (2018). Rather than denying leave to appeal, I would remand to the Court of Appeals as on leave granted.

MCCALLUM V MID-MICHIGAN PHYSICIANS, PC, No. 159982; Court of Appeals No. 346858.

Reconsideration Denied December 6, 2019:

In re HM McCLINTON, MINOR, No. 159987; Court of Appeals No. 346848. Leave to appeal denied at 504 Mich 977.

Summary Disposition December 11, 2019:

PEOPLE V GARRISON, No. 157417; Court of Appeals No. 334063. By order of July 29, 2019, the prosecutor was directed to answer Issue VI of the application for leave to appeal the January 30, 2018 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. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the two issues not addressed by that court during its initial review of this case—Issues V and VI in the defendant's supplemental brief, filed under AO 2004-6 (Minimum Standards for Indigent Criminal Appellate Defense Services), Standard 4. 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. The motions for peremptory reversal and for the appointment of counsel are denied. We do not retain jurisdiction.

EASTER V PROGRESSIVE MARATHON INSURANCE COMPANY, No. 157692; Court of Appeals No. 335815. By order of September 12, 2018, the application for leave to appeal the March 20, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *Dye v Esurance Prop & Cas Ins Co* (Docket No. 155784). On order of the Court, the case having been decided on July 11, 2019, 504 Mich 167 (2019), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse Part I.A. of the Court of Appeals judgment for the reasons stated in *Dye*. We remand this case to the

Eaton Circuit Court for further proceedings not inconsistent with 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.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE V RAINBOLT, No. 159313; Court of Appeals No. 345529. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Muskegon Circuit Court for reconsideration of the defendant's challenge to Barbara Cross's testimony, first addressed in the circuit court's March 15, 2018 opinion denying relief from judgment, in light of *People v Thorpe*, 504 Mich 230 (2019). 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.

TYSON V DAWKINS, No. 159815; Court of Appeals No. 346595. Pursuant to MCR 7.305(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 Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 11, 2019:

PEOPLE V ROBIN MANNING, No. 160034; Court of Appeals No. 345268. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the defendant's successive motion for relief from judgment is "based on a retroactive change in law," MCR 6.502(G)(2), where the law relied upon does not automatically entitle him to relief; and (2) if so, whether the United States Supreme Court's decisions in *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 136 S Ct 718 (2016), should be applied to 18-year-old defendants convicted of murder and sentenced to mandatory life without parole, under the Eighth Amendment to the United States Constitution or Const 1963, art 1, § 16, or both. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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 December 11, 2019:

PEOPLE V LOPEZ, No. 159581; Court of Appeals No. 341089.

PEOPLE V GARDNER, No. 159640; Court of Appeals No. 338800.

PEOPLE V HAYNES, No. 159811; Court of Appeals No. 343558.

GRAY V LAKELAND SPECIALTY HOSPITAL AT BERRIEN CENTER, No. 159835; reported below: 328 Mich App 142.

PEOPLE V LOVILY JOHNSON, No. 159895; Court of Appeals No. 348784.

PEOPLE V JERRICO TIMMONS, No. 159959; Court of Appeals No. 348327.

PEOPLE V JERRICO TIMMONS, No. 159961; Court of Appeals No. 348328.

Summary Disposition December 13, 2019:

SHEARS V BINGAMAN, No. 156789; Court of Appeals No. 329776. By order of May 30, 2018, the application for leave to appeal the August 24, 2017 judgment of the Court of Appeals was held in abeyance pending the decision in *Genesee Co Drain Comm'r Jeffrey Wright v Genesee Co* (Docket No. 156579). On order of the Court, the case having been decided on July 18, 2019, 504 Mich 410 (2019), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals' judgment holding that the plaintiffs' claims of unjust enrichment would be barred by governmental immunity. We remand this case to the Genesee Circuit Court for its consideration, in light of *Genesee Co Drain Comm'r*, of any motion plaintiffs may file seeking leave to amend the complaint to add their claims of unjust enrichment. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. We do not retain jurisdiction.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

KINCAID V CITY OF FLINT, Nos. 158070 and 158071; Court of Appeals Nos. 337972 and 337976. By order of December 4, 2018, the application for leave to appeal the June 26, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *Genesee Co Drain Comm'r Jeffrey Wright v Genesee Co* (Docket No. 156579). On order of the Court, the case having been decided on July 18, 2019, 504 Mich 410 (2019), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to that court for its consideration of plaintiffs' unjust enrichment claims in light of *Genesee Co Drain Comm'r Jeffrey Wright*, and, if necessary, the issues raised by the defendant but not addressed by that court during its initial review of this case. We do not retain jurisdiction.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

PEOPLE v MCJUNKIN, No. 158578; Court of Appeals No. 338400. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II of the judgment of the Court of Appeals, and we remand this case to the Calhoun Circuit Court for an evidentiary hearing to determine whether the consent or the plain view exceptions to the warrant requirement justify the warrantless search and seizure in this case. Specifically, the court shall determine: (1) whether, based on an assessment of the totality of the circumstances, consent was freely and voluntarily given, see *People v Borchard-Ruhland*, 460 Mich 278, 294 (1999); (2) whether an objectively reasonable officer would conclude that the homeowner had actual or apparent authority to consent to a search of the vehicle that the defendant had driven into the garage, see *People v Mead*, 503 Mich 205, 216-219 (2019); and (3) whether, assuming the officers were lawfully in the garage, the items seized from the vehicle were visible and their incriminating character was immediately apparent, see *People v Champion*, 452 Mich 92, 101 (1996). 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.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 13, 2019:

GAYDOS v BENDER, Nos. 159107 and 159124; reported below: 326 Mich App 667. The appellants shall file supplemental briefs within 42 days of the date of this order addressing whether the privilege of witness immunity extends to retained experts sued for professional malpractice. See *Maiden v Rozwood*, 461 Mich 109 (1999). In addition to the brief, the appellants shall electronically file appendices conforming to MCR 7.312(D)(2). In the briefs, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The plaintiff-appellee shall file a supplemental brief within 21 days of being served with the appellants' briefs. The plaintiff-appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendices filed by the appellants. Replies, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The time allowed for oral argument shall be 30 minutes: 15 minutes for appellants, to be divided at their discretion, and 15 minutes for plaintiff-appellee. MCR 7.314(B)(1).

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. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Gaydos v Bender*, Docket No. 159107, only and served on the parties in both cases.

CAVANAGH, J., not participating due to a preexisting relationship with a party.

Leave to Appeal Denied December 13, 2019:

SMITH v CITY OF DETROIT, No. 158300; Court of Appeals No. 337708. On December 11, 2019, the Court heard oral argument on the application for leave to appeal as cross-appellant of the July 24, 2018 judgment of the Court of Appeals. On order of the Court, the application for leave to appeal and the application for leave to appeal as cross-appellant are again considered, and they are denied, because we are not persuaded that the questions presented should be reviewed by this Court.

In re RC, MINOR, Nos. 160467 and 160468; Court of Appeals Nos. 345959 and 346102.

Leave to Appeal Denied December 17, 2019:

PEOPLE v MICHAEL DEARDOFF, No. 160510; Court of Appeals No. 348609.

Order Denying Requests for Advisory Opinion Entered December 18, 2019:

In re HOUSE OF REPRESENTATIVES REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2018 PA 368 AND 369 and *In re* SENATE REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2018 PA 368 AND 369, Nos. 159160 and 159201. On July 17, 2019, the Court heard oral argument on the requests by the House of Representatives and the Senate for an advisory opinion on the constitutionality of 2018 PA 368 and 2018 PA 369. On order of the Court, the requests are again considered, and they are denied, because we are not persuaded that granting the requests would be an appropriate exercise of the Court's discretion.

CLEMENT, J. (*concurring*). I concur in the Court's order denying the Legislature's request for an advisory opinion in this matter. I believe that this Court lacks jurisdiction under Const 1963, art 3, § 8 to issue an advisory opinion after the effective date of the legislation being scrutinized, and thus must refrain from doing so here notwithstanding the observations made by Justice ZAHRA about the importance of the legal issues presented. I believe we must instead wait for an "actual controvers[y] where the stakes of the parties are committed and the issues developed in adversary proceedings." *Request for Advisory Opinion on Constitutionality of 1978 PA 33*, 402 Mich 968, 968 (1978).

I. FACTS

The Michigan Constitution allows Michigan voters to exercise various forms of direct democracy, one of which is to initiate legislation via petitions signed by a requisite number of voters. See Const 1963, art 2, § 9. Groups known as "Michigan One Fair Wage" and "MI Time to Care" sponsored, respectively, proposals known as the "Improved Workforce Opportunity Wage Act" and the "Earned Sick Time Act." Pursuant to MCL 168.471, they filed those petitions with the Secretary of State in

the summer of 2018. The Secretary of State then notified the Board of State Canvassers, MCL 168.475(1), which canvassed the petitions to determine whether an adequate number of signatures was submitted, MCL 168.476(1). The Board ultimately certified both petitions as sufficient,¹ MCL 168.477(1), and, pursuant to Const 1963, art 2, § 9, the proposals were submitted to the Legislature. This constitutional provision required that the proposals were to “be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition [was] received by the legislature,” with enactment not “subject to the veto power of the governor.” The Legislature ultimately adopted both “without change or amendment” on September 5, 2018. 2018 PAs 337 and 338. Enacting them meant that they were not “submit[ted] . . . to the people for approval or rejection at the next general election.” Const 1963, art 2, § 9. Had they been submitted to the people and adopted, they would only have been amendable with a three-fourths majority in the Legislature. *Id.*

After the 2018 elections, the Legislature turned its attention to these policy areas once again. Although Attorney General Frank Kelley had, several decades ago, opined that “the legislature enacting an initiative petition proposal cannot amend the law so enacted at the same legislative session,” OAG, 1963-1964, No. 4,303, p 309, at 311 (March 6, 1964), a member of the Michigan Senate asked for an opinion on that issue and Attorney General Bill Schuette issued a new opinion which superseded the prior opinion and concluded that the Legislature *could* enact amendments to an initiated law during the same session at which the initiated law was itself enacted. See OAG, 2017-2018, No. 7,306, p 85 (December 3, 2018). The Legislature thereafter did adopt certain amendments to these proposals with a simple majority, which—as ordinary legislation—the Governor signed into law. See 2018 PA 368 and 369. Because neither law contained a more specific effective date, both took effect on the 91st day after the 99th Legislature adjourned *sine die*. Const 1963, art 4, § 27; *Frey v Dep’t of Mgt & Budget*, 429 Mich 315, 340 (1987). The Legislature adjourned on December 28, 2018, see 2018 HCR 29,² so the effective date of 2018 PA 368 and 369 was March 29, 2019.

¹ In the case of the “Improved Workforce Opportunity Wage Act,” this happened pursuant to a writ of mandamus issued by the Court of Appeals. See *Mich Opportunity v Bd of State Canvassers*, unpublished order of the Court of Appeals, entered August 22, 2018 (Docket No. 344619), lv den 503 Mich 918 (2018).

² Ordinarily, the date of adjournment would have been established by reference to a certificate of the Secretary of State, which state law requires to be “printed and published with the laws of the session of the legislature to which it refers . . .” MCL 4.202. The statute alludes to the requirement that “[a]ll laws enacted at any session of the legislature shall be published in book form,” Const 1963, art 4, § 35, and the implementing statute requires, among other things, this certificate, see

On February 13, 2019—about a month after the convening of the 100th Legislature, see Const 1963, art 4, § 13—a member of the Michigan Senate wrote to newly elected Attorney General Dana Nessel seeking another opinion on whether 2018 PA 368 and 369 had unconstitutionally subverted the constitutional protections for initiated legislation, and a week later, both chambers of the Legislature adopted resolutions asking for this Court to issue an opinion under Const 1963, art 3, § 8. See 2019 HR 25; 2019 SR 16. On April 3, 2019, we ordered argument on whether to issue an advisory opinion. *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 503 Mich 1003 (2019). We subsequently ordered additional briefing on the question of whether this Court has jurisdiction to issue an advisory opinion after the effective date of the legislation being scrutinized. *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 504 Mich 918 (2019).

II. ANALYSIS

In my view, this Court lacks jurisdiction under our Constitution to issue an advisory opinion after the effective date of the piece of legislation being scrutinized—as is the case here. When construing the Michigan Constitution, “[o]ur primary goal . . . is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of ‘common understanding.’” *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 323 (2015). Generally, “[w]e locate the common understanding of constitutional text by determining the plain meaning of the text as it was understood at the time of ratification,” although we “also take[] account of ‘the circumstances leading to the adoption of the provision and the purpose sought to be accomplished.’” *Id.* (citation omitted).³ “The Address to the People, which was distributed to Michigan citizens in advance of the ratification vote and which ex-

MCL 24.1(1)(l). However, volumes meeting the specifications of MCL 24.1 are not in the collection of the State Law Library after the 94th Legislature.

³ Justice VIVIANO faults me for “rel[ying] on extrinsic circumstances to determine the purpose of th[is] provision” and “violating a fundamental tenet of textualism,” citing the writings of the late Antonin Scalia in support of his critique of my references to historical context and the Address to the People. However, it appears to me that we have *explicitly authorized* looking to “extrinsic circumstances to determine the purpose of” constitutional provisions. In *Mich Coalition of State Employee Unions*, 498 Mich at 325-326, we said that the Address to the People was “[h]ighly significant to our assessment,” that “the transcript of the constitutional convention debates further confirm[ed]” our conclusion, and that “historical sources confirm[ed]” our conclusion. I believe my “interpretive approach” is consistent with Justice Scalia’s. See, e.g., *Blatchford v Native Village of Noatak*, 501 US 775, 779 (1991) (“Despite the narrowness of its

plained in everyday language what each provision of the proposed new Constitution was intended to accomplish, and, to a lesser degree, the constitutional convention debates are also relevant to understanding the ratifiers' intent." *Id.* at 323-324. I believe that all of these sources of meaning—the text of the Constitution, the circumstances leading to its adoption, and the constitutional convention proceedings (i.e., the Address to the People and the convention debates)—indicate that this Court lacks jurisdiction to issue an advisory opinion after the effective date of the legislation being reviewed.

A. CONSTITUTIONAL TEXT

The Michigan Constitution provides that we exercise “the judicial power of the state” Const 1963, art 6, § 1. We have described that power as “the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.” *People v Richmond*, 486 Mich 29, 34 (2010), quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 616 (1920). We also are limited to exercising *only* the judicial power. Const 1963, art 3, § 2. Out of respect for that limitation, we have long taken the position that courts do not “decide or declare abstract questions of right for the future guidance of suitors.” *Street R Co of E Saginaw v Wildman*, 58 Mich 286, 287 (1885). It is beyond the judicial power to opine “where our conclusions could not be made effective by final judgment, decree, and process[.]” *Anway*, 211 Mich at 622. Consequently, “our only constitutional authorization to issue advisory opinions is found in Const 1963, art 3, § 8” *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 588 n 57 (2005).

So, what does Const 1963, art 3, § 8 provide? “Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.” We have recognized this text as effectively describing elements for advisory opinions. “Michigan’s Constitution . . . restricts advisory opinions to[:] [1] important questions of “law”, [2] concerning the “constitutionality” of legislation, [3] “upon solemn occasions” when requested by either house of the Legislature or the Governor, [4] after the legislation has been enacted into law but before the effective date.” *Request for Advisory Opinion on Constitutionality of 1975 PA 227*, 395 Mich 148, 149 (1975), quoting *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 482-483 (1973) (LEVIN, J., concurring).⁴

terms, . . . we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms”). Where, as here, the terms are not merely *narrow*, but *silent*, I believe I am just as justified in considering the materials I have consulted to discern the text’s meaning.

⁴ Justice VIVIANO asserts that “the phrase ‘upon solemn occasions’ . . . is a legal term of art describing the circumstances in which this Court

Strictly speaking, the constitutional language only empowers the Legislature to *ask* for an opinion, and it imposes certain requirements when the Legislature does so. The next question is whether the constitutional provision is bilateral—whether it applies to this Court as much as the Legislature.

There is no dispute that at least some of the provisions of Const 1963, art 3, § 8 apply to this Court as well as the Legislature. Thus, while that section does not affirmatively grant this Court the power to issue advisory opinions, there is no dispute that we can.⁵ To hold that the

may properly exercise its discretion to issue an advisory opinion.” But the constitutional text clearly lists a “solemn occasion” as a separate element from the timing requirement; whatever effect the timing requirement has on us, it is distinct from the “solemn occasion” requirement. Thus, no one disputes that, regardless of how solemn the occasion, we cannot render an advisory opinion about some other issue than a statute’s constitutionality. The quotes from the convention delegates offered by Justice VIVIANO relate to this Court looking to the “solemn occasion” language as allowing this Court *not* to render an opinion, not granting an affirmative power to do so. Notably, the several other state constitutions Justice VIVIANO cites all contain language *requiring* their state supreme courts to issue advisory opinions, and it is in this context that other state supreme courts have focused on this language to avoid rendering advisory opinions they are disinclined to issue. See Topf, *A Doubtful and Perilous Experiment: Advisory Opinions, State Constitutions, and Judicial Supremacy* (New York: Oxford University Press, 2011), p 72 (“The only qualifications [in the Maine constitutional clause requiring advisory opinions] were that the opinions be given only ‘upon important questions of law’ and only ‘upon solemn occasions.’ The qualifications became, in the six states whose provisions included them, a window of opportunity [to get around the constitutional mandate].”) (citation omitted). I am aware of no authorities suggesting that the “solemn occasion” language provides independent authority that we would otherwise lack to issue an opinion, and I conclude that treating it as an element that must be satisfied distinct from the timing requirement is more consistent with the constitutional text and our statement in *Advisory Opinion on 1975 PA 227*.

⁵ See Ortner, Fayz & DeQuick, Annual Survey of Michigan Law: June 1, 1989–May 31, 1990, *Civil Procedure*, 37 Wayne L Rev 373, 380 n 29 (1991) (“The authority of the supreme court to render advisory opinions is indirectly conferred by the authority granted the legislature or governor to request an advisory opinion[.]”). Because of this dynamic, I disagree with Justice VIVIANO’s discussion of the “grammatical structure” of the constitutional section. Since our authority to opine is derived from the Legislature’s authority to request an opinion, I am unpersuaded that the fact that the timing requirement is grammatically tied to the making of the request ought to change my analysis.

Legislature may *ask* for an opinion but we may not *issue* one would render the constitutional text nugatory.⁶ That the Legislature may only ask about questions of “law” confines us to answering questions that do not require factual development. See *Request for Advisory Opinion on the Constitutionality of 1979 PA 57*, 407 Mich 60, 66 (1979), quoting *Advisory Opinion re Constitutionality of 1974 PA 272*, 393 Mich 916 (1975) (refusing to issue an advisory opinion where “[t]he questions ‘are so broad that any advisory opinion of the Court would depend for resolution on whatever particular factual situations the Court would be forced to hypothesize’”). There is also no dispute that “[t]he Court may be requested to render an advisory opinion only concerning ‘the constitutionality of legislation’” *Id.* at 67. See also *Advisory Opinion re 1972 PA 294*, 389 Mich at 483 (LEVIN, J., concurring) (“It would appear . . . that in the context of an advisory opinion, we may not examine questions of fact, and questions concerning the interpretation or construction of a statute may not be considered except as those questions affect a constitutional question.”) We have also held that the requirement that requests for advisory opinions not come until after legislation has been enacted into law constrains both the Legislature and this Court. *Request for Advisory Opinion on 1975 PA 227*, 395 Mich at 149-150 (“Viewed against what the Constitution requires, § 200 of 1975 PA 227 is insufficient to invoke this Court’s discretionary power to render an advisory opinion. . . . [T]he request was made during the enactment process itself, whereas the Constitution requires that the request be made after enactment and before the effective date.”).⁷

The question we face here is what to make of the “effective date” deadline in the Constitution. It clearly requires the Legislature to request an advisory opinion prior to the effective date, and when it asks too late, we may not opine. See *Request for Advisory Opinion on Constitutionality of 1975 PA 222*, 395 Mich 361, 361 (1975); *Request for Advisory Opinion on the Constitutionality of 1975 PA 195 & 196*, 395 Mich 642 (1975). But if the Legislature must *ask* prior to the effective date, I believe we must also *opine* before the effective date. Arguably, the resolution of this issue

⁶ We have, for that matter, also said that we may not render advisory opinions to anyone other than the Legislature or Governor. See *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 53 (1975), quoting *Advisory Opinion re 1972 PA 294*, 389 Mich at 485 (LEVIN, J., concurring) (“We are not . . . constitutionally authorized to furnish advisory opinions to the Michigan Trial Lawyers Association or a committee of the State Bar’. Similarly, we are not constitutionally authorized to furnish advisory opinions to the Attorney General or amici.”).

⁷ More broadly, we have indicated that satisfaction of the timing requirements of the advisory-opinion section are jurisdictional. See *In re Request for Advisory Opinion Regarding 2005 PA 71*, 479 Mich 1, 13 (2007) (“Because the House of Representatives requested an advisory opinion well before th[e effective] date, this Court indisputably has jurisdiction . . . to render an advisory opinion in this matter.”).

can be found in our discussion of the elements of advisory opinions. We said that “‘Michigan’s Constitution . . . restricts advisory opinions to . . . after the legislation has been enacted into law but before the effective date.’” *Request for Advisory Opinion on 1975 PA 227*, 395 Mich at 149 (citation omitted). While the question there was whether the Legislature’s request had been made “after [the statute] ha[d] been enacted into law”—and is therefore perhaps distinguishable from our present concern—our remark certainly came in the course of closely considering the jurisdictional consequences of the timing requirements in the advisory-opinion process, and thus may well be the sort of “‘principle[] of law deliberately examined and decided by a court of competent jurisdiction [that] should not be lightly departed,’” *People v Graves*, 458 Mich 476, 480 (1998), quoting *People v Jamieson*, 436 Mich 61, 79 (1990) (opinion by BRICKLEY, J.). We have more clearly remarked in subsequent nonbinding dicta that the timing requirements apply to this Court. See *Wayne Co v Hathcock*, 471 Mich 445, 485 n 98 (2004) (“The only instance in which we are constitutionally authorized to issue an advisory opinion is upon the request of either house of the Legislature or the Governor—and, then, only ‘on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.’ ”).⁸ Regardless of how bound we ought to

⁸ See also *Woodman v Kera LLC*, 486 Mich 228, 264 n 2 (2010) (opinion by MARKMAN, J.) (“Const 1963, art 3, § 8, authorizes this Court to issue advisory opinions concerning the constitutionality of legislation, but . . . only after it has been enacted into law but not yet taken effect.”). Many commentators have characterized the “effective date” language as a restriction on our ability to opine. See 22 Michigan Civil Jurisprudence, Statutes, § 125, p 710 (“The Michigan Supreme Court may render . . . an opinion as to the constitutionality of legislation after it has been enacted into law but before its effective date.”); 7A Michigan Pleading & Practice (2d ed), § 52:20, p 30 (“The Constitution empowers the Supreme Court to furnish advisory opinions . . . , but only as to legislative acts that are already passed and signed by the governor, and before they become effective.”); Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 BU L Rev 2243, 2259 (2017) (“The Michigan Constitution . . . permits an advisory opinion to be issued only after a bill ‘has been enacted into law but before its effective date.’ ”); *Doubtful and Perilous Experiment*, p 95 (“Michigan’s constitution limits advisory opinions to advice on legislation only after it has been enacted but before its effective date.”); Baughman, *Justice Moody’s Lament Unanswered: Michigan’s Unprincipled Retroactivity Jurisprudence*, 79 Mich BJ 664, 667 n 31 (2000) (Our authority to issue advisory opinions “may be exercised only . . . after the legislation has been enacted but before it has gone into effect”); *Civil Procedure*, 37 Wayne L Rev at 380 (“Although the Michigan constitution confers authority upon the court to render advisory opinions, that authority . . . is restricted . . . to questions concerning the constitutionality of enacted legislation that has not yet taken effect.”).

consider ourselves by these prior remarks of ours, I believe they are in any event correct. I have two reasons for this conclusion.

First, I see no reason that all of the other requirements of the advisory-opinion section would apply to both this Court and the Legislature, but the “before its effective date” requirement would not.⁹ That the Constitution expresses any timing element at all implies restrictions on the prerogatives of the branches of government during the advisory-opinion process. Consider that—again, strictly speaking—the Constitution says only that the Legislature “may request the opinion of the supreme court . . . as to the constitutionality of legislation after it has been enacted . . .” It does not expressly say that such a request *cannot* be made *before* legislation is enacted, for example by saying that the Legislature “may request the opinion of the supreme court . . . *only* after [the law] has been enacted.” Instead, such a restriction is implied, although we have (correctly, in my view) said that it exists—and that it restrains both this Court and the Legislature.¹⁰ See *Request for Advisory Opinion on 1975 PA 227*, 395 Mich at 149-150. The Constitution then also requires that such a request be made “before [the legislation’s] effective date.”¹¹ The implicit requirement to wait until legislation has been enacted, and the explicit requirement to ask before it takes effect, creates a window of time within which requests must be made.

I believe the existence of this window communicates limitations on both the ability to request an advisory opinion from us and our ability to render one. That the Legislature cannot ask (and we cannot opine) until the legislation is enacted appears to be aimed at requiring the Legislature to have committed to a particular course of action, leaving us out of

⁹ Justice MARKMAN does not believe my read of the Constitution is “even a reasonably *logical* implication of” the constitutional language, but I struggle to see the logic of accepting that all of the other requirements of the advisory-opinion process apply to both the Legislature and this Court, but that this requirement, uniquely, applies only to the Legislature. I see no textual basis for distinguishing the “before its effective date” requirement from the others.

¹⁰ Justices MARKMAN and VIVIANO acknowledge that the Constitution requires that the Legislature wait to ask for an advisory opinion until after the legislation is enacted, but a close reading of the Constitution indicates that it no more expressly requires that than it expressly precludes us from issuing a posteffectiveness advisory opinion. Both restrictions are, instead, implied from the text and its apparent purpose.

¹¹ The Constitution’s use of “but” in the phrase “but before [the law’s] effective date,” in *but’s* conjunctive sense that indicates an exception, avoids any lack of textual clarity about whether that functions as a restraint—it undoubtedly does. See *The American Heritage Dictionary of the English Language* (5th ed), defs 3 and 4 (defining “but”).

acting as legislative counsel during the drafting process.¹² But what purpose is served by requiring that the request arrive before the effective date, if our opinion must not also be rendered before the effective date? If we can issue an advisory opinion after the effective date, why does the Constitution bother to expressly state that the request must arrive before then? What has changed the day after legislation takes effect such that the Legislature may not even ask but we can still opine? It seems apparent to me that the “before the effective date” deadline communicates a structural function similar to the “after it has been enacted into law” requirement.¹³ In my view, that structural function is forcing the Legislature to request, and this Court to issue, an opinion before legislation takes effect, so the Legislature can remedy defects we identify.¹⁴ Therefore, I believe the presence of the deadline for the Legislature to make the request also implies the same deadline for us to act upon it, in much the same way as the implied requirement that the Legislature not ask *before* legislation is enacted leaves us unable to opine. In other words, our ability to opine coincides with the window of time within which the Legislature can ask.¹⁵

¹² This apparent purpose for the text was also the stated rationale offered by the proponent of the language at the convention, future Secretary of State Richard Austin. See 1 Official Record, Constitutional Convention 1961, p 1548 (“[W]ould it be possible for us to add some language to indicate that this should be done by the supreme court only after the legislation has been enacted into law? This, of course, would simply prevent the supreme court from getting involved until the legislative process was completed and they would be working with a law rather than some bills or proposals for legislation.”).

¹³ Justice MARKMAN contends that the Constitution draws a distinction between requirements as to the “substance” of advisory opinions and the “procedural” requirement of proper timing. However, it seems apparent to me that the timing requirement—at least on the front end, requiring that we not opine until a statute is “enacted into law”—is more than procedural, but is rather substantive and structural. If that requirement is structural, I see no reason the other end of the timing requirement would not be as well.

¹⁴ Consistent with this, one delegate remarked that he supported the proposal to add this section because “it enables us to settle questions . . . in advance without the necessity for going through all the agony of setting up [executive branch] divisions and departments and then having to dismantle them” and “it gives the legislature and the governor . . . an opportunity to get a decision *rather than* to plunge ahead regardless of what the legal outcome may be.” 1 Official Record, Constitutional Convention 1961, p 1544 (emphasis added).

¹⁵ Justice MARKMAN faults my interpretation because it imposes one “additional and applicable time restriction . . . found nowhere within the

My second observation about the text of the Constitution is that I believe our extraordinary power to issue advisory opinions must be construed in light of our ordinary exercise of only the judicial power.¹⁶ We are only *expressly* granted “the judicial power” in Const 1963, art 6, § 1—and, in fact, expressly *confined* to the judicial power, Const 1963, art 3, § 2—while our ability to issue advisory opinions is an *implicit* exception to that limitation under Const 1963, art 3, § 8. Careful consideration of the nature of our “judicial power” suggests we cannot issue advisory opinions after the effective date of the legislation being reviewed.¹⁷ Advisory opinions are “a departure from the historic judicial scheme.” *Request for Advisory Opinion on Constitutionality of 1977 PA 108*, 402 Mich 83, 86 (1977). In my view, the best way to reconcile these

language of Const 1963, art 3, § 8 or anywhere else within our Constitution.” I struggle to see why he objects to this. The word “moot” does not appear anywhere in the Constitution either, yet filing an application for leave to appeal that is timely under MCR 7.305(C) does not insulate the proceeding from being dismissed for mootness. See, e.g., *People v Givens*, 482 Mich 1072 (2008); *People v Newell*, 444 Mich 899 (1993). A party who “relied on th[e] clear and unambiguous language [of MCR 7.305(C)] in reaching the conclusion that this was the only applicable time restriction” may well be sorely disappointed. Indeed, although the court rule is arguably of constitutional significance—since it is promulgated pursuant to our authority to prescribe both our own appellate jurisdiction and rules of procedure, Const 1963, art 6, §§ 4 and 5—we have not treated our ability to promulgate the rule as an opportunity to broaden the judicial power the Constitution vests us with so as to dispense with mootness as an obstacle to adjudication. Justice MARKMAN is unpersuaded by this observation because the doctrine of mootness is “well established,” but it seems to me to be in the nature of a question of first impression that the answer to it is not yet well established. We have never performed this analysis before, so I am not surprised that an answer to it is not “well established.” Moreover, if it is acceptable to advocate that this Court overrule itself and reinstate a rule of law it has expressly rejected, see *Ader v Delta College Bd of Trustees*, 493 Mich 887, 887-889 (2012) (MARKMAN, J., dissenting) (calling on the Court to grant leave to appeal so as to overrule *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349 (2010)), I believe my argument that the Court ought to recognize a rule it has never before considered should not be faulted for its novelty.

¹⁶ While Justice VIVIANO faults my analysis for discerning a rule that is not “explicitly decreed,” I would note that our power to issue advisory opinions is just as “extraordinary,” yet is also not “explicitly decreed.”

¹⁷ Justice MARKMAN describes the language of Const 1963, art 3, § 8 as “straightforward and unambiguous,” but I disagree, at least as to this issue—because it does not expressly grant this Court the authority to issue advisory opinions (even while undoubtedly implying it), the param-

constitutional provisions is to conclude that advisory opinions can only be issued prior to the effective date of the legislation being scrutinized. An advisory opinion prior to the effective date of legislation is far more consistent with the nature of an advisory opinion—and therefore is in less tension with our ordinary constitutional constraint of being limited to “the judicial power”—than an advisory opinion after the effective date. Prior to the effective date, the Legislature can act on our advice to avoid the harm and confusion attendant to a statute’s being found unconstitutional. After the effective date, harms have already been suffered; an abstract statement from this Court holding a law unconstitutional posteffectiveness may well introduce more confusion, rather than less, given that the issue would not be presented in the context of an actual plaintiff suffering a discrete harm that can be remedied with a court order. Consequently, I think the nature of the advisory-opinion process as a limited *exception* to our ordinary exercise of “the judicial power” means that the text of the Michigan Constitution itself suggests that advisory opinions after the effective date of legislation are not allowed.¹⁸

B. THE CIRCUMSTANCES LEADING TO CONST 1963, ART 3, § 8

As noted, our caselaw establishes that where the meaning of the constitutional text is doubtful, we can supplement it with other considerations, such as the circumstances leading to the adoption of the relevant provision. Here, those circumstances also indicate that issuing

eters of our advisory-opinion power are not clear from the text alone given its uneasy juxtaposition with our ordinary exercise of what is essentially its antithesis, the judicial power.

¹⁸ Justice MARKMAN disagrees with my characterization of the advisory-opinion process as a limited exception to our exercise of the judicial power and claims it instead “broaden[ed] this Court’s, and this state’s, ‘judicial power’ to also encompass the authority to issue advisory opinions” The structure of the Constitution suggests that his gloss is incorrect; while Article 6 of the Michigan Constitution lays out the parameters of the judicial power, see Const 1963, art 6, § 1 *et seq.*, the advisory-opinion process is provided for in Article 3. Moreover, we have characterized an advisory opinion as “not a judicial determination of the question by the court,” *Anway*, 211 Mich at 603, as well as cited with apparent approval the remark that “[i]n no sense, even though . . . signed by five or more Justices . . . , would . . . an [advisory] opinion be or become a judicial determination,” *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 461 n 1 (1973), quoting *Advisory Opinion re Constitutionality of PA 1966, No 261*, 379 Mich 55, 67 (1967), rev’d on other grounds 380 Mich 736 (1968) (BLACK, J., concurring). See also *Cassidy v McGovern*, 415 Mich 483, 498 (1982) (citing Justice BLACK’s concurrence with approval); *Justice Moody’s Lament*, 79 Mich B J at 667 n 31 (Our authority to issue advisory opinions “is a special authority, not part of the judicial power . . .”).

such opinions after the effective date of legislation was not contemplated. While Justice MARKMAN asserts that “expediting an answer to a question that can only be answered by this Court . . . is the very *purpose* of an advisory opinion,” I believe this history demonstrates the contrary. I believe the lesson of the story is that the advisory-opinion process was not intended to provide an expeditious answer, but rather to avoid the problems that can sometimes attend to a law being held unconstitutional after it becomes effective—to enable review of a statute before any injury has been suffered.

The advisory-opinion provision was added to the Constitution in response to the fiscal and legal crises Michigan suffered in the middle decades of the 20th century relating to the sales tax. “The sales tax came to us in the depths of a great depression in order to provide the means for fulfilling desperate governmental needs.” *Lockwood v Comm’r of Revenue*, 357 Mich 517, 545 (1959).

By 1932, as a consequence of the Depression, [property] tax delinquency in Michigan had increased to frightening proportions, thus drastically reducing the yield from property tax assessments at the very time when additional monies were so desperately needed. By 1933 the delinquency rate was reported to be the highest in the country. . . . In November 1932 voters approved an amendment to the constitution that limited property taxes to no more than fifteen mills (1.5 percent) of assessed valuation.^[19] This virtually forced the legislature to find new sources of revenues, because fifteen mills was inadequate to support state as well as county, township, and school programs. Thus in 1933 the legislature . . . passed [1933 PA 62,]^[20] an act under which property taxes would go entirely to local units of government.^[21] To replace the \$23.5 million the state had received from property taxes in 1932, the legislature enacted [1933 PA 167,]^[22] a 3 percent sales tax. [Dunbar & May, *Michigan: A History of the Wolverine State* (Grand Rapids: Wm. B. Eerdmans Publishing Co, 1995), p 523.]

However, “[t]he sales tax, powerful though it was, was vulnerable to avoidance.” *Lockwood*, 357 Mich at 546.

¹⁹ Const 1908, art 10, § 21, the legality of which was tested in *Pontiac Sch Dist v City of Pontiac*, 262 Mich 338 (1933). Our current Constitution contains a modified analogue. See Const 1963, art 9, § 6.

²⁰ This statute is, to this day (in amended form), our Property Tax Limitation Act, MCL 211.201 *et seq.*

²¹ See also *Wikman v Novi*, 413 Mich 617, 688 n 66 (1982) (“After the 15-mill limitation was added to the constitution in 1932 and the Property Tax Limitation Act was enacted in 1933, the state ceased to receive a share of the tax revenues generated by the local assessment process.”).

²² This statute is, to this day (in amended form), our General Sales Tax Act, MCL 205.51 *et seq.*

If the purchase, possibly of an automobile, were made not in Michigan but in a neighboring State the Michigan sales tax would not apply. Thus not only did the State of Michigan lose the tax moneys but a Michigan merchant lost the sale. . . . To meet the threat of avoidance a tax was enacted[, 1937 PA 94].²³ The article purchased in another State would be taxed in Michigan by virtue of its use here, and at the same rate²⁴ as if sold in Michigan in the first place. This was the use tax. Through its enactment the flight across the border was blocked, the Michigan merchant protected in his competitive position, and the State tax funds safeguarded. [*Id.*]

The sales and use taxes were an effective form of government finance. The sales tax “was a tax easily collected and possessing the power of producing vast revenue.” *Id.* at 545. “No meal could be consumed without its payment, no shelter built, no clothing purchased without meeting its exaction, and in advance. It fell on all alike, and without regard to want or ability to bear the tax. Vast sums poured into the State treasury.” *Id.* at 545-546. “It soon became our leading source of revenue,” *id.* at 546-547, and “[b]y 1937 this tax was bringing in over \$55 million,” *Michigan*, p 523.

However, “the distribution of these funds” eventually became a problem. *Lockwood*, 357 Mich at 546. First, “an amendment added to the constitution in 1939 forbade the use of revenues derived from the gasoline and weight taxes for anything but highways.”²⁵ *Michigan*, p 524. Second, sales-tax revenues also were constitutionally restricted.

The sales tax . . . satisfactorily met the state’s needs for more than a decade. During World War II, in fact, revenues from this and other taxes had resulted in the accumulation of a sizable surplus in the state treasury. But local governmental units found themselves caught in a squeeze. Rising costs of materials as well as wages and salaries created a serious problem for them in view of the fifteen-mill tax limitation. At every legislative session mayors and school superintendents entreated the legislature for state aid. The response was meager. As a result of this situation, a constitutional amendment providing for the diversion of part of the state sales tax to local units was placed on the ballot by petition and adopted by the people in 1946.²⁶ [*Id.* at 551.]

²³ This statute is, to this day (in amended form), our Use Tax Act, MCL 205.91 *et seq.*

²⁴ That is to say, at the time 3%.

²⁵ Const 1908, art 10, § 22. Our current Constitution contains a modified analogue. See Const 1963, art 9, § 9.

²⁶ Const 1908, art 10, § 23, the legality of which was tested in *City of Jackson v Comm’r of Revenue*, 316 Mich 694 (1947). Our current Constitution contains a modified analogue. See Const 1963, art 9, § 10.

The amendment “took out of the hands of the legislature the spending of most of the 3 cents paid in.” *Lockwood*, 357 Mich at 547.

One-half of 1 cent went back to the counties and the other half to school districts. These diversions left 2 cents of the tax, but of those 2 cents almost half in turn, also was earmarked by the same amendment, leaving the legislature only a little over one-fifth of the total sales tax moneys available for distribution in its discretion. [*Id.*]

See also *Michigan*, p 551 (“At the time it was approved, it diverted some 77 percent of the state’s revenues to local governmental units.”). “The adoption of this ‘sales tax diversion amendment’ marked the beginning of a long period of financial problems and difficulties for the state government.” *Id.* With “the bulk of the money . . . no longer available for the general expenses of government,” “[i]t require[d] no great acuity to anticipate the next step since the path is worn smooth by constant use”: “It was simply to increase the tax.” *Lockwood*, 357 Mich at 547.

That avenue, however, was sealed off. “The sales tax, said our people, was not to follow this well-worn path of constant increases.” *Id.* “An amendment [to Const 1908, art 10, § 23] adopted in 1954 limited the sales tax to 3 percent.” *Michigan*, p 552. This prompted a fiscal crisis. “By July 1, 1958, the state treasury showed a deficit of \$21.1 million. . . . The amount of the deficit increased to \$95.4 million by July 1, 1959.” *Id.* “On August 29 lawmakers passed a series of bills to increase tax revenues,” and “[m]ain reliance was placed . . . upon [1959 PA 263,]” *id.* at 560-561. This statute amended the Use Tax Act to increase the tax to 4%, except for articles on which 3% sales tax had already been paid—for those, the use tax would be only 1%. Moreover, the statute contained “accommodation devices” whose “combined effect . . . [was] to convert the tax from one purportedly levied upon the user for his use of personal property, and to be reported and paid by him, into a tax to be collected by the seller at the point of sale and for the collection and reporting of which he, and he alone, [was] responsible.” *Lockwood*, 357 Mich at 551-552. “In effect this was an addition to the 3 percent sales tax,” but “[b]y calling it a use tax the legislature sought to evade the constitutional limit of 3 percent on the sales tax.” *Michigan*, p 561.

In an original action for mandamus in this Court, Charles Lockwood²⁷ challenged the constitutionality of the 1959 use-tax amendment.

²⁷ Charles Lockwood, a Detroit College of Law professor, perhaps most prominently represented several service members caught up in the “Red Scare” of the 1950s and accused of being communists. His work getting Milo Radulovich reinstated in the United State Air Force is commemorated by a Michigan Legal Milestones plaque outside the MSU College of Law. See State Bar of Michigan, *Milo Radulovich and the Fall of McCarthyism* <https://www.michbar.org/programs/milestone/milestones_miloradulovich> (accessed November 26, 2019) [<https://perma.cc/X66W-E6T4>]. See generally Ranville, *To Strike at a King: The Turning Point in the McCarthy Witch-Hunts* (Troy: Momentum Books, Ltd, 1997).

We took “judicial notice of what every citizen of this State kn[ew] from his daily life”: “[i]n actual operation of the tax, . . . [a] tax of 4% upon retail sales [was then] being collected by retailers in every city and village and township of Michigan,” leaving “[t]he citizens of this State . . . under no illusion—the tax payable by them upon their retail purchases ha[d] been increased above the 3% rate despite the prohibition in their Constitution.” *Lockwood*, 357 Mich at 553-554. “[A] levy of 4% [was being] made on the sale of every loaf of bread, every pair of shoes, and every stick of furniture despite the constitutional limitation of 3%.” *Id.* at 559. We held that the 1959 use-tax amendment was an unconstitutional effort to evade the constitutional sales-tax limit and ordered the state “to desist and refrain from levying, assessing or collecting the additional 1% tax . . .” *Id.* at 560.

Although the use-tax law had an effective date of September 1, 1959, see 1959 PA 263, § 2, and we issued our opinion in *Lockwood* holding it unconstitutional on October 22, 1959, several millions of dollars of tax revenue were unconstitutionally collected in the interim. At the constitutional convention, the proponent of the advisory-opinion section of our Constitution, future Secretary of State Richard Austin, remarked:

I am intensely interested in having a provision of this sort included in the constitution because I had quite a bit of experience with the 1959 law to increase the sales tax by way of a very peculiar means, through the use tax, to 4 per cent. Subsequently it was declared unconstitutional and there was well over \$20 million of moneys collected from taxpayers in small amounts that could not be refunded to them.²⁸ It was collected from them unconstitutionally, but it could not be refunded to them because there were administrative problems involved. And I certainly would not like to see a recurrence of this kind of affair. . . . This would do what I think needs to be done. It would first require that both houses of the legislature pass on the legislation and even the governor sign the bill so that we do have a law which the court can rule on, at least as to the constitutionality of it, but at least give the court a chance to look at it before it becomes effective and taxes are collected under the defective law. [1 Official Record, Constitutional Convention 1961, p 1547.]

The apparent problem the advisory-opinion section was trying to solve, in other words, was to *prevent the collection of unconstitutional taxes in the first place*.

In my view, then, the history of the sales- and use-tax challenge builds on the constitutional text to further demonstrate that an advisory opinion after legislation’s effective date is not contemplated by the Constitution. The reason we consider the circumstances leading up to

²⁸ Other sources offer a smaller figure. See *Michigan*, p 711 n 16 (“Although the use tax was thrown out by the courts, about \$13 million had already been collected, of which amount applications were received for the refunding of only \$900,000.”).

the adoption of the constitutional provision is that a “constitutional provision must receive a reasonable construction, with a view to give it effect,” which focuses on identifying “the mischief designed to be remedied . . .” *People ex rel Drake v Mahaney*, 13 Mich 481, 497 (1865).²⁹ The problem the advisory-opinion section was intended to solve was the one caused by *Lockwood*, but the problem there was not an insufficiently expeditious review of the statute. The case was an original action in this Court and was resolved slightly more than seven weeks after the legislation took effect.³⁰ Rather, the review was inadequate because the unconstitutionally collected taxes could not be returned to the taxpayers. The advisory-opinion provision was added to enable this Court to review legislation *prior* to its effective date, so that these kinds of problems could be avoided in the first place.³¹

²⁹ My analysis here does not run afoul of Justice VIVIANO’s critiques of the “mischief rule.” My analysis does not “*first* identify[] the problem . . . that [this constitutional provision] was designed to remedy and *then* adopt[] a construction that will suppress the problem and advance the remedy . . .” Rather, I begin with the constitutional text, offer what I believe is the best reading of it on its own, and supplement it with consideration of the problem the convention was trying to solve. I believe Justice COOLEY would have agreed with my approach, because— notwithstanding the remark from his “seminal treatise” cited by Justice VIVIANO—Justice COOLEY also authored *Mahaney*. Moreover, in light of Justice VIVIANO’s acknowledgment that this section of the Constitution “is not a model of clarity,” it is not clear to me under what circumstances it would ever be appropriate to consult or make practical use of historical context if we cannot do so here.

³⁰ To the extent that the convention contemplated a need for prompt posteffectiveness review of legislation, it was seemingly effectuated by maintaining our original jurisdiction “to issue, hear and determine prerogative and remedial writs,” Const 1963, art 6, § 4—such as the writ of mandamus that was at issue in *Lockwood* and over which we had jurisdiction under Const 1908, art 7, § 4.

³¹ Justice MARKMAN concedes “that historical context may be relevant in interpreting a constitutional provision,” but asserts that “even assuming that the ‘purpose’ of Const 1963, art 3, § 8 was to allow this Court to issue advisory opinions before the effective date of legislation, this does not signify in any way that Const 1963, art 3, § 8 does not *also* allow the Court to issue advisory opinions after the effective date.” Considering this proposition standing alone, I would agree—the circumstances leading up to *Lockwood* would not, on their own, be enough to conclude that we must only be able to issue advisory opinions prior to the effective date of legislation. But I do not think these circumstances must stand alone; they only supplement my read of the constitutional text, where I begin my

C. ADDRESS TO THE PEOPLE

Finally, the Address to the People also indicates that advisory opinions after the effective date of legislation are impermissible. We have described the Address to the People “as an authoritative contemporary construction of the constitutional provisions that the citizens of Michigan were asked to vote on,” *Mich Coalition of State Employee Unions*, 498 Mich at 325, because “it was approved by the general convention . . . as an explanation of the proposed constitution” and “was widely disseminated prior to adoption of the constitution by vote of the people,” *Regents of the Univ of Mich v Michigan*, 395 Mich 52, 60 (1975). In my view, the Address to the People confirms my interpretation of the advisory-opinion process in two ways. First, it makes clear that Mr. Austin’s view of the relationship between the advisory-opinion process and the sales/use-tax controversy was not some personal idiosyncrasy. Rather, the Address said that “[a]n example of the possible exercise of th[e advisory-opinion] section would have been the matter of the 4-cent state use tax which was passed and later declared unconstitutional.”² 2 Official Record, Constitutional Convention 1961, p 3368. Second, and more importantly, the Address to the People flatly states that Const 1963, art 3, § 8 “empowers the supreme court to furnish advisory opinions . . . but *only* as to legislative acts that are already passed and signed by the governor, *and before they become effective.*” *Id.* (emphasis added). What was communicated to the people, then, was (1) that advisory opinions could only be rendered “before [legislative acts] become effective,”³² and (2) that the advisory-opinion process was meant

analysis. Moreover, in light of the Constitution’s silence in expressly describing the parameters of when we can issue advisory opinions, if we cannot look to this history to help make sense of that silence it is once again not clear to me under what circumstances it would ever be appropriate to consult or make practical use of historical context.

³² Justice VIVIANO “question[s] whether” the language I find relevant in the Address to the People “is entitled to the elevated consideration normally given to the Address,” given that it was not included in the proof of the Address that was mailed out to the convention delegates in advance of its approval, but was rather “inserted along with scores of other changes” that “were not mailed to the delegates until . . . four days before the Address was approved.” I am, however, not aware of any principle of law that a deliberative assembly’s action can be scrutinized for the amount of time spent considering it. Because “[a]ll political power is inherent in the people,” Const 1963, art 1, § 1, it was the people themselves to whom the question of ratification was submitted, Const 1963, sched § 15, and our principal inquiry is therefore how “the great mass of the people themselves’” would understand the text, *Mich Farm Bureau v Secretary of State*, 379 Mich 387, 391 (1967), quoting *May v Topping*, 65 W Va 656, 660 (1909). Therefore, the central issue is the

to address the problem presented by *Lockwood*, which was judicial review of a statute after its effective date. This resolves any remaining doubt in my mind about how best to interpret both the constitutional text and the inferences that should be drawn from the advisory-opinion process being a response to *Lockwood*.³³

D. HISTORICAL PRACTICE

On the other hand, and challenging my interpretation of Const 1963, art 3, § 8, is the fact that on several occasions we have issued advisory opinions after the effective date of the legislation being assessed. However, I find this past practice unpersuasive. First, on at least one occasion, we appear to have ignored even an uncontroversial constitutional timing requirement. In *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41 (1975), we reviewed legislation which was given immediate effect on the date of enactment: July 26, 1974. Where there is no gap between a statute's date of enactment and its effective date, there is seemingly no opportunity for the Legislature to even ask (let alone for us to opine) after its enactment but before its effective date.³⁴ I am disinclined to defer to our past practice if we disregarded

effect the Address had on the electorate to whom it was disseminated and which was invited to look to it in understanding the proposed constitution they were voting on, and what the people were told was that advisory opinions could only be rendered "before [legislative acts] become effective."

³³ I disagree with Justices MARKMAN and VIVIANO that the Address to the People contradicts the constitutional text. The Constitution expressly allows the Legislature to ask for an advisory opinion on a piece of legislation until its effective date, just as MCR 7.305(C) expressly establishes deadlines for filing an application for leave to appeal in this Court. That the expression of those deadlines does not also recite the risk of, e.g., mootness being an obstacle to adjudication does not mean that dismissal on account of mootness would be "inconsistent with [MCR 7.305(C)'s] actual language," and I do not think it contradicts the Constitution to conclude that similar obstacles to an advisory opinion exist even if not recited in Const 1963, art 3, § 8. I would note that the Address to the People's expression of the meaning of Const 1963, art 3, § 8 is a sufficiently natural gloss on the constitutional text that we echoed it in the previously quoted dicta from *Hathcock*.

³⁴ Our handling of 1975 PA 227 also deserves scrutiny. The Legislature asked us 10 questions about the statute, the first of which being whether it complied with the title-object requirement of Const 1963, art 4, § 24. Prior to the law's effective date, we said that the law violated this constitutional requirement, *Advisory Opinion on Constitutionality of 1975 PA 227 (Question 1)*, 396 Mich 123 (1976), but after the effective

the Constitution's uncontroversial requirements. Second, most of the remaining posteffectiveness advisory opinions left the question of the timing of the request and the propriety of issuing a posteffectiveness opinion unaddressed.³⁵ This is certainly not a "principle[] of law deliberately examined." *Graves*, 458 Mich at 480 (citation omitted).

The one time we appear to have specifically concerned ourselves with whether it was too late for us to issue an advisory opinion is in *In re Request for Advisory Opinion Regarding 2005 PA 71*, 479 Mich 1 (2007). In 1996, the Legislature had amended MCL 168.523 to require that voters present a photo ID in order to vote. Attorney General Kelley,

date we went on to offer answers to the remaining questions, *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465 (1975). Because the latter opinion came while the Legislature was drafting legislation that was responsive to our first opinion, it seems to have been in substantial tension with the goal of this Court not acting as legislative counsel.

³⁵ See *Advisory Opinion re Constitutionality of PA 1966, No 261 (On Reconsideration)*, 380 Mich 736, rev'g 379 Mich 55 (opinion issued on May 8, 1968, reversing opinion issued on April 10, 1967, regarding statute that took effect on March 10, 1967); *Advisory Opinion re Constitutionality of PA 1966, No 346*, 380 Mich 554, 561 (1968) (opinion issued on May 6, 1968, regarding statute that took effect on March 10, 1967); *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82 (1970) (opinion issued on October 5, 1970, regarding statute that took effect on September 1, 1970); *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659 (1973) (opinion issued on July 24, 1973, regarding statute that took effect on January 1, 1973); *Advisory Opinion re Constitutionality of 1973 PA 1 & 2*, 390 Mich 166 (1973) (opinion issued on October 17, 1973, regarding statutes that took effect on March 13, 1973); *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465 (1976) (opinion issued May 21, 1976, regarding statute that took effect on March 31, 1976); *Advisory Opinion on Constitutionality of 1976 PA 240*, 400 Mich 311, explaining 400 Mich 175 (1977) (opinion issued June 10, 1977, explaining order entered May 25, 1977, regarding statute that took effect on March 31, 1977); *Advisory Opinion on Constitutionality of 1975 PA 301*, 400 Mich 270 (1977) (opinion issued June 10, 1977, regarding statute that took effect on March 31, 1976); *Advisory Opinion on Constitutionality of 1976 PA 295, 1976 PA 297*, 401 Mich 686 (1977) (opinion issued November 7, 1977, regarding legislation that took effect on November 15, 1976); *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49 (1983) (opinion issued November 23, 1983, regarding legislation that took effect on September 19, 1982); *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93 (1988) (opinion issued March 22, 1988, regarding legislation that took effect on February 1, 1987).

however, opined that this requirement was unconstitutional. OAG, 1997-1998, No. 6,930, p 1 (January 29, 1997). Thereafter, it went unenforced. A decade later, the Legislature adopted 2005 PA 71, which made certain other changes to MCL 168.523 with an effective date of January 1, 2007. On February 22, 2006, the House of Representatives asked for an advisory opinion as to the constitutionality of the original photo ID requirement. 2006 HR 199. We granted the request for an opinion and asked Attorney General Michael Cox to arrange for arguing both sides of the issue. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 474 Mich 1230 (2006). In those submissions, “the opposing Attorney General claim[ed] that this Court lack[ed] the constitutional authority to issue an advisory opinion in this case because the request for the advisory opinion was untimely.” *In re 2005 PA 71*, 479 Mich at 12. We characterized the opposing Attorney General’s position as being “that the effective date of 2005 PA 71 was March 31, 1997, the effective date of 1996 PA 583.” *Id.* We rejected that argument, because “the effective date of 2005 PA 71 was January 1, 2007.” *Id.* at 13. It was in that context that we said that, “[b]ecause the House of Representatives requested an advisory opinion well before that date, this Court indisputably ha[d] jurisdiction . . . to render an advisory opinion in this matter.” *Id.* We ultimately issued an opinion holding 2005 PA 71 to be constitutional on July 18, 2007, well after its January 1, 2007 effective date.

It seems apparent to me that *In re 2005 PA 71* does not answer the question at hand. The issue presented in that case ultimately related to how to handle amendments to pre-existing statutes; our Constitution requires that “[t]he section or sections of the act altered or amended shall be re-enacted and published at length,” Const 1963, art 4, § 25, so the question was whether, in “re-enact[ing] and publish[ing] [them] at length” while making an unrelated change, the Legislature could give itself another opportunity to ask for an advisory opinion. Whether our resolution of that question was right or wrong,³⁶ we simply did not grapple with the *current* question, which is whether advisory opinions can be issued after the effective date of the legislation. “[A]ll that is necessary for a decision to be authoritative is to show application of the judicial mind to the subject.” *Detroit v Mich Pub Utilities Comm*, 288 Mich 267, 299 (1939). I do not see where “the judicial mind” was “applied” to this issue in *In re 2005 PA 71*, and I therefore do not consider it authoritative. To the extent that it has been our practice to issue posteffectiveness advisory opinions, I would “refuse to perpetuate the error” of doing so. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219 (2007).

³⁶ While not raised by the dissents in *In re 2005 PA 71*, it has been argued that “the advisory opinion was neither proper nor permissible” because the language being reviewed was not original to 2005 PA 71, but rather had been enacted and taken effect in 1996. *Doubtful and Perilous Experiment*, p 178.

III. LOOKING TO THE FUTURE

Although it is my view that this Court lacks jurisdiction to issue an advisory opinion after the effective date of the legislation being reviewed, my position lacks majority support. So long as it is not the law that this Court *cannot* issue an advisory opinion under such circumstances, I do not anticipate refusing to participate in the future solely on the basis of my personal view that the Court cannot do so. However, even if my view of the jurisdictional question is not the law, the Legislature should be aware that this will inform my judgment about when it is appropriate for this Court to exercise its discretion to issue an advisory opinion. Because I do not think we should issue advisory opinions after the effective date of the legislation being scrutinized, I believe the Legislature should make every effort to give us a reasonable amount of time prior to the effective date to issue an opinion.³⁷

The Legislature did not go to such efforts in this matter. The relevant legislation was passed by the Legislature on December 4, 2018. See 2018 Senate Journal 1956–1957 (No. 74, December 4, 2018). At that time, the Legislature could have extended the effective date if it wanted to. See *Gale v Oakland Co Bd of Supervisors*, 260 Mich 399, 403 (1932)

³⁷ Justice MARKMAN notes, correctly, that my view of our jurisdiction makes it impossible for “the Legislature to know how much time in advance of the effective date will be viewed by future members of this Court as sufficient[.]” Given that advisory opinions are purely discretionary on our part, however, I do not believe this adds meaningful uncertainty to the Legislature’s deliberations. Under current law, the Legislature must, as Justice MARKMAN expresses it, “engage in . . . speculation” as to whether we will issue an opinion, and—had I not publicized my position—I would have been free to silently allow my view of our jurisdiction to inform my vote on whether to grant advisory-opinion requests in the future. I am simply publicizing my reasons for not issuing an opinion in light of Justice ZAHRA’s forceful discussion of the importance of the issues at hand. I also question Justice MARKMAN’s assertion that we have a “(discretionary) constitutional responsibility to furnish advisory opinions when these have been appropriately requested” Our advisory-opinion jurisprudence has never expressed any responsibility to opine, instead emphasizing that “the intent was for sparing resort to this mechanism” and that advisory opinions are issued “at the discretion of the Supreme Court.” *Request for Advisory Opinion on 1977 PA 108*, 402 Mich at 86. Indeed, when the Governor made a request for an advisory opinion some six months after we had rejected the Legislature’s request for an opinion as to the same statute, we had no compunction about once again rejecting the request, notwithstanding the even stronger signal that had been sent by our coordinate branches of government about the desire for an opinion. See *Request for Advisory Opinion on the Constitutionality of 1979 PA 57*, 407 Mich 506 (1980).

("[F]requently laws are made effective long after the 90 days provided for by the Constitution."); OAG, 1937-1938, p 111, at 112 (October 7, 1937) ("The rule is well settled that where a constitution provides . . . that all statutes shall go into effect a designated number of days after the adjournment of the session at which same are passed, the terms of such a constitution are not violated by a provision of the legislature that an Act shall take effect at a date subsequent to the specified number of days."); Mayer, *Effective Date of Michigan Public Acts*, 56 Mich St B J 116, 116 (1977) ("In general, a 1976 public act which was not given immediate effect will take effect on March 31, 1977, unless the act contains a specified effective date after March 31, 1977. In that case the act takes effect on that specified date.").³⁸ It did not. The legislation was signed into law by the Governor on December 13, 2018, and filed with the Secretary of State the following day. See 2018 Senate Journal 2376 (No. 81, December 19, 2018). The Legislature could have requested an advisory opinion at that time. It did not. Instead, it did not request an advisory opinion from this Court for another 10 weeks, with the House of Representatives' request arriving only five weeks before this legislation's effective date. Under these circumstances, I would be disinclined to exercise this Court's discretion to issue an advisory opinion even if I felt that we had jurisdiction to do so.³⁹

IV. CONCLUSION

I believe there are several reasons to conclude that we lack jurisdiction to issue an advisory opinion after the legislation being scrutinized has taken effect. First, I read the constitutional text as making two suggestions: (1) that the "effective date" deadline of Const 1963, art 3, § 8 is a structural element reflecting the expectation that we render

³⁸ See also *Price v Hopkin*, 13 Mich 318 (1865). The legislation in *Price*, 1863 PA 227, was signed into law on March 20, 1863, and was not given immediate effect by the Legislature but had an effective date of January 1, 1864. See 1863 House Journal 1215-1216; 1863 Senate Journal 820-821. Our Constitution at the time contained a similar requirement that legislation not "take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed" in the absence of a $\frac{2}{3}$ vote, Const 1850, art 4, § 20, but that session ended on March 23, meaning that 90 days after the end of the session was well before January 1, yet we had no objection to the legislation taking effect on January 1st.

³⁹ This sort of equitable analysis is particularly applicable when it is the Legislature requesting an advisory opinion, given that it is the Legislature that could adjust the effective date. Although my view of the jurisdictional issue would not change, my view of the equities might if it were the Governor rather than the Legislature making the request for an advisory opinion, as allowed by Const 1963, art 3, § 8.

advice to the Legislature before legislation takes effect, so that the Legislature can act on that advice before an injury occurs; and (2) that we are granted only “the judicial power,” and limiting advisory opinions prior to the effective date of legislation is the best reconciliation of our ordinary exercise of judicial power with the implied and limited exception to that power that is the advisory-opinion process. Second, to the extent that the Michigan Constitution itself is less than perfectly clear on this, both the Address to the People and the convention debates show that the advisory-opinion process was added specifically to address problems akin to the sales/use-tax problem confronted in *Lockwood*, such that the Legislature could fix an unconstitutional law *before* it took effect to avoid implementing an unconstitutional law and ringing a bell that cannot be unring. Third, the Address to the People squarely informed the voters who ratified the Michigan Constitution of 1963 that Const 1963, art 3, § 8 conferred on us the power to review the constitutionality of legislative acts, but “only . . . before they become effective.”⁴⁰

I would, moreover, note that the laws at issue here are very similar to the sort scrutinized in *Lockwood*—untold numbers of hours have been worked in Michigan since these laws took effect on March 29, just as untold numbers of sales occurred with the unconstitutional sales tax applied to them. An advisory opinion at this point might introduce more confusion, not less, precisely because—were the laws held unconstitutional—the effect of such a pronouncement would be highly uncertain. At least as to those hours worked prior to our opinion, there would be nothing the Legislature could do to fix the constitutional defect; yet “our conclusions could not be made effective by final judgment, decree, and process” in the absence of a discrete injury suffered by actual parties. In such a circumstance, where our advice cannot be heeded but we have no actual solution we can provide in the form of a court order or judgment, I conclude that we lack jurisdiction to act—regardless of whether the amount of time that has passed is 1 day, or 100 days. Therefore, I concur in the Court’s order denying the request for an opinion.⁴¹

⁴⁰ Justice MARKMAN asserts that “historical context is not invariably relevant, much less dispositive” when “interpreting a constitutional provision” I agree, both in general and in this matter. To the extent that his remark is meant to suggest that I *do* believe it is dispositive here, that is incorrect—as noted, I think the best reading of the constitutional text alone supports my view, but I am even more confident in light of the historical context and constitutional convention materials.

⁴¹ Justice MARKMAN decries the time this Court has taken in resolving this matter and alleges that, “had the public ever anticipated a delay of this length in responding to the requests for an advisory opinion, a private party would surely have already challenged these amendments in pursuit of a traditional ‘case or controversy.’” Because “the public” does not speak with one voice, it is not clear to me how the pendency of this request for an advisory opinion has interfered with anyone filing such a suit should they so desire. In any event, I disagree that there has

MCCORMACK, C.J., joins the statement of CLEMENT, J.

CAVANAGH, J. (*concurring*). I concur in the order denying the Legislature's request for an advisory opinion. Although granted the constitutional authority to do so, this Court rarely exercises its discretion to issue an advisory opinion. I believe that the most compelling reason for this is that advisory opinions are a departure from this Court's traditional role. They are neither decisions of this Court nor binding authority on this Court or on any other branch of government. *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 460-461 n 1 (1973). "Requests for advisory opinions are an extraordinary exception to the typical process that brings cases to this Court. Absent are parties who have an actual stake in the outcome and a record fully developed in our lower courts." *In re 2002 PA 48 (House of Representatives' Request for an Advisory Opinion)*, 467 Mich 1203, 1203 (2002).

I find Justice CLEMENT's view of this Court's jurisdiction compelling, and I believe the textual clues and history Justice CLEMENT discusses

been an unreasonable delay. Our policy is that "[r]equests for advisory opinions receive expedited review by the Court given their time sensitive nature." MSC IOP 7.308(B)(3). Consistent with this policy, this matter was argued only five months after the request was made, at a special July session of this Court—not a month in which we ordinarily hear argument—rather than waiting until the next regular session of the Court in October, see MCR 7.301(B), and will be disposed of in less than a year. This is obviously far less time than we take on our ordinary discretionary docket, and it is less time than we took in *In re 2005 PA 71*, in which the advisory opinion was issued nearly 15 months after the request was made and eight months after it was argued. It is true that we took a little less than six months to issue an advisory opinion in *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295 (2011)—apparently because that opinion was expedited so that it could be issued before the statute's effective date. Justice MARKMAN distinguishes this situation from *In re 2005 PA 71* because there we issued an opinion, while here we did not. While true, I would note that within 40 days of receiving this request we had ordered that it be briefed and argued, which left the matter pending idly for less time than in *In re Request for Advisory Opinion Regarding Constitutionality of 2016 PA 249*, 500 Mich 875 (2016) (84 days); *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348 and 2014 PA 349*, 494 Mich 876 (2013) (158 days); *In re Request for Advisory Opinion Regarding Constitutionality of 2002 PA 678*, 468 Mich 1213 (2003) (46 days); *In re 2002 PA 48 (House of Representatives' Request for an Advisory Opinion)*, 467 Mich 1203 (2002) (152 days); or *Request for Advisory Opinion on Constitutionality of 1989 PA 117*, 435 Mich 1243 (121 days). I trust he would prefer that we heard this matter than not, and with the delays that are a natural consequence of the heightened scrutiny that argued matters receive, I believe the Court is acting with appropriate urgency.

counsel against exercising any discretion we have to issue an advisory opinion under the circumstances presented here. The Legislature's requests for an advisory opinion as to the constitutionality of 2018 PA 368 and 2018 PA 369 were made before the laws' effective date but not, I believe, sufficiently in advance of the effective date to allow this Court a meaningful opportunity to carefully consider and decide the complex constitutional issues raised. Had the Legislature specified a later effective date for the laws, rather than allowing the laws to take effect *sine die*, it could have afforded the Court sufficient time to issue a decision prior to the effective date.¹ In fact, the requests could have been made as soon as the laws were enacted.² When the Senate and the House of Representatives requested an advisory opinion on February 20 and 21, 2019, respectively, this Court had just over one month to decide the complex constitutional question of whether the Court could and should exercise its discretion under Const 1963, art 3, § 8 and, if so, whether the "adopt-and-amend procedure" used by the Legislature was permissible under Const 1963, art 2, § 9.³ Regardless of this Court's jurisdiction to issue an advisory opinion after the effective date of these acts, it is clear that the practical value to Michigan's citizens of such an opinion is much greater if it is issued before the laws become effective. I believe the diminished practical value of an opinion now cautions against exercise of the Court's discretion to issue an opinion.

I respectfully disagree with Justice ZAHRA that, absent this Court's rendering an advisory opinion in the manner and form presented by this case, the State's economy will suffer unique uncertainty and employers will face a quandary about whether to follow the statutes as amended or to follow the preamendment version of the laws. While there is clearly much to debate about which version of the statutes *should* be the law, there is no genuine confusion about which version of the statutes *is* the law today. Michigan's citizens follow the law. And they will, undoubtedly,

¹ 2018 PA 368 and 2018 PA 369 were signed into law on December 13, 2018. Because the Legislature did not establish a specific effective date for the laws, both took effect on the 91st day after the 99th Legislature adjourned *sine die*. See *Frey v Dep't of Mgt & Budget*, 429 Mich 315, 340 (1987). Accordingly, the effective date of the laws was March 29, 2019.

² The 100th Legislature convened on January 9, 2019. On February 20, 2019, the House of Representatives adopted a resolution requesting an advisory opinion. The Senate adopted a similar resolution the following day. Those resolutions requesting an advisory opinion on the constitutionality of 2018 PA 368 and 2018 PA 369 were not filed with this Court until February 22, 2019, and March 1, 2019, respectively.

³ The complexity of the issues involved is evidenced by the more than 20 briefs that were filed for consideration by this Court. Indeed, the question of whether this Court possessed jurisdiction under Const 1963, art 3, § 8 was not addressed by the parties until it was raised by this Court in its July 5, 2019 order.

continue to follow the existing laws unless and until those laws are held to be unconstitutional by order of this Court in an actual case or controversy. An advisory opinion from this Court—whether issued today or before March 29, 2019—could not effect any real remedy to any citizen, be they employee or employer, actually injured by the contested laws.⁴

Finally, given that the Legislature’s use of the adopt-and-amend procedure is argued to be both controversial and political, I do not find it surprising that the request for an advisory opinion is supported by members of both political parties and by proponents and opponents of the initiatives. In my view, “the current divisive political climate in which we find our state and nation” referred to in Justice ZAHRA’s dissent further cautions against, rather than in favor of, this Court entering into the fray absent an actual case or controversy.

I concur in the Court’s order denying the Legislature’s requests.

BERNSTEIN, J., joins the statement of CAVANAGH, J.

MARKMAN, J. (*dissenting*). Both the Michigan House of Representatives and the Michigan Senate have requested this Court’s guidance concerning the constitutionality of 2018 PA 368, which amended the Improved Workforce Opportunity Wage Act, and 2018 PA 369, which amended the Earned Sick Time Act. Specifically, they have each requested that we issue an opinion addressing whether Const 1963, art 2, § 9 permits the Legislature to enact an initiative petition into law and then amend that law during the same legislative session. This is without a doubt an “important question[] of law” and one presented on a “solemn occasion[.]” Const 1963, art 3, § 8. And the House and Senate made their requests “after [the legislation] ha[d] been enacted into law but before its effective date.” *Id.*; see also *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 13 (2007) (“Because the House of Representatives requested an advisory opinion well before [the effective] date, this Court indisputably has jurisdiction under art 3, § 8 to render an advisory opinion in this matter.”). Thus, this Court possesses the authority—and, in my judgment, the reasonable obligation—to answer the question before it. Not only should we answer the question as a matter of comity to the Legislature, but also because it presents a matter of substantial importance to the people of

⁴ I respectfully disagree with Justice MARKMAN that uncertainty over “which version of [these statutes] is going to be the law *tomorrow*” is a compelling reason for this Court to issue an advisory opinion in this matter. The constitutionality of almost every law is unsettled until this Court opines on the issue, and that uncertainty is actually part of how the law should develop. When this Court does opine on the constitutionality of a particular law, it does so in a case on review from lower courts, with a fully developed factual record and actual litigants who have suffered actual harm and for whom an actual remedy can be provided. While there may be some circumstances in which an advisory opinion is warranted despite the absence of an actual case or controversy, I do not believe those circumstances are presented here.

this state, occasioning in particular considerable uncertainty and confusion among large numbers of employers and employees of the state.¹

¹ Justice CAVANAGH questions whether there is any genuine confusion and uncertainty concerning the state of the law. While she may conceivably be correct that “there is no genuine confusion about which version of the statutes is the law today,” there is certainly confusion and uncertainty regarding which version is going to be the law *tomorrow*. Moreover, the people of this state, and their elected representatives, have a legitimate interest in knowing, and a right to know, which version of the statutes is going to be the law tomorrow; this Court could usefully have provided such guidance; and we have specifically been asked by a wide variety of organizations, including both houses of the Legislature, to afford this guidance. And yet we have chosen to withhold such guidance. Justice CAVANAGH asserts that uncertainty over which version of these statutes is going to be the law tomorrow is not a compelling reason for this Court to issue an advisory opinion because “[t]he constitutionality of almost every law is unsettled until this Court opines on the issue” I disagree. Laws are presumed to be constitutional. *People v Skinner*, 502 Mich 89, 111 (2018). They are not, as Justice CAVANAGH asserts, “unsettled” until they receive this Court’s blessing. This case is distinctive because there are two versions of each of the statutes at issue; there are conflicting Attorney General opinions regarding the constitutionality of the adopt-and-amend procedure utilized by the Legislature in enacting these laws; and the Legislature has requested this Court to decide which of these two Attorney General opinions is correct, a request that has been supported by numerous different organizations. Justice CAVANAGH contends that “[w]hen this Court does opine on the constitutionality of a particular law, it does so in a case on review from lower courts, with a fully developed factual record and actual litigants who have suffered actual harm and for whom an actual remedy can be provided.” However, the ratifiers of the 1963 Constitution have provided for an additional avenue of relief when there are “important questions of law upon solemn occasions as to the constitutionality of legislation,” Const 1963, art 3, § 8—an advisory opinion—and Justice CAVANAGH has not explained why this is not just such an occasion.

Justice CAVANAGH also asserts that an advisory opinion issued after the effective date has a “diminished practical value” compared to one issued before the effective date. Even assuming this to be true, a post-effective-date advisory opinion would nonetheless have considerably greater “practical value” than an opinion months or even years further down the road, which is the practical alternative. Perhaps even more to the point, the Legislature and the amici are as aware as any member of this Court that an advisory opinion almost certainly could not have been rendered before the effective date and yet nonetheless

While I respectfully differ with the Court in its decision not to issue the requested advisory opinion, I find far more troubling the Court's utter lack of urgency in communicating a response to the Legislature and to the people. It has now been 300 days since the request for an advisory opinion was first made to this Court and 155 days since oral arguments were heard.² Each day that passes, the confusion and uncertainty persist and, should the Court at some later juncture eventually determine the laws in question to be unconstitutional, the question of a remedy will have become increasingly more difficult. Moreover, had the public ever anticipated a delay of this length in responding to the requests for an advisory opinion, a private party would surely have already challenged these amendments in pursuit of a traditional "case or controversy." So, rather than expediting an answer to a question that can only be answered by this Court—which is the very *purpose* of an advisory opinion—this Court has needlessly delayed providing an answer, thus both paralyzing the legal process and confounding employers and employees in search of the guidance that might have been afforded

they each sought an advisory opinion and presumably believed, contrary to Justice CAVANAGH, that such an opinion would still have "practical value." She further asserts in justification of her position that the sheer volume of briefs filed on behalf of the requests for an advisory opinion evidences the "complexity" of the issues involved and for that reason argues against an opinion. Respectfully, I believe that the volume of filings far *better* evidences the breadth of the perspective that there would have been considerable "practical value" to even a post-effective-date advisory opinion from this Court.

Justice CLEMENT indicates that an advisory opinion at this point may "introduce more confusion, not less, precisely because—were the laws held unconstitutional—the effect of such a pronouncement would be highly uncertain." All quite interesting, but to repeat, the Legislature has affirmatively sought our guidance on the constitutionality of two legislative acts. By that action, the Legislature was presumably of the view that this Court could have *clarified* matters rather than generated "confusion," and that it was likely to have accepted our ultimate guidance. Indeed, I am unaware of any occasion on which this Court has issued an advisory opinion concluding that legislation was unconstitutional in which the Legislature has not taken that guidance and promptly remedied the problem.

² Justice CLEMENT states that we have resolved this matter in "less time than we took in *In re 2005 PA 71*, in which the advisory opinion was issued nearly 15 months after the request was made and eight months after it was argued." Perhaps, however, a relevant distinction between the two matters is that in *In re 2005 PA 71*, we *granted* the request for an advisory opinion and actually answered the question presented in a 104-page opinion. Here, it has taken the Court well over nine months to *deny* the Legislature's request.

them.³ Because I would have answered the issue presented, and would have done so in a reasonably timely manner, I dissent.

RESPONSE TO CONCURRENCES

Justice CLEMENT has written a highly thoughtful concurrence in which she concludes that this Court lacks the authority to issue an advisory opinion after the effective date of the legislation at issue. And Justice CAVANAGH has written a separate concurrence in which she indicates that she finds Justice CLEMENT's view "compelling." Although Justice CAVANAGH does not indicate whether she ultimately agrees with Justice CLEMENT's conclusion, she does indicate that she believes that the "textual clues and history Justice CLEMENT discusses counsel against exercising any discretion we have to issue an advisory opinion under the circumstances presented here." I respectfully disagree with both Justice CLEMENT and Justice CAVANAGH.

A. TEXT AND PRECEDENT

Most importantly, I disagree because the language of Const 1963, art 3, § 8 does not contain the time limitation asserted by Justice CLEMENT. Instead, the only time limitation contained in this provision is that the Legislature must undertake its request for an advisory opinion "after [the legislation at issue] has been enacted into law but before its effective date." Article 3, § 8 does not contain any time limitation as to *this Court's* authority to issue an advisory opinion in response to a timely received request. As we have explained, "it is to the words of the statute itself that a citizen first looks for guidance in directing his actions." *Robinson v Detroit*, 462 Mich 439, 467 (2000). Similarly, it is to the words of the constitution that the Legislature first looks for guidance in directing its actions. "This is the essence of the rule of law: to know in advance what the rules of society are." *Id.* "Thus, if the words of the [law] are clear, the actor should be able to expect . . . that [these] will be carried out by all in society, including the courts." *Id.* The Legislature has presumably looked to the words of Const 1963, art 3, § 8 and recognized that this provision requires only that the Legislature undertake its request for an advisory opinion after the enactment of the

³ Justice CLEMENT contends that the "advisory-opinion process was not intended to provide an expeditious answer," but instead "to enable review of a statute before any injury has been suffered." Providing an answer "before any injury has been suffered," i.e., before the effective date of the legislation, would indeed also have provided an "expeditious answer." Accordingly, we agree that the purpose of an advisory opinion is to provide an "expeditious answer." She, however, believes that the purpose is a considerably narrower one than do I, to provide a *singular* kind of "expeditious answer"—one occurring prior to the effective date of the legislation.

legislation, but before its effective date, and the Legislature—altogether reasonably—has relied upon this clear and unambiguous language in reaching the conclusion that this was the only applicable time restriction. In other words, it looked to the constitutional charter of this state and acted in a manner that was faithful to that charter. Now, two members of this Court are instructing the Legislature that, unfortunately, there is an additional and applicable time restriction—one found nowhere within the language of Const 1963, art 3, § 8 or anywhere else within our Constitution.⁴

⁴ Justice CLEMENT contends that we should not be concerned that her new time restriction is found nowhere within our state's Constitution because, although "[t]he word 'moot' [also] does not appear anywhere in the Constitution," we nevertheless dismiss actions on the grounds of mootness. Comparing her newly devised time restriction concerning advisory opinions with longstanding understandings of mootness (and equally, if she had chosen to do so, with similar judicial doctrines such as standing, ripeness, and justiciability) is comparing apples to oranges. As Justice CLEMENT herself acknowledges, her new time limitation "lacks majority support" and thus is not "established," let alone "well established," legal doctrine. Yet "[i]t is well established that a court will not decide moot issues." *People v Richmond*, 486 Mich 29, 34 (2010) (emphasis added). Indeed, this Court has adhered to this principle of law for more than a century. See, e.g., *Street R Co of E Saginaw v Wildman*, 58 Mich 286 (1885). The principle that this Court will not decide moot issues is derived from the constitutional requirement that the judiciary is to exercise the "judicial power," Const 1963, art 6, § 1, and only the "judicial power," Const 1963, art 3, § 2. This power has long been defined as "the right to determine actual controversies arising between adverse litigants," *Anway v Grand Rapids R Co*, 211 Mich 592, 616 (1920) (quotation marks and citation omitted), which is why the ratifiers of the 1963 Constitution were obligated to add art 3, § 8 in order to invest this Court with the authority to issue advisory opinions—an authority not otherwise encompassed within the "judicial power." When there is no longer an actual and pending controversy between the parties, the matter at issue has become moot, and deciding a moot issue "is not an exercise of judicial power." *Id.* at 615 (quotation marks and citation omitted). In other words, although the word "moot" may not appear anywhere in the Constitution, the term "judicial power" *does* appear, and it is well established that this term encompasses the principle that this Court will not decide moot issues. On the other hand, nowhere in the Constitution does it say that this Court cannot issue an advisory opinion after the effective date of legislation, and it is hardly "established," let alone "well established," that language requiring the Legislature to request an advisory opinion before the effective date of the legislation somehow encompasses the principle that this Court cannot issue an advisory opinion after the effective date of the legislation.

Not only is this additional time restriction absent from the language of the Constitution, but it is also absent from our state's constitutional

Furthermore, there are no grounds for Justice CLEMENT's assertion that I am somehow "fault[ing]" her legal argument "for its novelty." "Novel" arguments, as with any other, should be assessed on the basis of their merits, and that is what I do here in suggesting that her analogizing of her arguments in this case to those made in support of the doctrine of mootness are entirely misplaced.

Nor is Justice CLEMENT's newly devised rule even a reasonably *logical* implication of the language of art 3, § 8. That is, just because the ratifiers of the 1963 Constitution imposed a requirement on the *Legislature to request* an advisory opinion prior to the effective date of the legislation does not suggest in any way that the ratifiers also intended to impose a requirement on this *Court to issue* an advisory opinion prior to the effective date of legislation. Justice CLEMENT asks why the ratifiers would conceivably have chosen to impose this requirement on the Legislature, but not this Court. Although there is no obligation on the part of this Court either to raise or to answer this question, the answer nonetheless is quite simple—it is far more difficult for this Court to issue an advisory opinion prior to the effective date of legislation than it is for the Legislature merely to request such an opinion. They also presumably trusted that this Court would act in a timely fashion with regard to such requests and thus did not believe that it was necessary to impose a time limitation upon this Court.

Justice CLEMENT "struggle[s] to see the logic of accepting that all of the other requirements of the advisory-opinion process apply to both the Legislature and this Court, but that [the timing] requirement, uniquely, applies only to the Legislature." However, again she is comparing apples to oranges. All of these "other requirements"—that the request for an advisory opinion relate to an "important question of law," that it be submitted upon a "solemn occasion," and that it concern "the constitutionality of legislation"—pertain to the *substance* of the question asked, and each requirement is obviously unaffected in any way by whether the question is being *presented* by the Legislature or being *received* by this Court; after all, it is exactly the *same* question that is at issue in either instance. By contrast, the timing requirement, unlike each of the "other requirements," is a wholly *procedural* requirement, and there is no particular reason why the same timing requirement should apply to the presenting and the receiving public bodies. That is, while it is perfectly logical to imply from the explicit requirement of the Constitution that the Legislature's request must pertain to "important questions of law upon solemn occasions as to the constitutionality of legislation" that this Court's responsive opinion must also pertain to "important questions of law upon solemn occasions as to the constitutionality of legislation," it is

practice because this Court has on numerous occasions issued advisory opinions after the effective date of the legislation at issue. See, e.g., *In re Request for Advisory Opinion Regarding 2005 PA 71*, 479 Mich 1; *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93 (1988); *Advisory Opinion on Constitutionality of 1975 PA 301*, 400 Mich 270 (1977); *Advisory Opinion re Constitutionality of PA 1966, No 346*, 380 Mich 554 (1968); *Advisory Opinion re Constitutionality of PA 1966, No 261*, 379 Mich 55 (1967), rev'd on other grounds 380 Mich 736 (1968).⁵ Indeed, in *In re Request for Advisory Opinion Regarding 2005 PA 71*, 479 Mich at 13, this Court stated explicitly, "Because the House

not equally logical to imply from the explicit requirement that the "Legislature" must request an advisory opinion before the effective date of the legislation that this Court must also issue its advisory opinion before the same date. In short, it is entirely logical—indeed self-evident—that the same substantive characterizations and preconditions would be applicable to the question whether the process is in the hands of the Legislature or the Court; however, no similar logic would apply to the procedural requirement here in dispute, for the Legislature and this Court stand in considerably different circumstances, not only on the basis of the constitutional text but also on the basis of the practical obligations imposed upon each by the Constitution.

⁵ Justice CLEMENT asserts that this Court has made statements in dicta in two cases—*Request for Advisory Opinion on Constitutionality of 1975 PA 227*, 395 Mich 148, 149 (1975), and *Wayne Co v Hathcock*, 471 Mich 445, 485 n 98 (2004)—and that I have made a statement in a concurring opinion, *Woodman v Kera LLC*, 486 Mich 228, 264 n 2 (2010), each of which may be read to suggest that an opinion from this Court must be issued before the effective date of legislation. While, in my judgment, these statements are somewhat less clear than she asserts, they are nonetheless sufficiently imprecise to render them susceptible to Justice CLEMENT's characterization, as they fail carefully to distinguish between the Legislature's *request* for an advisory opinion and this Court's *response* thereto by failing to incorporate fully within their excerpted constitutional language surrounding words necessary to a complete and contextual understanding of their meaning. However, none of these statements can be understood as anything but dictum because none of these cases pertained in any way to our authority to issue an advisory opinion after the effective date. Moreover, two of the three did not pertain to *any* aspect of procedure concerning advisory opinions or even to a request for an advisory opinion, and thus did not contain a single word of analysis concerning Const 1963, art 3, § 8. Perhaps most significantly, by the time these statements were issued, this Court had already, and without objection from any justice, exercised its authority on numerous occasions to issue advisory opinions after the effective date of the legislation.

of Representatives requested an advisory opinion well before [the effective] date, this Court indisputably has jurisdiction under art 3, § 8 to render an advisory opinion in this matter.” Even in the present case, in which this Court has received numerous amicus briefs, *nobody* has argued that this Court lacked the authority to issue an advisory opinion after the effective date until we raised the issue on our own and *mandated* supplemental briefing by the Attorney General on both sides of the issue. Thus, despite this additional time restriction being located nowhere within the Constitution and being altogether inconsistent with this Court’s own prior practices, some members of this Court are denying the present request for an advisory opinion on the grounds that it does not satisfy this limitation.

The Legislature obviously could not have foreseen the imposition of this new restriction when it proffered the request at issue here, and future Legislatures will now have an equally difficult time determining when exactly their requests must be proffered because all we are told by the concurring justices is that these must be made sufficiently in advance of the effective date to allow this Court an opportunity to consider and decide the constitutional issues raised, and to issue an opinion before the effective date. How is the Legislature to know how much time in advance of the effective date will be viewed by future members of this Court as sufficient? Because nothing in the actual text of the Constitution requires the Legislature to engage in such speculation, I would not impose this or any other additional obligation upon the Legislature. Again, the only time restriction found within Const 1963, art 3, § 8 is that the Legislature must make its request “after [the legislation] has been enacted into law but before its effective date.” That Const 1963, art 3, § 8 contains *this* restriction and no other is *itself* meaningful because “the express mention . . . of one thing implies the exclusion of other similar things,” *Bradley v Saranac Community Schs Bd of Ed*, 455 Mich 285, 298 (1997), *mod* on other grounds by *Mich Fed of Teachers v Univ of Mich*, 481 Mich 657 (2008), and “[w]e cannot read into the [Constitution] what is not there,” *AFSCME v Detroit*, 468 Mich 388, 412 (2003).

B. PURPOSE

Justice CLEMENT concludes that the “purpose sought to be accomplished” by Const 1963, art 3, § 8 is “to enable review of a statute before any injury has been suffered,” i.e., before the effective date of the statute. She explains at length her belief that the provision was “added in response” to *Lockwood v Comm’r of Revenue*, 357 Mich 517, 545 (1959), an opinion of this Court that held that the 1959 use-tax amendment represented an unconstitutional effort to evade the constitutional sales-tax limit after several millions of dollars of tax revenue had been unconstitutionally collected. While I do not question this historical context, or indeed that historical context may be relevant in interpreting a constitutional provision, such context is not invariably relevant, much less dispositive, in particular where such context is *inconsistent* with the constitutional text. That is, while this context

might well suggest that a “purpose” of Const 1963, art 3, § 8 was to enable this Court to issue an advisory opinion before the effective date of legislation, i.e., “to enable review of a statute before any injury has been suffered” or, even more specifically, “to prevent the collection of unconstitutional taxes in the first place,” this is not the equivalent of signifying that such is the *exclusive* “purpose” to be served. Indeed, “the [constitutional] remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.”’” *Dist of Columbia v Heller*, 554 US 570, 578 (2008) (citations omitted); see also *id.* at 599 (noting that although the purpose of the Second Amendment was “to prevent elimination of the [state] militia,” it also by its terms protects the right to possess a firearm “as an individual right unconnected with militia service,” *id.* at 582). Thus, even assuming that Justice CLEMENT is correct in her historical recitation that the “purpose” of Const 1963, art 3, § 8 was “to prevent the collection of unconstitutional taxes in the first place” by allowing this Court to issue an advisory opinion before the effective date of the legislation, that does not mean that this must be its only “purpose” or, even more significantly, that such historical context can be allowed to take *priority* over the straightforward and unambiguous language of Const 1963, art 3, § 8. Rather, it is quite possible that a constitutional provision may have multiple “purposes,” and extraconstitutional sources of “history” are considerably more likely to identify “purposes” *additional* to those set forth by constitutional text than, as Justice CLEMENT suggests, to *subtract* from the “purposes” that appear clearly from constitutional text.

Furthermore, even assuming that Justice CLEMENT is correct that the purpose of this provision was to enable this Court to issue an advisory opinion before the effective date of legislation, allowing it to also issue an advisory opinion after the effective date of legislation is in no way incompatible with her discerned purpose. Before the adoption of Const 1963, art 3, § 8, this Court only possessed the “judicial power” to render an opinion in an actual case or controversy after the effective date of the legislation being challenged. The ratifiers of the 1963 Constitution decided to broaden this Court’s, and this state’s, “judicial power” to also encompass the authority to issue advisory opinions in certain circumstances in which the Legislature has requested an opinion in advance of the effective date of the legislation.⁶ Reading Const 1963, art 3, § 8 as allowing this Court to issue an advisory opinion after the effective date of the legislation in circumstances in which the Legislature requested such an opinion before the effective date of the legislation does nothing to undermine this Court’s undeniable authority to issue an advisory opinion before the effective date of the legislation. In other words, even assuming that the “purpose” of Const 1963, art 3, § 8 was to allow this Court to issue advisory opinions before the effective date of legislation,

⁶ While Justice CLEMENT describes Const 1963, art 3, § 8 as creating a “limited *exception* to our ordinary exercise of the ‘judicial power’” (emphasis added), I would describe it instead as *expanding* this state’s conception of its own “judicial power.”

this does not signify in any way that Const 1963, art 3, § 8 does not *also* allow the Court to issue advisory opinions after the effective date. And as discussed earlier, because the only time limitation contained in the actual text of Const 1963, art 3, § 8 is that the Legislature must make its request “after [the legislation] has been enacted into law but before its effective date,” that is the only time limitation I would impose. And it is the only time limitation that has *ever* been imposed by this Court under Const 1963, art 3, § 8.

C. ADDRESS TO THE PEOPLE

Next, Justice CLEMENT relies upon the Address to the People to support her conclusion that “advisory opinions after the effective date of legislation are impermissible.” In particular, the Address to the People states that Const 1963, art 3, § 8 “empowers the supreme court to furnish advisory opinions . . . but only as to legislative acts that are already passed and signed by the governor, and before they become effective.” 2 Official Record, Constitutional Convention 1961, p 3368. Although the Address to the People may well be “relevant to understanding the ratifiers’ intent,” *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 324 (2015), it is “not controlling,” and “it cannot be used to contradict . . . the constitutional text.” *Citizens Protecting Michigan’s Constitution v Secretary of State*, 503 Mich 42, 61 & n 26 (2018). Just as even “a prefatory clause does not limit or expand the scope of the operative clause,” *Heller*, 554 US at 578, the Address to the People hardly can limit or expand the scope of the constitutional text. To emphasize, I view the Address as a highly relevant historical consideration, particularly where there is textual unclarity or ambiguity, but it is not so highly relevant that it can countermand the actual language of the Constitution, the text of which is even more highly relevant, and indeed in almost all instances is dispositive of the Constitution’s meaning.⁷

Const 1963, art 3, § 8 provides that the Legislature may request an advisory opinion “after [the legislation] has been enacted into law but before its effective date.” Pursuant to this language, the Legislature can request an advisory opinion the day before the effective date of the

⁷ And contrary to how Justice CLEMENT apparently reads Const 1963, art 3, § 8, the silence of this provision concerning an ending date beyond which this Court cannot issue an advisory opinion, i.e., the effective date of the underlying legislation, does not give rise to an ambiguity. Rather, Const 1963, art 3, § 8 is quite clear, and unambiguous, that a legislative enactment’s effective date is relevant only as to the Legislature’s *request* for an opinion and that this Court is not constrained in any way by that date as an ending time for the *issuance* of an opinion. This is made clear both by the silence of Const 1963, art 3, § 8 in this regard, as well as by implications that can be reasonably and logically drawn from the provision’s nonsilence as to other dates that Const 1963, art 3, § 8 has made relevant in the advisory-opinion process.

legislation. However, according to the concurring justices, the Legislature could not request an advisory opinion at that time because that would not be sufficiently in advance of the effective date to allow this Court an opportunity to consider and decide the constitutional issues raised and to issue an opinion before the effective date. Because the actual language of the Constitution allows the Legislature to request an advisory opinion up to the effective date of the legislation, we are obliged to interpret it in a consonant manner. If instead we interpret Const 1963, art 3, § 8, as does Justice CLEMENT, as prohibiting this Court from issuing an advisory opinion after the effective date of the legislation, the Legislature would *also* be deprived of its authority to request an advisory opinion *up to* the effective date of the legislation because a request made too closely in time would be inadequate to comply with the newly discerned requirements of Const 1963, art 3, § 8. That is, even the limited “purpose” ascribed to Const 1963, art 3, § 8 by Justice CLEMENT understates the extent to which her understanding would curtail the effective ability of the Legislature or the Governor to seek an advisory opinion, by imposing upon each an obligation to engage in speculation and guesswork as to how long in advance of the effective date a request for an advisory opinion must be made and then to suffer the prospect that delays on the part of the Court itself might undo any such calculation. I will abide instead by the advisory-opinion process, and its certainties, as set forth by Const 1963, art 3, § 8. The language in the Address to the People describing this provision as only allowing this Court to furnish advisory opinions before the effective date is simply inconsistent with its actual language, which accords the Legislature the authority to request an advisory opinion up to the effective date of the legislation. Because the language in the Address to the People is *not* controlling, and because the language of Const 1963, art 3, § 8 *is* controlling, I would preserve and maintain the latter.

D. DELAYS

Finally, Justice CLEMENT’s interpretation of Const 1963, art 3, § 8 would enable delays—of the very sort that have occurred in the instant case on the part of the Court itself—to nullify this Court’s authority to affirmatively respond to requests for advisory opinions. That is, her understanding would enable the Court to avoid its (discretionary) constitutional responsibility to furnish advisory opinions when these have been appropriately requested by the Governor or the Legislature by simply doing nothing at all rather than by acting in an accountable manner and in comity with the legislative and executive branches, either to grant or to deny the request. Such delays, as I have already remarked, are particularly troubling in the context of Const 1963, art 3, § 8 because every day delayed in affording the Governor or the Legislature an answer—affirmative or negative—is one more day denied interested parties in pursuing an actual case or controversy.

For the reasons set forth in both Justice ZAHRA’s dissenting statement and this dissenting statement, I would have affirmatively answered the instant request for an advisory opinion, and I would have done so in a far timelier manner. Thus, I respectfully dissent.

ZAHRA, J., joins the statement of MARKMAN, J.

ZAHRA, J. (*dissenting*). I respectfully dissent from this Court's decision to deny the requests of the Michigan House of Representatives and the Michigan Senate (collectively, the Legislature) for the issuance of an opinion on the constitutionality of 2018 PA 368 (which amended the Improved Workforce Opportunity Wage Act, 2018 PA 337) and 2018 PA 369 (which amended the Earned Sick Time Act, 2018 PA 338). I would forthwith honor the requests and issue an advisory opinion addressing the constitutionality of the Legislature's action with regard to these public acts.

The Earned Sick Time Act and the Improved Workforce Opportunity Wage Act were originally proposed as initiative petitions through the people's right to exercise direct democracy.¹ After the Board of Canvassers certified the initiatives for placement on the ballot and before the ballots were printed, the Legislature enacted both acts without change.² Thus, the initiatives were not presented to the people for a vote in the November 2018 election. On December 13, 2018, the Governor signed bills that amended both acts. Neither act was given immediate effect. After the legislation was enacted into law but before its effective date, both the House and the Senate resolved to request an advisory opinion pursuant to Const 1963, art 3, § 8. Specifically, we are asked to opine on the constitutionality of enacting an act proposed by the initiative process and later amending that act in the same legislative session.

I would grant the Legislature's request because this is precisely the sort of important question that Const 1963, art 3, § 8 is intended to address.³ The question presented is profoundly significant because this legislation will likely affect in one form or another nearly every Michigan resident.⁴ By not addressing the Legislature's requests, em-

¹ Const 1963, art 2, § 9.

² *Id.*

³ That provision states:

Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date. [Const 1963, art 3, § 8.]

⁴ The importance of the question presented is exemplified by the fact that in the current divisive political climate in which we find our state and nation, the request for an advisory opinion is supported by members of both major political parties and by both proponents and opponents of the initiatives, as well as by proponents and opponents of the changes made to the initiatives by the Legislature. The entities that have submitted amicus curiae briefs persuasively assert urgency for an opinion from this Court, maintaining that genuine confusion exists among employers regarding which versions of the laws they should follow.

ployers will face a quandary about whether to follow the statutes as amended or the preamendment versions of the laws. This dilemma has resulted in uncertainty and confusion throughout a significant sector of Michigan's economy.

Furthermore, the request for an advisory opinion has been presented "upon [a] solemn occasion[]" as to the constitutionality of legislation . . .⁵ "[I]f this Court does not issue an opinion now, but at some later time determines that one or more of the provisions of these laws is unconstitutional, the question of remedy almost certainly will have become far more difficult, with far greater potential for unfairness to the parties."⁶

Finally, a response on the Court's part would reflect the kind of comity among the branches of state government that underlies both our Constitution generally as well as Const 1963, art 3, § 8 specifically. In short, I believe that a response to the advisory-opinion request in the present circumstance is exactly what is required of the highest court of our state. Such a response would clarify the validity of two laws in which confusion and uncertainty otherwise would obtain to the detriment of innumerable employers and employees across our state. Because the Legislature's advisory-opinion request pertains to an "important question[]" of law," it has been presented upon a "solemn occasion,"⁷ and a response would alleviate the legal uncertainty and confusion Michigan now faces, I would grant this request and answer the questions presented in an expedited manner.

MARKMAN and VIVIANO, JJ., join the statement of ZAHRA, J.

VIVIANO, J. (*dissenting*). For the reasons expressed in Justice ZAHRA's dissenting statement, I believe that this Court should issue an advisory opinion as to the constitutionality of 2018 PA 368 and 2018 PA 369. I write separately to explain why I believe this Court has discretion to do so after the effective date of the public acts in question.

The objective of interpreting a constitutional provision "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *People v Tanner*, 496 Mich 199, 223 (2014), quoting *Wayne Co v Hathcock*, 471 Mich 445, 468 (2004). "The first rule a court should follow in ascertaining the meaning of words in a constitution is to give effect to the plain meaning of such words as understood by the people who adopted it." *Bond v Ann Arbor Sch Dist*, 383 Mich 693, 699 (1970). We do this "by determining the plain meaning of the text as it was understood at the time of ratification," *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 323 (2015), "unless technical, legal terms are used," *id.* at 323 n 17 (quotation marks and citation omitted). "To help discover the common understanding, this Court has observed that constitutional convention debates and the address to the people, though not controlling, are relevant." *Citizens Protecting Michigan's Constitution v*

⁵ Const 1963, art 3, § 8.

⁶ *In re 2002 PA 48 (House of Representatives' Request for an Advisory Opinion)*, 467 Mich 1203, 1205 (2002) (MARKMAN, J., dissenting).

⁷ Const 1963, art 3, § 8.

Secretary of State, 503 Mich 42, 61 (2018) (“The primary rule is that of common understanding . . .”) (quotation marks and citations omitted). “However, such extrinsic evidence can hardly be used to contradict the unambiguous language of the constitution.” *Nat’l Pride At Work, Inc v Governor*, 481 Mich 56, 80 (2008).

Article 3, § 8 of our Constitution provides that “[e]ither house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.” As Justice CLEMENT notes, Const 1963, art 3, § 8 “does not affirmatively grant this Court the power to issue advisory opinions . . .” *Ante* at 888 (CLEMENT, J., concurring). Instead, this Court’s power to issue advisory opinions is rather obviously implied from the text. The provision is not a model of clarity, but that does not relieve us of our obligation to determine its original meaning, i.e., “the meaning the words and phrases of the [provision] would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted[.]” Kesavan & Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 Geo LJ 1113, 1118 (2003).

To determine whether the Court has discretion to issue an advisory opinion after the effective date of those acts, two phrases from Article 3, § 8 must be examined. Both phrases generally relate to when an advisory opinion may be requested and thus, impliedly, when one may properly be issued by the Court. The first of these phrases relates to the circumstances in which an advisory opinion may be requested: “upon solemn occasions.” This phrase has not been construed by our Court; however, it has been construed by our sister state courts both before and after it was adopted in Michigan. Understanding the original meaning of this phrase is key to a proper understanding of the scope of the Court’s advisory-opinion power.

At the time of the constitutional convention for Michigan’s 1963 Constitution, the phrase “upon solemn occasions” appeared in the state constitutions of Massachusetts, Maine, Colorado, New Hampshire, and South Dakota¹—a fact that was not lost on the convention delegates. See

¹ See Mass Const, art 85 (“Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.”); NH Const, art 74 (“Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.”); Me Const, art VI, § 3 (“The Justices of the Supreme Judicial Court shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate or House of Representatives.”); SD Const, art 5, § 5 (“The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the

1 Official Record, Constitutional Convention 1961, p 1548. When first introducing the “upon solemn occasions” language, Delegate Marjorie McGowan explained how she understood its meaning:

By a solemn occasion the constitution means some serious and unusual urgent need. It has been held to be such urgent need when either branch of the legislature having some action in view has serious doubts as to their power and authority to take such action under the constitution or existing statutes. [*Id.* at 1543.]

Delegate McGowan noted that this definition was taken from a Massachusetts case interpreting the phrase. *Id.*, citing *In re Opinion of the Justices*, 290 Mass 601, 602 (1935) (“These words mean that the opinions can be required only when ‘such questions of law are necessary to be determined by the body making the inquiry, in the exercise of the legislative or executive power entrusted to it by the Constitution and laws of the Commonwealth.’ ‘By a solemn occasion, the Constitution means some serious and unusual exigency. It has been held to be such an exigency when . . . either branch of the Legislature, having some action in view, has serious doubts as to their power and authority to take such action, under the Constitution, or under existing statutes.’”) (citations omitted).²

Because the phrase “upon solemn occasions” had acquired a particular meaning in the law by this time, I believe it is a legal term of art describing the circumstances in which this Court may properly exercise its discretion to issue an advisory opinion. See *People v Law*, 459 Mich 419, 425 n 8 (1999) (“A legal term of art is a technical word or phrase that has acquired a particular and appropriate meaning in the law.”). And, while we are not bound by later decisions from other state courts interpreting the phrase, I believe some of those, too, are instructive. See, e.g., *In re Opinion of the Justices*, 815 A2d 791, 794 (Me, 2002) (“The following guideposts assist our determination on whether a ‘solemn occasion’ has been presented on an ‘important question[] of law.’ First, the matter must be of ‘live gravity,’ referring to the immediacy and

exercise of his executive power and upon solemn occasions.”); Colo Const, art VI, § 3 (“The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decision of said court.”).

² See also *Questions Submitted by the House of Representatives with Answers of the Justices*, 95 Me 564, 566-567 (1901) (“The questions submitted at the present time are undoubtedly important questions of law[;] it therefore becomes necessary to determine if they were submitted upon a solemn occasion. It has been said that this language of the Constitution means some serious and unusual exigency, such an exigency as exists when the body making the inquiry, having some action in view, has serious doubts as to its power and authority to take such action under the Constitution or under existing statutes.”).

seriousness of the question.”); *In re Daugaard*, 884 NW2d 163, 167 (SD, 2016) (“In determining whether a request for an advisory opinion presents a solemn occasion, the Court weighs . . . whether the question presents issues pending before the Court, . . . whether alternative remedies exist, whether the facts and questions are final or ripe for an advisory opinion, the urgency of the question, . . . and whether the Court has been provided with an adequate amount of time to consider the issue.”).

As these decisions recognize, the original meaning of the phrase “upon solemn occasions” was “some serious and unusual urgent need,” and the timing of the request is an important consideration in determining whether the request was made on a “solemn occasion.” This language was understood by the delegates as providing the Court wide discretion in choosing whether or not to issue an advisory opinion.³

The second phrase of Article 3, § 8 relating to when an advisory opinion may be requested provides that a request must be made “after [the legislation] has been enacted into law but before its effective date.” Thus, the provision expressly restricts the chronological time period in which such a request may be made. By direct implication, the phrase also restricts this Court’s power to issue an advisory opinion to cases in which the request is timely made. For the following reasons, however, I do not believe that this phrase can fairly be understood as placing a direct, jurisdictional limitation on this Court’s ability to issue an advisory opinion after the effective date of the legislation under review.

First, that is not what the provision says, nor do I think it reasonable to imply such a rule from the text. The grammatical structure of this provision gives us an important clue as to why this timing requirement does not apply to issuance of the Court’s opinion. In the text, the word “opinion” (the object of the sentence) is modified by three adjectival prepositional phrases—“of the supreme court,” “on important questions of law,” and “as to the constitutionality of the legislation.” The first answers the question of which court may issue such an opinion—only this Court. The second two phrases limit the subject matter of advisory opinions to “important questions of law . . . as to the constitutionality of legislation.” These limitations are directly connected to any advisory opinion that may

³ As Delegate Eugene Wanger explained: “What these words do is give the court sound legal doctrine for hanging their hat on in refusing to give an opinion. . . . In exercising restraint, . . . opinions [of other states’ courts] construe the words ‘solemn occasions’ to authorize their refusal . . . in answering these questions.” 1 Official Record, Constitutional Convention 1961, pp 1548-1549. Delegate Robert Danhof similarly stated: “[I]t is upon those words ‘solemn occasion’ that [the Supreme Court] ha[s] the right to turn [a request] down and they will turn it down when they don’t want to do it, which we would imagine would be most of the time, and because of that, they use that to state, no, this is not a solemn occasion, even though we might have an important question of law.” *Id.* at 1549.

be issued by this Court. The remaining two phrases in the text (“upon solemn occasions” and “after [the legislation] has been enacted into law but before its effective date”) are adverbial prepositional phrases that modify the verb: “may request.” Ordinarily, therefore, we would interpret these phrases as describing when the subject of the sentence (“[e]ither house of the legislature or the governor”) may undertake the action permitted (requesting an advisory opinion). However, as noted above, “upon solemn occasions” is a legal term of art that provides this Court with wide discretion in choosing whether or not to issue an advisory opinion. Thus, while perhaps inartfully drafted, this phrase was clearly intended to relate to the Court’s power to issue an advisory opinion. But there is no similar reason to disregard the grammatical structure of the sentence as it relates to the “effective date” phrase—that provision is directly connected to and limits when a request can be made. By direct implication, it also restricts this Court’s power to issue an advisory opinion to cases in which the request is timely made. But there is simply nothing in the text of this provision to indicate that it also limits when this Court may issue its opinion.

Moreover, I would not lightly infer that the provision establishes a jurisdictional deadline for issuance of the Court’s opinion in the absence of express language. Indeed, because placing such a deadline on the Court would be so extraordinary, “one would normally expect it to be explicitly decreed rather than offhandedly implied.”⁴ Nor would this be the most natural reading of the provision—it would be strange for a provision to impliedly impose the same deadline for two sequential events by two different constitutional actors. That is not typically how deadline provisions are drafted, and with good reason—the time period for the second actor (here, the Court) would vary depending on the expedition of the first. And, in any event, such a strained reading is unnecessary—as I noted above, the phrase “upon solemn occasions” provides this Court with wide discretion to take into account a number of considerations in deciding whether to grant or deny a request for an advisory opinion,

⁴ Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p 29. Notably, the one state constitution I found that contains timing requirements for issuance of a court’s advisory opinion does so expressly. Cf. Fla Const, art IV, § 1(c) (“The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting the governor’s executive powers and duties. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and *shall render their written opinion not earlier than ten days from the filing and docketing of the request, unless in their judgment the delay would cause public injury.*”) (emphasis added); Fla Const, art IV, § 10 (“The justices . . . shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.”).

including timing. Lastly, and as a further aid in determining the public understanding of this provision, it is worth noting that this Court has frequently issued advisory opinions after the effective date of the act at issue, including in the period immediately after ratification.⁵

I am unpersuaded by Justice CLEMENT's analysis because I do not believe she provides adequate textual support for her conclusion that the effective date deadline also was intended to apply to issuance of the Court's opinion. "Those who suggest that the meaning to be given a provision of our constitution varies from a natural reading of the constitutional text bear the burden of providing the evidence that the ratifiers subscribed to such an alternative construction." *Michigan United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 376 (2001) (YOUNG, J., concurring). I do not believe Justice CLEMENT has met this burden. First, it appears no delegate at the constitutional convention ever mentioned that he or she understood the effective date deadline as barring the Court from issuing an advisory opinion after the legislation's effective date.⁶ Second, while language suggesting this understanding did find its way into the Address,⁷ that language was added in a late amendment right before the Address was approved, so it is questionable how well it reflects the delegates' understanding of the provision.⁸ In any event, the more important

⁵ See *ante* at 902 n 35 (CLEMENT, J., concurring).

⁶ In this sense, it was like the watchdog that did not bark in the famous Sherlock Holmes novel, i.e., the absence of a fact that one would expect to see. Conan Doyle, "Silver Blaze," *Memoirs of Sherlock Holmes* (New York: Harper & Bros, 1894), pp 22, 26. See also *Mich Coalition*, 498 Mich at 326-327 (noting the absence of references of "pensions" or "retirement" during the constitutional convention debates as further support for its conclusion that the phrase "rates of compensation" in Const 1963, art 11, § 5 was not commonly understood to include them).

⁷ The Address to the People states, in pertinent part, that the Court may issue advisory opinions only "before [the legislation at issue] become[s] effective." 2 Official Record, Constitutional Convention 1961, p 3368.

⁸ We have also recognized that in the hierarchy of permissible extrinsic evidence, the Address to the People should take precedence over the debates. See *Mich Coalition*, 498 Mich at 323-324 ("The Address to the People, which was distributed to Michigan citizens in advance of the ratification vote and which explained in everyday language what each provision of the proposed new Constitution was intended to accomplish, and, to a lesser degree, the constitutional convention debates are also relevant to understanding the ratifiers' intent.") (cleaned up; emphasis added). This is because the Address to the People was approved by the delegates and was distributed prior to ratification. See, e.g., *Regents of Univ of Mich v Michigan*, 395 Mich 52, 60 (1975) ("The

inquiry is the effect this provision of the Address had on the common understanding of the people who ratified the Constitution. As for them, it is well to remember that they voted on and approved the language of the Constitution, not the language of the Address. As we have previously recognized, “the actual language of the proposed constitution constitutes the best evidence of the ‘common understanding[.]’” *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 561 n 4 (2007), quoting *Studier v Mich Pub Sch Employees’ Ret Bd*, 472 Mich 642, 652 (2005). And, while the Address may be a relevant consideration, it cannot be used to contradict the unambiguous language of the Constitution. See *Nat’l Pride At Work, Inc*, 481 Mich at 80. In my view, the errant phrase in the Address is insufficient to overcome the textual and historical clues as to the meaning of Article 3, § 8 that are discussed above.

I also disagree with Justice CLEMENT’s interpretive approach because she relies upon extrinsic circumstances to determine the purpose of the provision, which violates a fundamental tenet of textualism. Although extrinsic sources may be used to help us determine the original meaning of the words and phrases in the text, see *Citizens Protecting Michigan’s Constitution*, 503 Mich at 61; *Dist of Columbia v Heller*, 554 US 570, 605 (2008), they should not be used to determine what the original drafters intended based on the mistaken notion that “because they were Framers . . . their intent is authoritative and must be the law[.]” Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ:

reliability of the ‘Address to the People . . . lies in the fact that it was approved by the general convention on August 1, 1962 as an explanation of the proposed constitution. The ‘Address’ also was widely disseminated prior to adoption of the constitution by vote of the people.”).

Interestingly, the proof of the Address to the People, which was mailed to the delegates on June 26, 1962, states only that the new section “empowers the supreme court to furnish advisory opinions to the governor and each house of the legislature on important questions of law and on solemn occasions,” and refers to the unconstitutional use tax. Proof Copy, Address to the People, p 23, available at <<https://babel.hathitrust.org/cgi/pt?id=rndp.39015071175999&view=1up&seq=25>> (accessed December 5, 2019) [<https://perma.cc/AQ52-VYGG>]. The language Justice CLEMENT refers to was inserted along with scores of other changes in a later amendment that was proposed by the Committee on Public Information. However, these changes were not mailed to the delegates until July 27, 1962, only four days before the Address was approved. 2 Official Record, Constitutional Convention 1961, p 3301. The language, which was one of 112 proposed nonsubstantive amendments to the Address to the People, was not discussed by the delegates before its adoption. *Id.* at 3301-3311. The only explanation as to why the amendment was proposed is a brief note in the Official Record—“for clarification.” *Id.* at 3303. Therefore, I question whether the amended language is entitled to the elevated consideration normally given to the Address.

Princeton University Press, 1997), p 38.⁹ Instead, “[t]he purpose of a law must be ‘collected chiefly from its words,’ not ‘from extrinsic circumstances.’” *King v Burwell*, 135 S Ct 2480, 2503 (2015) (SCALIA, J., dissenting), citing *Sturges v Crowninshield*, 17 US 122, 202 (1819). Similarly, in his seminal treatise, Justice COOLEY recognized that intent “is to be found in the instrument itself” rather than extrinsic sources.¹⁰ We have reaffirmed this principle on more than one occasion. See, e.g., *City of Lansing v Lansing Twp*, 356 Mich 641, 649-650 (1959) (“No intent may be imputed to the legislature in the enactment of a law other than such is supported by the face of the law itself. The courts may not speculate as to the probable intent of the legislature beyond the words employed in the act.”).¹¹ Not surprisingly, we have recognized that it is error to “focus[] on the history behind [a constitutional provision] and the

⁹ See also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 56 (noting, in distinguishing “textualist interpretation and so-called purposive interpretation,” that textualists insist, among other things, that “the purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter’s desires”).

¹⁰ Cooley, *Constitutional Limitations* (1st ed), p 55; see also *id.* (“It is to be presumed that language has been employed with sufficient precision to convey [the intent], and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it.”); *id.* at 55 n 3 (discussing Justice Greene Bronson’s remarks “showing the impolicy and danger of looking beyond the instrument itself to ascertain its meaning, when the terms employed are positive and free from all ambiguity”), citing *People v Purdy*, 2 Hill 31, 35 (NY, 1841) (Bronson, J., dissenting), rev’d 4 Hill 384 (NY, 1842).

¹¹ Citing *Mich Coalition*, 498 Mich at 325-326, Justice CLEMENT incorrectly asserts that “we have *explicitly authorized* looking to ‘extrinsic circumstances to determine the purpose of’ constitutional provisions.” *Ante* at 886 n 3 (CLEMENT, J., concurring). However, no such authorization appears in the text of the Court’s opinion or is even implicit in the interpretive work we did in that case. See *Mich Coalition*, 498 Mich at 323-327 (using historical sources not to determine the purpose of Const 1963, art 11, § 5, but instead to confirm the Court’s textual interpretation of the original meaning of one phrase in that provision, “rates of compensation”). Although we have stated in *Mich Coalition* and elsewhere that in construing constitutional provisions, “the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished,” see, e.g., *Kearney v Bd of State Auditors*, 189 Mich 666, 673 (1915), as the authorities cited above make abundantly clear, the purpose of the provision must be derived from its text, see *id.* at 672-673. Properly understood, then, we

intent of the constitutional convention delegates in proposing it, rather than on the interpretation that the people would have given the provision when they adopted it.”¹²

Having derived the purpose from an improper source, Justice CLEMENT also errs in the way she uses it. A purpose properly derived from the text may be used as follows:

The subject matter of the document (its purpose, broadly speaking) is the context that helps to give the words meaning—that

should only have regard to the circumstances leading to the adoption of the Constitution if those circumstances help us to discover the common understanding of the words and phrases in the provision at the time of ratification. *Citizens Protecting Michigan's Constitution*, 503 Mich at 61.

¹² *Studier*, 472 Mich at 651-652. In her dissent in *Musselman v Governor*, 448 Mich 503 (1995), which this Court cited with approval in *Studier*, Justice RILEY explained why this is so:

While the majority does attempt to substantiate its conclusion . . . by looking to the intent of the framers of the provision, such an examination is improper because, as stated by Justice COOLEY in [*Twitchell v Blodgett*, 13 Mich 127, 166 (1865)], “the light to be derived from an examination of the proceedings of constitutional conventions, on questions of constitutional construction, is commonly vague and inconclusive, and not to be allowed, in any case, to control the meaning of unambiguous terms.” He further stated:

If, however, by an examination of these proceedings, we had succeeded in ascertaining definitely the intent of the convention, we might still be far from the intent of the people in adopting their work. That intent should be gathered from the words embraced by the instrument as adopted, if those words are free from doubt. The people, in passing upon it, looked only to the clauses as they then stood, without troubling themselves with the considerations, or the accidental circumstances, that may have brought them to their present form.

Justice COOLEY then concluded that if the constitution expresses a natural meaning which, upon

the first impression . . . strike[s] the mind on reading the clause . . . then further examination, with a view to find some other and more subtle meaning, ought to be made with extreme caution, lest we deceive ourselves into disregarding the plain and obvious sense for some other, which only ingenuity discovers and suggests.

[*Musselman v Governor*, 448 Mich 503, 528-529 (1995), on reh 450 Mich 574 (1996) (RILEY, J., dissenting) (citations omitted).]

might cause *draft* to mean a bank note rather than a breeze. And even beyond that, it can be said more generally that the resolution of an ambiguity or vagueness that achieves a statute's purpose should be favored over the resolution that frustrates its purpose. [Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 56.]

Justice CLEMENT does not use the purpose of the provision to give meaning to a particular word or to resolve an ambiguity in a manner that does not frustrate the purpose of the provision. Instead, she interprets the provision by focusing on “the mischief designed to be remedied . . .” *Ante* at 899 (CLEMENT, J., concurring), quoting *People ex rel Drake v Mahaney*, 13 Mich 481, 497 (1865). This interpretive approach, known as the “mischief rule,” is generally synonymous with purposivism.¹³ It has been sharply criticized, and rightly so. See, e.g., Jordan, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 USF L Rev 1, 6 (1994) (“[T]he mischief rule has also been criticized as unduly subjective, authorizing the courts, in the words of one Lord Justice, to engage in ‘redrafting with a vengeance.’”).¹⁴ Instead, while extrinsic circumstances may be relevant as an aid in discerning the common understanding of a legal text, that history may not be used to identify the problem the provision was designed to remedy so the provision may be construed only to mitigate that problem in the absence of textual support for such a narrow reading.¹⁵

I agree that timing is an important consideration for the Court in deciding whether to grant or deny a request for an advisory opinion;

¹³ See *Reading Law*, p 433 (defining the “mischief rule” as “[t]he interpretive doctrine that a statute should be interpreted by first identifying the problem (or ‘mischief’) that the statute was designed to remedy and then adopting a construction that will suppress the problem and advance the remedy,” and characterizing the mischief rule as “a primarily British name for purposivism”); *id.* at 438 (noting that “[b]roadly speaking, *purposivism* is synonymous with *mischief rule*”).

¹⁴ I recognize, of course, that Justice COOLEY authored *Mahaney* and that he appeared to utilize the “mischief rule” in that case. He did so, however, only after examining the text of the constitutional provision and determining that it did not preclude the action at issue. See *Mahaney*, 13 Mich at 496 (“We are unable to see how this conflicts with the provision referred to.”). To the extent he looked outside the text for “[t]he mischief designed to be remedied” in *Mahaney*, he clearly rejected this interpretive approach in his later work on the subject. See Cooley, *Constitutional Limitations* (1st ed), p 55.

¹⁵ See *Oncale v Sundowner Offshore Servs, Inc*, 523 US 75, 79 (1998) (noting that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”).

however, I do not believe the Court is precluded from issuing an advisory opinion after the effective date of the legislation at issue. For the reasons stated in Justice ZAHRA's dissenting statement, I believe the requests from the House and Senate at issue here were submitted upon a solemn occasion and that we should grant the requests and issue an advisory opinion despite the fact that the public acts in question have already taken effect.

Leave to Appeal Before Decision by the Court of Appeals Denied December 18, 2019:

LEAGUE OF WOMEN VOTERS V SECRETARY OF STATE, No. 160492; Court of Appeals No. 350938. On order of the Court, the motion for immediate consideration is granted. The application for leave to appeal prior to decision by the Court of Appeals is considered, and it is denied, because the Court is not persuaded that the questions presented, to the extent that the appellants have appellate standing to raise them, should be reviewed by this Court before consideration by the Court of Appeals. The motion to intervene is denied. We direct the Court of Appeals to issue an abbreviated briefing schedule to the parties and to issue a decision no later than Monday, January 27, 2020. Any appeal from that decision must be filed in this Court by 5:00 p.m. on Monday, February 3, 2020.

Stay Granted December 18, 2019:

NYLAAN V WOLVERINE WORLD WIDE, INC, No. 160675; Court of Appeals No. 351697. On order of the Court, the motions for immediate consideration and for stay of the Kent Circuit Court's order compelling the defendant to produce documents withheld as privileged are granted. The application for leave to appeal the December 11, 2019 order of the Court of Appeals remains pending.

Summary Disposition December 20, 2019:

PEOPLE V COLVILLE, No. 159004; Court of Appeals No. 336405. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II of the Court of Appeals judgment addressing the defendant's motion to suppress, and we remand this case to the Oakland Circuit Court for further proceedings. The circuit court shall conduct an evidentiary hearing to determine: (1) whether, at the time that Officer Proulx initially searched the property at 695 Livernois, he had been advised that he had consent to search the property; (2) if so, whether Treasury employee Jill Robinson had actual authority to consent to that search; and (3) if not, whether Officer Proulx reasonably relied on apparent authority for consent to search, i.e., whether it was reasonable for him to rely on the apparent consent without making any effort to verify the authority to consent, in light of the citation posted on the front door. The circuit court shall then decide whether to grant the defendant

a new trial. 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.

ZAHRA, J. (*dissenting*). I respectfully dissent from the order remanding this case to the trial court for an evidentiary hearing to determine whether, at the time that Officer Proulx initially searched the property at 695 Livernois, he had been advised that he had consent to search the property; whether Department of Treasury employee Jill Robinson had actual authority to consent to that search; or whether Officer Proulx reasonably relied on Robinson's apparent authority for consent to search. Defendant did not preserve these issues below and has not properly presented these issues to this Court. Instead, defendant raises only two issues in this Court: whether the Court of Appeals misapplied the doctrine of "inevitable discovery" in rejecting defendant's argument that the search of his house violated the Fourth Amendment; and whether defendant was denied his right to an impartial jury, or to the effective assistance of counsel, when a juror attempted to engage a court clerk in a conversation about the case, but no further inquiry was made into (a) what was said, (b) whether the juror was biased, or (c) whether there was further communication with the jury at large. Because the questions presented on remand were not preserved and were wholly abandoned by defendant, I would deny the application for leave to appeal and offer defendant no avenue for relief.

In the trial court, defendant moved to suppress incriminating evidence recovered from the warrantless entry into the Livernois home under the Fourth Amendment. His motion, however, focused on the validity of the search warrant and the veracity of the assertions within Detective Matthew Goebel's affidavit supporting the warrant rather than Officer Proulx's initial warrantless entry. Defendant alerted the trial court that the county did not own the Livernois home and alleged that "Ms. Robinson did not have authority to grant officers or county employees permission to enter the premises/home." But he made this assertion in the context of requesting an evidentiary hearing pursuant to *Franks v Delaware*,¹ arguing that the allegations in Detective Goebel's affidavit were materially false. Defendant did not ask for a hearing on whether Officer Proulx or Detective Goebel had valid consent to search, nor did he present any argument on the doctrine of consent. In the Court of Appeals, defendant again stated that Robinson had no authority to consent to the search, but just as he failed to do before this Court, he did not argue the relevant body of law on the validity of Robinson's consent.

This Court has recognized that

[i]t is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and

¹ *Franks v Delaware*, 438 US 154 (1978).

elaborate for him his arguments, and then search for authority either to sustain or reject his position.^[2]

As the appellant, defendant was required to preserve his issues adequately and make at least a threshold showing of error entitling him to relief.³ His failure to do so constitutes abandonment of those issues on appeal.⁴ This Court correctly denies defendant relief on the issues he raises, but on its own initiative also grants defendant relief that he has not requested. Because defendant has failed to properly raise and present the dispositive arguments adopted by the majority or any other jurisprudentially significant issues ripe for resolution, I would deny him the relief the majority gives him today.

PEOPLE V WALTER KELLY, No. 159605; Court of Appeals No. 340033. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse Part II of the Court of Appeals judgment, and we remand this case to the Wayne Circuit Court for further proceedings. As noted by dissenting Judge RONAYNE KRAUSE, while *Miranda v Arizona*, 384 US 436 (1966), is not generally invoked for on-the-scene questioning or other general questioning of citizens, such inquiries apply to questioning of persons “not under restraint.” *Id.* at 477, and see *People v Hill*, 429 Mich 382, 397-399 (1987). The defendant was handcuffed and under restraint when questioned, so *Miranda* applied. On remand, the prosecutor is not precluded from arguing that the evidence is admissible under the public-safety exception to *Miranda*. 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.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court’s order peremptorily reversing the judgment of the Court of Appeals. Defendant approached police officers executing a search warrant at a home that he had listed on his driver’s license as his place of residence. Based upon defendant’s association with the home, an officer handcuffed him, asked him for identification, and inquired whether there were any weapons in the vehicle defendant had driven to the home. Defendant informed the officer that there was a firearm in the vehicle and volunteered that he did not have a concealed-weapons permit for the weapon. Police then retrieved the firearm, and defendant was charged with unlawfully carrying a concealed weapon. He subsequently moved to suppress evidence of the firearm, arguing that the officer had not provided him warnings consistent with *Miranda v Arizona*, 384 US 436 (1966). The trial court denied the motion, a jury convicted defendant as charged, and the Court of Appeals affirmed the conviction, rejecting defendant’s argument that the lower court had erred by denying his

² *Mitcham v Detroit*, 355 Mich 182, 203 (1959).

³ See *id.* (“The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.”).

⁴ *People v McGraw*, 484 Mich 120, 131 n 36 (“Failure to brief an issue on appeal constitutes abandonment.”).

motion to suppress. This Court now reverses the Court of Appeals, concluding that because the officer handcuffed defendant, he was required to “Mirandize” defendant before asking any further questions. I would grant leave to appeal for two reasons.

First, it is not immediately apparent that police handcuffing an individual necessarily triggers the warnings requirement set forth in *Miranda*. “In *Miranda*, the United States Supreme Court held that the Fifth Amendment’s prohibition against compelled self-incrimination requires that the accused be given a series of warnings before being subjected to ‘custodial interrogation.’” *People v Elliott*, 494 Mich 292, 301 (2013), quoting *Miranda*, 384 US at 444. But “not . . . all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation.” *Rhode Island v Innis*, 446 US 291, 299 (1980). Rather, “[i]nterrogation,’ as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.” *Id.* at 300. And “the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.” *Id.* at 302. Here, a police officer on a public street, and in plain view of a number of members of the public (rather than within a police car or a police station), asked defendant general questions concerning his identity and whether there were weapons within his vehicle. Thus, it is hardly clear that the officer either (a) applied any measure of compulsion beyond placing defendant in custody by way of handcuffing defendant, or (b) asked questions that he should have known would elicit an incriminating response. Affirmative answers to *both* of these legal assessments is a required precondition to a reversal.

Second, the United States Supreme Court has held that officers executing a search warrant on a residence may for the duration of the search detain and handcuff individuals found at the residence. *Muehler v Mena*, 544 US 93, 98-102 (2005). And it is commonplace for officers under these circumstances to ask generalized and informational questions when detaining such an individual. Therefore, I would grant leave to appeal and establish clear precedent in the instant circumstance in order to afford the police in this state reasonable guidance as to whether they must “Mirandize” individuals detained and questioned in the course of the execution of a search warrant. It is a matter of considerable law-enforcement consequence for the people of this state that its highest Court would peremptorily conclude that *Miranda* has been breached, and therefore that an unlawful firearm must be excluded as evidence, without first addressing the threshold inquiries set forth in this dissent.

ZAHRA, J., joins the statement of MARKMAN, J.

Leave to Appeal Denied December 20, 2019:

TOWNSHIP OF WEST BLOOMFIELD V CONNOLLY, No. 159557; Court of Appeals No. 345428.

MARKMAN, J. (*concurring*). I agree that the questions presented should not be further reviewed by this Court, but as to defendants' challenges to their conditions of probation, I would deny leave specifically on the ground of mootness, given that the lengthiest of their terms of probation have already elapsed. *People v Anderson*, 284 Mich App 11, 17 (2009).

MEGERIAN V UNITED SERVICES AUTOMOBILE ASSOCIATION, No. 159684; Court of Appeals No. 336483.

MARKMAN, J. (*dissenting*). I respectfully dissent. Mari Zimmerman-Thompson and Christopher Thompson married in May 2002. They married later in life, and each owned a separate house before and throughout the marriage. Mari's house was located on Stoneham Road (the Stoneham house), while Christopher's was located on Gleaner Road several miles away (the Gleaner house). In July 2015, Christopher was driving a car with Mari as a passenger and he caused a car accident that killed both of them.

Christopher was covered by an automobile insurance policy issued by defendant. The policy provided that defendant would provide additional liability coverage on behalf of Christopher beyond the minimum required by the no-fault act, MCL 500.3101 *et seq.*, but it included the following exclusion:

We do not provide Liability Coverage . . . for . . . [bodily injury] to a relative who resides primarily in that covered person's household.

Plaintiff, the representative of Mari's estate, sued defendant for liability coverage, alleging that Christopher had been negligent in causing the accident. Because there was no dispute that Mari was a "relative" of Christopher—the "covered person"—the issue was whether Mari "reside[d] primarily in [Christopher's] household." The trial court ruled that there was a question of fact concerning this issue, and the Court of Appeals affirmed in a split decision. *Megerian v United Servs Auto Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2019 (Docket No. 336483). For the following alternative reasons, I believe the Court of Appeals erred.

First, as explained by the Court of Appeals dissent, "over the past seven or eight years, Mari spent most of her evenings at the Gleaner house with Christopher. She seldom left Christopher to stay overnight alone . . ." *Id.* at 2 (SWARTZLE, J., dissenting in part). Indeed, the Court of Appeals majority itself acknowledged that "Mari apparently spent the majority of her overnights at Gleaner house . . ." *Id.* at 5 (opinion of the Court). Furthermore, "[w]hen she did stay at the Stoneham house, it was with Christopher . . ." *Id.* at 2 (SWARTZLE, J., dissenting in part). Because Mari spent a majority of her nights at the Gleaner house with Christopher, I believe that she "primarily" resided in the Gleaner house with Christopher, even if she is deemed also to have resided in the Stoneham house. I respectfully disagree with the Court of Appeals majority in this context that "primary residence requires more than a bare majority of time." *Id.* at 5 (opinion of the Court) (emphasis omitted).

Second, even if Mari resided in both the Gleaner and the Stoneham houses such that it is impossible to conclude as a matter of law that she “primarily” resided in the Gleaner house, the policy refers to residence in a “household,” not residence in a “house.” And *Random House Webster’s College Dictionary* (1997) defines “household” in relevant part as “the people of a house collectively; a family including any servants.” That is, “household” is better understood as describing a unit composed of persons and not a physical location. To illustrate, if Christopher and Mari had spent six months of the year in Michigan and six months in Florida, it would not be understood in common parlance that they had separate households. Rather, it would be understood that they comprise a single household unit of husband and wife that persists notwithstanding any change of locations. Here, even when Mari stayed at the Stoneham house for an extended period of time, typically no longer than two weeks, she stayed there *with* Christopher. There is no evidence that Christopher and Mari ever actually “resided” apart. Accordingly, in my judgment, Mari “reside[d] primarily” in Christopher’s “household,” regardless of the physical location of Christopher’s “household.”

For these reasons, I believe there is no genuine issue of material fact concerning whether Mari “reside[d] primarily in [Christopher’s] household” for purposes of the policy exclusion. As a result, I would reverse the judgment of the Court of Appeals and remand to the trial court for entry of summary disposition in favor of defendant.

ZAHRA, J., joins the statement of MARKMAN, J.

CAVANAGH, J., not participating due to her prior relationship with Garan Lucow Miller, P.C.

In re FRANZEL, MINORS, Nos. 160382 and 160383; Court of Appeals Nos. 346547 and 347366.

In re DEAN, MINORS, No. 160532; Court of Appeals No. 347946.

Summary Disposition December 23, 2019:

PEOPLE V CLINGMAN, No. 158423; Court of Appeals No. 334806. By order of May 28, 2019, the application for leave to appeal the July 24, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Harbison* (Docket No. 157404). On order of the Court, the case having been decided on July 11, 2019, 504 Mich 230 (2019), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration in light of *People v Thorpe* and *People v Harbison*, 504 Mich 230 (2019). We do not retain jurisdiction.

PEOPLE V BERRY, No. 158681; Court of Appeals No. 343166. Pursuant to MCR 7.305(H)(1), in lieu of granting the application for leave to appeal, we vacate the April 4, 2017 opinion of the Wayne Circuit Court denying the defendant’s motion for relief from judgment, and we remand this case to the Wayne Circuit Court for reconsideration of the defendant’s motion under MCR 6.508(D) in light of *People v Johnson*, 502 Mich 541 (2018). On remand, the trial court shall determine

whether the new evidence is credible and whether the impact of the new evidence, in conjunction with the evidence that would be presented on retrial, would make a different result probable on retrial. *Id.* at 566-567. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We do not retain jurisdiction.

PEOPLE V HERMAN, No. 158995; Court of Appeals No. 345222. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the July 12, 2018 order of the Macomb Circuit Court denying the defendant's motion for relief from judgment, and we remand this case to the trial court for reconsideration of that motion. The trial court's order denied the motion by indicating with a check mark that "Defendant's request is denied." This order failed to "include a concise statement of the reasons for the denial," as required by MCR 6.504(B)(2).

PEOPLE V MICHAEL BARBER, No. 159076; Court of Appeals No. 339452. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part III of the Court of Appeals judgment, which did not address the defendant's argument that the Legislature did not intend for a single act to result in convictions for both assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a), and assault by strangulation, MCL 750.84(1)(b). We remand this case to the Court of Appeals for reconsideration in light of *People v Miller*, 498 Mich 13, 19 (2015). 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 SHANE HAWKINS, No. 159215; Court of Appeals No. 339020. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing whether the defendant established that Detective Boczar's testimony was sufficiently prejudicial to warrant reversal, and we remand this case to the Court of Appeals to address the question whether the defendant has established that there is a reasonable probability that, but for defense counsel's failure to object to Detective Boczar's testimony, the outcome of this trial would have been different. *Strickland v Washington*, 466 US 668, 694 (1984). While the Court of Appeals quoted the "reasonable probability" standard for determining prejudice in ineffective assistance of counsel cases, the panel did not clearly apply this standard. Instead, the panel concluded that Detective Boczar's testimony "did not rise to the level of overwhelming the proper evidence." *People v Hawkins*, unpublished per curiam opinion of the Court of Appeals, issued January 17, 2019 (Docket No. 339020), p 8. 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 PAROLE OF JOHN EMIL HRITZ, No. 159335; Court of Appeals No. 345782. Pursuant to MCR 7.305(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 VANN, Nos. 159789 and 159790; Court of Appeals Nos. 338742 and 344432. Pursuant to MCR 7.305(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 consideration of the parties' appeals on the merits. The defendant was entitled to an appeal of right, with counsel. *Douglas v California*, 372 US 353 (1963); Const 1963, art 1, § 20. He timely requested, and initially received, appointed appellate counsel. Although the defendant purportedly received an appeal of right, the substitution of counsel filed in the Court of Appeals on November 23, 2011 resulted in both attorneys disclaiming responsibility for representing the defendant. The defendant was left without counsel of record for the remainder of the appeal, from a point before the filing of the brief on appeal. Accordingly, as both parties concede, the defendant was deprived of his right to a direct appeal with counsel. The remedy for this constitutional error is the reinstatement of the appeal. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States*, 526 US 23, 28 (1999). Since the defendant is currently represented by appointed appellate counsel, who has preserved his appellate rights in the courts below, all that remains to be remedied is the consideration of his direct appeal on the merits. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should now be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V HOLLEY, No. 160047; Court of Appeals No. 337912. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II.C. of the judgment of the Court of Appeals, regarding newly discovered evidence, and we remand this case to the Wayne Circuit Court for reconsideration of the defendant's motion for a new trial in light of *People v Johnson*, 502 Mich 541 (2018). On remand, the trial court shall determine whether the new evidence is credible and whether the impact of the new evidence, in conjunction with the evidence that would be presented on retrial, would make a different result probable on retrial. *Id.* at 566-567. 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 BERRIDGE, No. 160052; Court of Appeals No. 348768. Pursuant to MCR 7.305(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 December 23, 2019:

PEOPLE V PAGANO, No. 159981; Court of Appeals No. 340859. The parties shall address whether the 911 call relayed to the police provided reasonable suspicion that defendant was intoxicated so as to justify the stop of her vehicle. See *Alabama v White*, 496 US 325 (1990), *Florida v JL*, 529 US 266 (2000), and *Navarette v California*, 572 US 393 (2014). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered December 23, 2019:

PEOPLE v HAMPTON, No. 159676; Court of Appeals No. 338418. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Legislature intended to elevate to felony-murder those instances of first-degree child abuse in which the only act of abuse is the child's murder. See MCL 750.316(1). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Bean* (Docket No. 159384).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

In re PETITION OF ATTORNEY GENERAL FOR SUBPOENAS, No. 159690; reported below: 327 Mich App 136. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the circuit court was required to hold a hearing before authorizing the disclosure of medical records under 42 CFR 2.66; (2) whether the circuit court erred when it determined that the petitioner established "good cause" and otherwise satisfied the criteria set forth in 42 CFR 2.64(d) and 42 CFR 2.64(e); and (3) whether the circuit court erred in authorizing the disclosure of confidential patient communications under 42 CFR 2.63(a). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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 December 23, 2019:

PEOPLE V TROY HITE, No. 157674; Court of Appeals No. 342618.

PEOPLE V ALCALA, No. 157893; Court of Appeals No. 342611.

PEOPLE V RAHM, No. 158062; Court of Appeals No. 342810.

PEOPLE V JASON STREATER, No. 158103; Court of Appeals No. 335670.

PEOPLE V JASON STREATER, No. 158123; Court of Appeals No. 335670.

PEOPLE V MERCER, No. 158442; Court of Appeals No. 335181.

PEOPLE V GRIFFIN, No. 158466; Court of Appeals No. 338160.

In re ESTATE OF ROBERT BERRY BULLOCK, No. 158584; Court of Appeals No. 338635.

WHEELER V CITY OF LIVONIA, No. 158910; Court of Appeals No. 338704.

WALTON & ADAMS, LLC V SERVICE STATION INSTALLATION BUILDING & CAR WASH EQUIPMENT, INC, No. 159030; Court of Appeals No. 340758.

PEOPLE V HILER, No. 159134; Court of Appeals No. 346229.

PEOPLE V DERRICK JOHNSON, No. 159252; Court of Appeals No. 328443.

PEOPLE V BRENEMAN, No. 159256; Court of Appeals No. 340824.

PEOPLE V TANAKA WELLS, No. 159275; Court of Appeals No. 342663.

PEOPLE V TANAKA WELLS, No. 159277; Court of Appeals No. 342665.

PEOPLE V HINTON, No. 159300; Court of Appeals No. 345771.

AGARWAL V AGARWAL, Nos. 159348, 159349, and 159350; Court of Appeals Nos. 340133, 340435, and 340591.

PEOPLE V MASSEY, No. 159352; Court of Appeals No. 338183. On order of the Court, the application for leave to appeal the March 21, 2019 judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. The Court notes, however, to the extent that the sentencing court assigned zero points to Offense Variable (OV) 7, MCL 777.37, on the ground that judicial fact-finding was not permitted, the court erred as a matter of law. *People v Steanhouse*, 500 Mich 453, 466-467 (2017); *People v Lockridge*, 498 Mich 358, 364, 391-392, 392 n 28 (2015). To the extent that the sentencing court concluded that a preponderance of the evidence did not support assigning 50 points to OV 7, but that a departure was warranted based on the “egregious nature of th[e] heinous assault,” the court erred as a matter of law. MCL 769.34(3)(b).

On remand, the sentencing judge shall determine whether zero points or 50 points are to be assigned to OV 7 and, as ordered by the Court of Appeals, shall either resentence defendant or articulate the reasons for any departure based on the applicable sentencing guidelines range.

LOCKARD V MAYCO INTERNATIONAL, LLC, No. 159358; Court of Appeals No. 341808.

PEOPLE V SCOTT COLE, No. 159362; Court of Appeals No. 346869.

PEOPLE V WINER, No. 159460; Court of Appeals No. 340688.

PEOPLE V ANTHONY, No. 159480; Court of Appeals No. 340535.

KONDAUR CAPITAL CORPORATION V DOUGLAS, No. 159632; Court of Appeals No. 347596.

PEOPLE V LEE, No. 159703; Court of Appeals No. 348403.

PEOPLE V BUTTERS, No. 159755; Court of Appeals No. 347637.

PEOPLE V JOHNNIE GORDON, No. 159766; Court of Appeals No. 346758.

PEOPLE V BONNER, No. 159778; Court of Appeals No. 347941.

PEOPLE V DURAM, No. 159805; Court of Appeals No. 340486.

PEOPLE V DONTREL WILLIAMS, No. 159826; Court of Appeals No. 343761.

MCELMURRY V RUGG, No. 159846; Court of Appeals No. 346588.

PEOPLE V WEISSERT, No. 159876; Court of Appeals No. 346640.

PEOPLE V HAWKS, No. 159901; Court of Appeals No. 347870.

PEOPLE V JEFFRIES, No. 159905; Court of Appeals No. 347356.

PEOPLE V ERIC HARVEY, No. 159909; Court of Appeals No. 339262.

PEOPLE V DEQUARIES JACKSON, No. 159917; Court of Appeals No. 343198.

PEOPLE V KEYSUE BOONE, No. 159929; Court of Appeals No. 348081.

RCS RECOVERY SERVICES, LLC V MITCHELL, No. 159946; Court of Appeals No. 347388.

WATTS V PATEL, No. 159958; Court of Appeals No. 346959.

PEOPLE V DAJUAN SIMPSON, No. 159973; Court of Appeals No. 348573.

PEOPLE V CALVEY, No. 159974; Court of Appeals No. 347163.

PEOPLE V DONALD WILLIAMS, No. 159985; Court of Appeals No. 347430.

PEOPLE V ANDREW HILL, No. 160010; Court of Appeals No. 348756.

PEOPLE V DARIUS MALONE, Nos. 160021 and 160022; Court of Appeals Nos. 348779 and 348781.

BRONSON HEALTH CARE GROUP, INC V FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 160025; Court of Appeals No. 341200.

PEOPLE V TYRONE WALKER, No. 160033; Court of Appeals No. 348656.

PEOPLE V THORNTON, No. 160038; Court of Appeals No. 348414.

PEOPLE V JAMES DANIELS, No. 160042; Court of Appeals No. 349712.

PEOPLE V MICHAEL PETERSON, No. 160045; Court of Appeals No. 347080.

PEOPLE V SHAMON SMITH, No. 160055; Court of Appeals No. 347263.

HANNOSH V HANNOSH, No. 160056; Court of Appeals No. 348159.

PEOPLE V STEPHENSON, No. 160058; Court of Appeals No. 348758.

PEOPLE V SCHAFER, No. 160062; Court of Appeals No. 347437.

PEOPLE V RENDER, No. 160064; Court of Appeals No. 348191.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

ARABBO V CITY OF BURTON, No. 160067; Court of Appeals No. 341713.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE V MARLON BURNS, No. 160073; Court of Appeals No. 342712.

PCT BRANDS, LLC V DIGITAL GADGETS, LLC, No. 160077; Court of Appeals No. 342481.

PEOPLE V KOLBY WILLIAMS, No. 160084; Court of Appeals No. 348899.

PEOPLE V LEHRE, No. 160085; Court of Appeals No. 349260.

TODD STEIN & ASSOCIATES V CAZEL, No. 160087; Court of Appeals No. 348053.

PEOPLE V TANINO MILLER, No. 160088; Court of Appeals No. 341306.

PEOPLE V KEMP, No. 160090; Court of Appeals No. 342244.

PEOPLE V KNACK, No. 160102; Court of Appeals No. 348933.

PEOPLE V WILLIAM FORD, No. 160108; Court of Appeals No. 349281.

PEOPLE V WILLIAM CALLOWAY, No. 160112; Court of Appeals No. 348164.

PEOPLE V SHAWN BAILEY, No. 160116; Court of Appeals No. 343430.

PEOPLE V McFALL, No. 160117; Court of Appeals No. 349399.

PEOPLE V ROBERT WATTS, No. 160119; Court of Appeals No. 347283.

PEOPLE V SHIGWADJA, No. 160123; Court of Appeals No. 347719.

PEOPLE V JOHN WILSON, No. 160126; Court of Appeals No. 343990.

PEOPLE V FEZZEY, No. 160127; Court of Appeals No. 347571.

PEOPLE V LANDERS, No. 160135; Court of Appeals No. 347878.

PEOPLE V BALLARD, No. 160136; Court of Appeals No. 347734.

CITY OF DETROIT V CARMACK'S COLLISON, LLC, No. 160139; Court of Appeals No. 343496.

PEOPLE V EASTERLING, No. 160140; Court of Appeals No. 348136.

PEOPLE V CARNELL BATES, No. 160141; Court of Appeals No. 347304.

PEOPLE V DARNELL BATES, No. 160155; Court of Appeals No. 347279.

Superintending Control Denied December 23, 2019:

BLACKWARD V ATTORNEY GRIEVANCE COMMISSION, No. 160018.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied December 23, 2019:

MARTINEZ V TMF II WATERCHASE, LLC, No. 155197; Court of Appeals No. 329931. Leave to appeal denied at 504 Mich 967.

MENARD V IMIG, No. 158563; Court of Appeals No. 336220. Summary disposition order entered at 505 Mich 858.

PEOPLE V CAMPBELL, No. 159111; Court of Appeals No. 345315. Leave to appeal denied at 504 Mich 957.

WALKER V ATTORNEY GRIEVANCE COMMISSION, No. 159375. Superintending control denied at 504 Mich 949.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

SABADOS V STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 159437; Court of Appeals No. 342088. Leave to appeal denied at 504 Mich 948.

PEOPLE V KARIEM, No. 159452; Court of Appeals No. 347327. Leave to appeal denied at 504 Mich 948.

PEOPLE V SPENCER, No. 159572; Court of Appeals No. 348890. Leave to appeal denied at 504 Mich 894.

Leave to Appeal Before Decision by the Court of Appeals Denied December 27, 2019:

SLIS V STATE OF MICHIGAN and A CLEAN CIGARETTE CORPORATION V GOVERNOR, Nos. 160431 and 160432; Court of Appeals Nos. 351211 and 351212.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's decision to deny defendants' bypass application. Instead, I would grant defendants' request for a bypass of the Court of Appeals pursuant to MCR 7.305(B)(4) and thereby expedite final resolution of this dispute.¹

On September 18, 2019, the Michigan Department of Health and Human Services (DHHS), acting pursuant to MCL 24.248(1) and with the Governor's consent, issued emergency rules (rules enacted without complying with the traditional rulemaking procedures of the Administrative Procedures Act, MCL 24.201 *et seq.*) governing the sale and advertisement of flavored nicotine vapor products in Michigan. The rules took effect 14 days later. Plaintiffs, retailers of flavored nicotine vapor products, then brought this action seeking to invalidate the rules and enjoin their enforcement. On October 15, 2019, the Court of Claims granted plaintiffs' motion for a preliminary injunction and enjoined defendants from enforcing the rules. On October 25, 2019, defendants filed an application for leave to appeal in the Court of Appeals and a bypass application for leave to appeal in this Court.

By granting the preliminary injunction, the Court of Claims judge suspended the implementation of rules enacted under the law by the executive branch with the specific concurrence of the Governor. It is "a matter of considerable constitutional consequence when a single judge delays the implementation of a legislative measure approved by 148 legislators and one governor, each acting on behalf of 'we the people.'" *Council of Organizations & Others for Ed About Parochiaid v Michigan*, 501 Mich 1015, 1022 (2018) (MARKMAN, C.J., *dissenting*).² And it is also a matter of considerable constitutional consequence when a single judge delays the implementation of an executive measure approved by the

¹ I would grant under MCR 7.305(B)(4)(a), viewing a delay in the adjudication of this case as likely to cause "substantial harm" to the interests of the separation of powers, see Const 1963, art 3, § 2. However, I note that the values reflected in MCR 7.305(B)(4)(b), expediting appeals from rulings of invalidity of legislative and executive branch actions, are also implicated here. Indeed, a preliminary injunction arguably implicates these values to an even greater degree by suspending presumptively lawful actions enacted by the representative branches of government in the *absence* of an actual ruling of constitutional invalidity.

² In *Council of Organizations*, the plaintiffs filed suit in the Court of Claims challenging the constitutionality of MCL 388.1752b, which allocates funds to provide reimbursement for "actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state." MCL 388.1752b(1). The Court of Claims, in that case as here, granted plaintiffs' motion for a preliminary injunction, which prevented the disbursement of funds under that law. The Court of Appeals and this Court denied leave to appeal over my dissent.

Governor. It is a matter of consequence “for the constitutional architecture of this state,” *id.* at 1015, in particular, “for our constitutional system of separated powers[,] when a [judge] enjoins the executive authority from undertaking an action,” *Smith v Dep’t of Human Servs Dir*, 491 Mich 898, 898 (2012) (MARKMAN, J., dissenting). “Such a case raises a question of ‘considerable delicacy, as it requires one of the co-ordinate branches of the government to pass its judgment on the acts of another, and the presumption is that the executive department has the same desire to keep within constitutional limits as either of the other two.’” *Id.*, quoting *Dullam v Willson*, 53 Mich 392, 397 (1884). Because the decision here of the Court of Claims had the effect of entirely halting the implementation of rules enacted by the executive branch, it warrants, in my judgment, the most expeditious, and the most final, review by the highest judicial authority of this state.

This need for expedited review is underscored in the present case by the fact that the issue may well be rendered moot before this Court even has an opportunity to address the issue. The rules in dispute are effective only until April 2, 2020, and the parties’ briefs are not due in the Court of Appeals until February 3, 2020. This leaves an extremely short period of time for the Court of Appeals to issue an opinion, an appeal to be filed in this Court, and this Court to hear arguments, review the case, and issue a decision. In other words, the rules may well expire before they have ever been enforced, notwithstanding a presumptively valid decision by the Governor of this state to have these rules enacted. In order to avoid such “government by injunction,” I would grant defendants’ bypass application. I would do so not necessarily to reverse the injunction, but to affirm the proposition that the judiciary must act with the greatest dispatch in resolving the constitutional validity of actions undertaken by representative public institutions, where such actions have been enjoined by the judiciary.

Summary Disposition December 30, 2019:

PEOPLE V COLLINS, No. 153733; Court of Appeals No. 331222. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Livingston Circuit Court. The trial court imposed a 30-year maximum sentence for the defendant’s conviction of unarmed robbery, MCL 750.530, as enhanced by MCL 769.11, stating that the maximum is set by statute. It is unclear whether the trial court recognized its discretion, pursuant to MCL 769.11(1)(a), to impose a lesser maximum sentence. On remand, the trial court shall either issue an order clarifying that it deliberately exercised its discretion to impose the 30-year maximum term, or resentence the defendant. 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 December 30, 2019:

In re JAI SATCHELL-VENTA, MINOR, No. 160531; Court of Appeals No. 347906.

Summary Disposition December 30, 2019:

HARDY V SECRETARY OF STATE, No. 160719; Court of Appeals No. 351694. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals and remand this case to the Court of Appeals for entry of an order of mandamus. As acknowledged by the Board of State Canvassers in its brief filed in the related appeal in *Inman v Bd of State Canvassers*, Court of Appeals No. 350173, the reasons given for the recall are the officeholder's filing of a notice of diminished capacity in his federal criminal case and the allegedly missed votes in the House of Representatives. See Defendant's Court of Appeals Brief at pp 5-6 ("While the inclusion of a description of the counts of the indictment was certainly not flattering or helpful to Representative Inman, the language of the petition does not make the indictment a reason for the recall."). The recall petition is proper because the reasons given for recall in the circulated petitions were not different than the reasons that were approved by the Board of Canvassers. This Court is not presented with, and is not passing on, the merits of the officeholder's claim of appeal that is currently pending in the Court of Appeals. Court of Appeals Docket No. 350173. The Court of Appeals shall continue to treat this matter as a priority. MCR 7.213(C)(4).

Summary Disposition January 2, 2020:

PEOPLE V ISON, No. 160282; Court of Appeals No. 343530. Pursuant to MCR 7.305(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 *People v Beck*, 504 Mich 605 (2019). We do not retain jurisdiction.

Leave to Appeal Denied January 2, 2020:

PEOPLE V RAND GOULD, No. 160142; Court of Appeals No. 347625.
PEOPLE V ROBERT MARTINEZ, No. 160143; Court of Appeals No. 348399.
PEOPLE V GRAM BENTON, No. 160145; Court of Appeals No. 348913.
PEOPLE V SEAN DANIELS, No. 160156; Court of Appeals No. 348638.
PEOPLE V WILLIE GREEN, No. 160159; Court of Appeals No. 337756.
PEOPLE V FRILL, No. 160161; Court of Appeals No. 348194.
PEOPLE V ALBERT WALKER, No. 160162; Court of Appeals No. 347877.
PEOPLE V TYLER WEBB, No. 160172; Court of Appeals No. 349099.
PEOPLE V FINNIE, No. 160173; Court of Appeals No. 349178.
HUDSON V KLEUESSENDORF, No. 160175; Court of Appeals No. 344482.
HANEY V HANEY, No. 160176; Court of Appeals No. 342019.

BELSER V EVANS, No. 160181; Court of Appeals No. 349705.

PEOPLE V ARCELL CARTER, No. 160182; Court of Appeals No. 338764.

STOLAJ V FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 160188; Court of Appeals No. 348503.

PEOPLE V VANDERMEULEN, No. 160191; Court of Appeals No. 342960.

PEOPLE V CRUDUP, No. 160194; Court of Appeals No. 349293.

PEOPLE V JAMES BAILEY, No. 160197; Court of Appeals No. 347657.

WHITE V MATTHEWS, No. 160198; Court of Appeals No. 348497.

PEOPLE V BEST, No. 160199; Court of Appeals No. 349044.

WHITE V SOUTHEAST MICHIGAN SURGICAL HOSPITAL, No. 160200; Court of Appeals No. 348552.

PEOPLE V HOOF, No. 160204; Court of Appeals No. 349213.

PEOPLE V AUSTIN, No. 160216; Court of Appeals No. 349109.

GOTTLEBER V COUNTY OF SAGINAW, No. 160217; Court of Appeals No. 336011.

FLATT V DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 160218; Court of Appeals No. 347547.

PEOPLE V DEMARIO SIMPSON, No. 160221; Court of Appeals No. 349076.

PEOPLE V SCHOOLCRAFT, Nos. 160225 and 160226; Court of Appeals Nos. 349287 and 349290.

SOLOMON V CHARLES EGELER RECEPTION AND GUIDANCE CENTER WARDEN, No. 160227; Court of Appeals No. 349111.

PEOPLE V KYLE RICHARDS, No. 160237; Court of Appeals No. 344161.

PEOPLE V JOSHUA FORD, No. 160238; Court of Appeals No. 349312.

PEOPLE V RUCKES, No. 160247; Court of Appeals No. 342994.

PEOPLE V POWELL, No. 160257; Court of Appeals No. 349590.

PEOPLE V JAKE CUNNINGHAM, No. 160260; Court of Appeals No. 342637.

PEOPLE V STEPHENS, No. 160257; Court of Appeals No. 345187.

PEOPLE V ADAMS, No. 160280; Court of Appeals No. 344238.

PEOPLE V KAELAN ALLEN, No. 160294; Court of Appeals No. 349214.

PEOPLE V REUEBEN JENKINS, No. 160307; Court of Appeals No. 345606.

PEOPLE V CHARESE ARNOLD, No. 160310; Court of Appeals No. 349744.

PEOPLE V GWINN, No. 160314; Court of Appeals No. 349647.

PEOPLE V HECK, No. 160316; Court of Appeals No. 349762.

PEOPLE V ACCETTOLA, No. 160317; Court of Appeals No. 348173.

KOZLOWSKI V CHARTER TOWNSHIP OF WATERFORD, No. 160322; Court of Appeals No. 346029.

PEOPLE V DIANE STEVENS, No. 160323; Court of Appeals No. 349571.

PEOPLE V RONALD BENNETT, No. 160326; Court of Appeals No. 350023.

In re TIPPINS, No. 160329; Court of Appeals No. 349398.

PEOPLE V NORFLEET, No. 160365; Court of Appeals No. 348694.

PEOPLE V MARSHA SPRINGER, No. 160367; Court of Appeals No. 348963.

PEOPLE V TERREON SMITH, No. 160370; Court of Appeals No. 348459.

PEOPLE V JIMMIE COLE, No. 160373; Court of Appeals No. 349688.

PEOPLE V ANTHONY SPRINGER, No. 160401; Court of Appeals No. 348840.

GRIEVANCE ADMINISTRATOR V BECK, No. 160430.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Superintending Control Denied January 2, 2020:

HIXON V ATTORNEY GRIEVANCE COMMISSION, No. 160170.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

WERTH V ATTORNEY GRIEVANCE COMMISSION, No. 160184.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

AMATO V ATTORNEY GRIEVANCE COMMISSION, No. 160248.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

AYERS V ATTORNEY GRIEVANCE COMMISSION, No. 160295.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Application for Leave to Appeal Dismissed January 2, 2020:

WHITE V EDS CARE MANAGEMENT, LLC, No. 160298; Court of Appeals No. 349018. On order of the Court, the application for leave to appeal the August 29, 2019 order of the Court of Appeals and the defendants' motion to dismiss are considered. The defendants' motion to dismiss is granted and the application is dismissed, because the plaintiff is a vexatious litigator under MCR 7.316(C)(3). We direct the Clerk of this Court not to

accept any further filings from the plaintiff in this matter unless the plaintiff has obtained leave and has submitted the filing fee required by MCR 7.319.

Leave to Appeal Denied January 3, 2020:

In re RIVERA-IZAGUIRRE/FERNANDEZ/MENDEZ-IZAGUIRRE, MINORS, No. 160544; Court of Appeals No. 348229.

Leave to Appeal Denied January 10, 2020:

IRIS LLC v CITY OF ROYAL OAK, No. 159496; Court of Appeals No. 342812.

PEOPLE v SINNETT, No. 159871; Court of Appeals No. 336775.

CAVANAGH, J. (*concurring*). I concur in the Court's order denying leave to appeal in this case but write separately to identify a serious trial court error, which would warrant reversal of defendant's conviction were it not rendered harmless by the overwhelming evidence of defendant's guilt.

Defendant was tried before a jury for armed robbery, possession of a firearm during the commission of a felony, and unlawfully driving away a motor vehicle. After the prosecution rested, defense counsel informed the trial court that defendant had intended to testify but had been threatened in the jail by an individual who would likely be called as a rebuttal witness. According to defendant, a man named Derrick Johnson threatened him "don't be a rat" because defendant planned to implicate an associate of Johnson's. Defense counsel asked for time to confer with defendant about whether he still intended to testify. Following a brief off-the-record discussion, defense counsel made a record:

[*Defense Counsel*]: Okay. And as we stand here today and you are here to make your final decision, do you wish to testify or do you wish to remain silent?

The Defendant: It would be better for me to stay silent.

[*Defense Counsel*]: Has anyone promised you or threatened you to get you to make this decision?

The Defendant: Besides Derrick Johnson, no.

After that, the trial court also questioned defendant about the alleged threat. Defendant elected not to testify and was ultimately found guilty as charged. Defendant's convictions were affirmed on appeal; the Court of Appeals concluded that defendant waived his right to testify and there was no plain error affecting his substantial rights.

A defendant's right to testify is grounded in the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. *People v*

Bonilla-Machado, 489 Mich 412, 419 (2011). The right to testify is “essential to due process of law in a fair adversary process.” *Rock v Arkansas*, 483 US 44, 51 (1987) (quotation marks and citation omitted). In fact, a defendant’s right to present his own version of events is fundamental, and sometimes “the most important witness for the defense” is the defendant himself. *Id.* at 52. A defense attorney may counsel a defendant against testifying as a matter of sound trial strategy; however, the ultimate decision to testify rests solely with the defendant. *Bonilla-Machado*, 489 Mich at 419. In Michigan, the trial court is not required to determine whether a defendant waives the right to testify, and if the defendant “decides not to testify . . . the right will be deemed waived.” *People v Simmons*, 140 Mich App 681, 685 (1985) (quotation marks and citation omitted).

In the Court of Appeals, defendant argued that that trial court failed to take sufficient steps to protect his constitutional right to testify. I agree. The record shows that defendant *repeatedly* informed the trial court that he believed he had been threatened not to testify, but the trial court did nothing about it:

The Court: All right. Mr. Sinnett, this is your decision as to whether you want to testify or not. You’ve talked to your attorney at length prior to this case starting, during this week, additionally this morning. Has anyone promised you or threatened you?

The Defendant: I actually, ma’am, I had intended on taking the stand the whole time until this morning. I was—I had made my attorney aware that I had been threatened in the past. That my paperwork had been stolen and she knows of it and I only recently—

The Court: What, what was the threat? What was the threat and where did it come from?

The Defendant: The threat came from a black guy they call DJ that was in your holding tank

* * *

The Court: What, what was the threat?

The Defendant: The threat was don’t be a rat. Don’t be a rat. I know Duane and I was like—

* * *

The Court: It is up to you to decide whether you want to testify or not. If you think it’s in your best interest to testify and say whatever it is that you want to say in front of this jury then you do it. If, if you don’t want to do it, you don’t do it. It is your decision ultimately.

You've had plenty of time to speak with your attorney correct?

The Defendant: Yes ma'am.

The Court: Okay. And so you know you have an absolute [sic] not to testify.

The Defendant: I do.

The Court: And that I'm going to instruct the jury that they are to not take that into account whatsoever in their deliberations because you have a right not to testify, you understand that?

The Defendant: Yes ma'am.

The Court: Okay. You also have a right to testify if you want to. Okay. So when [defense counsel] is asking you whether anyone has promised you anything or threatened you you're indicating to me that you're deciding not to testify because of something you heard from another person that's in custody, correct?

The Defendant: That the prosecution plans to call against me as a rebuttal.

The Court: It doesn't matter—that doesn't matter. You're indicating the reason why you're not going to testify is because someone else that's in custody—

The Defendant: Yes.

The Court: —has accused or, or said to you don't be a rat.

* * *

The Court: Okay. All that aside, I don't know any of this and I don't know the truth to any of that. Okay. So all I'm hearing is that someone is accusing you of potentially if you testify that you might be a rat, okay. Correct?

The Defendant: Right.

The Court: Okay. There have been no threats other than that, other than those statements, correct?

The Defendant: I mean that's the most serious one, yes.

The Court of Appeals suggested that this was sufficient to protect defendant's constitutional rights, outlining:

Here, the trial court provided defendant the opportunity to consult with counsel before making a decision whether to testify. The court then placed defendant under oath and questioned him about the alleged threat. Defendant agreed on the record that he

had sufficient time to talk with counsel and that he was aware that he had an absolute right to testify. Indeed, on appeal defendant does not dispute that it was his decision not to testify. [*People v Sinnett*, unpublished per curiam opinion of the Court of Appeals, issued May 9, 2019 (Docket No. 336775), p 6.]

I fail to see how *any* of this procedure safeguarded defendant's right to testify. Consulting with his attorney and putting the threat on the record did nothing to resolve the threat. The trial court did not hold an evidentiary hearing to ascertain if defendant's allegations were credible, nor did it assure defendant that it would take appropriate curative action if he wished to exercise his constitutional rights. The court could have, for example, ensured that defendant would not be placed in a holding cell with the man who allegedly imperiled his safety. Although I recognize that in Michigan the trial court is under no duty to confirm on the record that a waiver of the right to testify is made intelligently and knowingly, *Simmons*, 140 Mich App at 684, I believe that when the trial court is informed that the free exercise of a constitutional right is at stake, its duty to protect that right is clearly implicated.¹

Next, I am troubled by the Court of Appeals' conclusion that defendant waived his constitutional right to testify. A waiver is the "intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 762 n 7 (1999) (quotation marks and citation omitted). Furthermore, "[i]ntelligent waiver, of course, is made to depend upon the considered choice of defendant . . ." *People v McKinley*, 383 Mich 529, 536 (1970). A waiver of a constitutional right based on intimidation or coercion is invalid as it is not a freely made choice. See *People v Akins*, 259 Mich App 545, 564 (2003). Taking defendant at his word—given that, as noted, the trial court failed to meaningfully delve into the nature and circumstances of the threats or ascertain whether the threats were credible—his decision not to testify does not appear to be one made upon considered choice. In my view, the choice to stay silent or to exercise a right and face potential physical harm² is no choice at all.

¹ I find instructive the following holding from the Court of Appeals of Alaska:

A trial judge faced with a defendant who, in the course of this process, voices fears of reprisal as a consequence of testifying—even vague and insubstantial fears—must do everything realistically possible to delve into the issue and elicit an informed, voluntary choice. To this end, the judge should invite a full disclosure by the defendant and the defendant's counsel of any purported threat, offer to invoke the full weight of the court's protective powers against the source of any threat, and conduct a thorough inquiry in response to any information disclosed. [*Knix v State*, 922 P2d 913, 919 (Alas App, 1996).]

² At defendant's posttrial *Ginther* hearing, he explained that in his opinion being labeled "a rat" would be a "death sentence" in the county jail. See *People v Ginther*, 390 Mich 436 (1973).

I also disagree with the Court of Appeals' conclusion that defendant failed to preserve this issue since he "did not argue in the trial court that he was denied his constitutional right to testify on his own behalf . . ." *Sinnett*, unpub op at 5. The record clearly shows that both defense counsel and the trial court put defendant's "waiver" of his *constitutional* right to testify on the record. In fact, the trial court's questioning of defendant on this topic spans seven pages of the transcript. "The purpose of the appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice." *People v Mayfield*, 221 Mich App 656, 660 (1997). Other than using the word "constitutional" when informing the trial court that he wished to testify but would not because he had allegedly been threatened, I am unsure what else defendant could have done to preserve this issue or why the Court of Appeals would require more. Defendant raised this issue, a record was created, and the trial court had an opportunity to alleviate the prejudice. Because this issue was preserved, the Court of Appeals erred by reviewing the claim for plain error instead of for harmless error.

All this aside, however, I join the Court's denial order because even under the appropriate harmless-error standard of review, see *People v Anderson (After Remand)*, 446 Mich 392, 405-406 (1994), I cannot conclude that defendant is entitled to relief. Defendant visited the victim's home the day before the robbery and earlier on the same day as the robbery. The victim was able to identify him as was an employee of the victim's husband. On the afternoon of the robbery, defendant visited the home acting suspiciously; for example, he offered to buy the home for a price that exceeded its appraised value, asked to come inside and look around, and asked the victim why she was not wearing her wedding ring. While speaking with defendant, the victim noted that defendant was wearing shoes that did not match the rest of his professional attire. During the robbery, the victim observed that the suspect had a similar physical build to defendant and that he was wearing the same shoes that defendant had worn when he visited her home earlier that day. In addition, the victim's stolen Jeep was discovered in a parking lot about one-half mile from her home. Surveillance video footage from that parking lot showed that just prior to the robbery a black Ford F-150 backed into that parking lot and a man exited the truck. Approximately 15 minutes later, the victim's Jeep was shown pulling up next to the F-150. The driver exited the Jeep and got into the F-150 and drove away. Defendant later admitted to police that he drove a black Ford F-150. Furthermore, defendant's phone number and that of his girlfriend, whose phone had an area code from Arizona, were linked to phone calls associated with the crime. Finally, defendant provided police with information about a man named Duane Butler. When a search was conducted at Butler's residence, the victim's credit cards were found. Overall, the prosecution presented substantial and overwhelming evidence that defendant was the perpetrator of the charged crimes, and I

cannot conceive what defendant could have testified to that would have altered the verdict.³

NYLAAN V WOLVERINE WORLD WIDE, INC, No. 160675; Court of Appeals No. 351697.

Leave to Appeal Before Decision by the Court of Appeals Denied January 10, 2020:

NYLAAN V WOLVERINE WORLD WIDE, INC, No. 160682; Court of Appeals No. 351895. By order of December 18, 2019, this Court granted immediate consideration and a stay of the Kent Circuit Court's November 26, 2019 order compelling the defendant to produce documents withheld as privileged. On order of the Court, the application for leave to appeal the December 11, 2019 order of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. The stay ordered on December 18, 2019, is dissolved. The motion for waiver of requirement to move for stay in the trial court is denied as moot.

Summary Disposition January 17, 2020:

PEOPLE V TURNER, No. 158068; Court of Appeals No. 336406. 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 reverse the May 17, 2018 judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court to reinstate the December 21, 2016 judgment of sentence.

The Court of Appeals erred to the extent it held that MCL 769.25a does not allow a defendant to be resentenced on concurrent sentences. *People v Turner*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 336406), p 3. Section 25a creates a resentencing procedure for sentences in violation of *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US 190 (2016). Under that procedure, the prosecuting attorney was required to “provide a list of names to the chief circuit judge of that county of all defendants who are subject to the jurisdiction of that court and who must be resentenced under [*Montgomery*].” MCL 769.25a(4)(a). Once that occurred, the defendant was not required to file a separate motion for relief from judgment in order to seek resentencing on his concurrent sentence for assault with intent to murder.

A sentence is invalid if it is “based upon . . . a misconception of law . . .” *People v Miles*, 454 Mich 90, 96 (1997). In the *Miller* context,

³ In addition, it is clear from a review of the *Ginther* hearing transcript that the trial court did not find defendant credible, and this strengthens my conclusion that any testimony provided to the jury would not have been likely to help defendant's cause.

a concurrent sentence for a lesser offense is invalid if there is reason to believe that it was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense. Accordingly, at a *Miller* resentencing, the trial court may exercise its discretion to resentence a defendant on a concurrent sentence if it finds that the sentence was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense.

KROLL V DEMORROW, No. 159413; Court of Appeals No. 341895. On order of the Court, the application for leave to appeal the February 26, 2019 judgment of the Court of Appeals is considered.

The issue before us is whether the plaintiffs, Loren Kroll's legal guardians, presented a genuine issue of material fact as to whether Delores DeMorrow's alleged failure to activate the bus's caution lights was a cause in fact of Loren's injuries. When reviewing a motion for summary disposition under MCR 2.116(C)(10), the evidence must be viewed in the light most favorable to the nonmoving party. *Odom v Wayne Co*, 482 Mich 459, 466-467 (2008). Summary disposition is appropriate only if there is no genuine issue regarding any material fact and the moving party is therefore entitled to judgment as a matter of law. *Id.* at 467. Factual causation requires showing that "but for" the defendant's actions, the plaintiffs injury would not have occurred. *Ray v Swager*, 501 Mich 52, 63 (2017).

Viewed in the light most favorable to the plaintiffs, there was sufficient evidence to bar summary disposition on the factual-cause element of the plaintiffs' negligence claim. The driver of the truck that struck Loren testified that it was his habit to slow to a stop when he saw a bus's caution lights activated. He further testified that had the bus's caution lights been on in this case, he would have stopped. The Court of Appeals erred when it found that this testimony was mere speculation and that it was not proven that DeMorrow's alleged failure to activate the caution lights was a factual cause of Loren's injuries. The truck driver's testimony created a genuine issue of material fact as to whether the accident would have occurred but for DeMorrow's failure to turn on the lights because the truck driver would have slowed to a stop before he hit Loren. Relying at least in part on its erroneous factual-cause analysis, the panel then concluded that "DeMorrow's failure to activate the caution lights cannot be the proximate cause of the accident." *Kroll v DeMorrow*, unpublished per curiam opinion of the Court of Appeals, issued February 26, 2019 (Docket No. 341895), p 3. Therefore, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals as to cause in fact, vacate the judgment of the Court of Appeals as to proximate cause, and remand this case to that court for further proceedings not inconsistent with this order.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN V BENEBUILDING, LLC, No. 160713; Court of Appeals No. 351305. Pursuant to MCR

7.305(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 do not retain jurisdiction.

Leave to Appeal Denied January 17, 2020:

In re ROBERT E WHITTON REVOCABLE TRUST, No. 158408; Court of Appeals No. 337828. On January 8, 2020, the Court heard oral argument on the application for leave to appeal the August 9, 2018 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.

TOMASIK V STATE OF MICHIGAN, No. 159715; reported below: 327 Mich App 660.

MCCORMACK C.J. (*concurring*). I concur in the order denying leave to appeal but write separately to highlight the troubling—and perhaps unforeseen by the Legislature—outcome in this case. In 2015, this Court reversed the plaintiff's convictions for first-degree criminal sexual conduct and remanded for a new trial because the trial court had committed an evidentiary error by admitting a video recording of the plaintiff's police interview and that error rose to the level of plain error. *People v Tomasik*, 498 Mich 953 (2015). The plaintiff had also sought relief based on a claim of new evidence, but this Court did not address that claim because we granted relief on the evidentiary error. *Id.* (stating that “[i]n light of this disposition, we decline to address the other issues presented in our order granting leave to appeal”).

After being acquitted by a jury following his new trial, the plaintiff sought compensation under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq.* The Court of Claims granted summary disposition to the state, and the Court of Appeals affirmed on the ground that the plaintiff's convictions had not been reversed on the basis of new evidence under MCL 691.1755(1)(c).

While I tend to agree with the Court of Appeals that the statutory language does not entitle this plaintiff to compensation, I question whether this result is consistent with the Legislature's intent. In enacting the WICA, the Legislature intended wrongly incarcerated individuals to seek compensation when their convictions are voided and they are exonerated of all charges on the basis of new evidence. If the sole basis for the plaintiff's claim was that he is entitled to compensation because of the trial court's evidentiary error, I would agree that the Legislature did not intend to provide for compensation under such circumstances.

But here, there's more: as noted, the plaintiff sought relief based on the evidentiary error *and* new evidence. Had he brought only the new-evidence questions to this Court, and not the other trial errors, he'd likely be eligible for WICA compensation. Yet because his trial was unfair for reasons in addition to that it did not include the new evidence, he's out of luck? Under these unique circumstances, I encourage the

Legislature to consider whether it intended to exclude individuals such as the plaintiff—call them “new evidence plus-ers”—from the WICA.

CAVANAGH, J., joins the statement of McCORMACK, C.J.

PEOPLE V DEBRUYNE, No. 160148; Court of Appeals No. 346534.

ZAHRA, J. (*dissenting*). I disagree with this Court’s decision to deny the prosecution’s application. On January 26, 2018, defendant was driving his motorcycle in Napoleon Township. His ex-wife, Ann Sahadi, was riding on the back and neither was wearing a helmet. It was an unseasonably warm day and the road was dry. Defendant was traveling 70 to 80 miles per hour on Austin Road, which is a two-lane road with a speed limit of 55 miles per hour in a remote farm area. He weaved across his lane, tailgated a car in front of him, tried to pass a car in front of him on the gravel shoulder, and ultimately passed that car by crossing the double yellow center line. At approximately 5:30 p.m., he failed to negotiate a curve in the road and the motorcycle crashed. Ms. Sahadi suffered a skull fracture and broken neck and died at the scene. Defendant was rushed by ambulance to Henry Ford Allegiance Hospital (HFA) in Jackson. Shortly after the accident, a man who lived at a nearby home who had watched defendant speed by found a whiskey bottle on his property in a roadside ditch. The bottle had not been there previously, and he brought the bottle to the accident scene.

Officer Justin Boatman of the Napoleon Township Police Department interviewed the first responders to the scene, including the firefighters and paramedics, and asked whether they smelled any intoxicants at the scene. They responded that both the driver and passenger of the motorcycle smelled of intoxicants. Boatman also smelled alcohol on the female victim when he examined her.

Boatman drafted an affidavit for a search warrant authorizing a blood draw. The affidavit states in pertinent part:

2. That the affiant has determined through personal contact with witnesses and/or personal observations at the scene, that Dail Glenn Debruyne was the operator of a motor vehicle upon a public highway, or other place open to the general public within the state.

3. That the affiant has personally observed the above named operator and/or believes said person to be under the influence of alcohol, or a controlled substance, or both, or has an unlawful blood alcohol level, based upon the following observation: Debruyne was the driver of a motorcycle involved in fatal accident in which his female passenger was killed (Ann Marie Sahadi). Witness observed Debruyne driving motorcycle [in a] reckless manner, speeding E/B Austin Rd. Debruyne is at HFA being treated for severe injury[.]

A magistrate signed the order at 8:00 p.m. A blood sample was taken and a subsequent test of that sample showed a blood alcohol content (BAC) of 0.136. Defendant had two prior drunk-driving convictions.

Defendant filed a motion to suppress evidence of the blood test results. In an order dated October 15, 2018, the circuit court denied the

motion. Defendant filed a motion for reconsideration, which was denied on November 14, 2018. Defendant sought leave to file an interlocutory appeal in the Court of Appeals and sought immediate consideration. On January 10, 2019, that court granted defendant's motion for immediate consideration, but denied leave to appeal "for failure to persuade the Court of the need for immediate appellate review."¹ Defendant appealed in this Court, and we remanded to the Court of Appeals as on leave granted.² A panel of the Court of Appeals reversed the circuit court's decision, concluding that "[t]he issuing judge could not reach an independent finding that probable cause existed based on the information provided and the resultant warrant was invalid."³ The panel also concluded that the defendant's BAC results must be excluded from trial because Officer Boatman's reliance on the warrant was not in good faith. Specifically, the panel concluded that "[t]he affidavit in this case was so 'bare bones' and 'lacking in indicia of probable cause' that no 'reasonably well trained officer' could have been believed [sic] the warrant was valid."⁴

The prosecution now appeals in this Court. When a warrant request is based solely on an affidavit, that affidavit must establish probable cause on its face.⁵ Conclusory statements by the officer will not suffice.⁶ The affidavit must state the facts that justify drawing the asserted conclusions.⁷

But this Court reviews a magistrate's decision to issue a warrant to determine whether a reasonably cautious person could have believed that there was a substantial basis for finding probable cause.⁸ The Court must look at the specific facts underlying the probable cause determination and "must ensure that the magistrate's decision is based on actual facts—not merely the conclusions of the affiant."⁹

¹ *People v DeBruyne*, unpublished order of the Court of Appeals, entered January 10, 2019 (Docket No. 346534).

² *People v DeBruyne*, 503 Mich 982 (2019). The discrepancies in the capitalization within defendant's last name reflect the way his name was spelled in the opinions and orders at issue.

³ *People v DeBruyne*, unpublished per curiam opinion of the Court of Appeals, issued July 11, 2019 (Docket No. 346534), p 4.

⁴ *Id.* at 5.

⁵ *Whitley v Warden, Wyoming State Penitentiary*, 401 US 560, 564-566 (1971).

⁶ *Illinois v Gates*, 462 US 213, 239 (1983).

⁷ *People v Rosborough*, 387 Mich 183, 199 (1972).

⁸ *People v Sloan*, 450 Mich 160, 168 (1995), overruled in part on other grounds by *People v Hawkins*, 468 Mich 488 (2003).

⁹ *Id.* at 168-169.

I disagree with the panel's conclusion that "[t]he warrant affidavit in this case was woefully deficient."¹⁰ The panel explained that "[a] person who is in an accident after driving in a reckless manner and speeding may be intoxicated. However, there are endless other explanations for such behavior, including road rage, showing off, tardiness, or an emergency."¹¹ I admit these examples may also explain such behavior, but I believe that Officer Boatman's explanation is the most likely explanation of the behavior. Officer Boatman arrived at the scene to find a crashed motorcycle, a deceased passenger reeking of alcohol, and reports from witnesses that leading up to the accident defendant was operating the motorcycle in a reckless manner and speeding. Officer Boatman testified that defendant was not in a position to consent to a blood draw. All of this information in some manner was stated in a sworn affidavit that was provided to a neutral magistrate who signed the warrant. Contrary to the panel's suggestion, the affidavit did not provide "[u]nconfirmed reports of driving without a seatbelt or slightly over the speed limit, for example, [that] are so tenuously connected to drunk driving that a stop on those grounds would be constitutionally suspect."¹² The affidavit provides a more descriptive narrative that most people, let alone a reasonably trained police officer, would accept as a substantial basis to believe that defendant was intoxicated.¹³

Further, even if the affidavit was not sufficient to establish probable cause, the officer relied in good faith on the magistrate signing it.¹⁴ "Good faith" is less demanding than probable cause.¹⁵ In this case, the

¹⁰ *DeBruyne*, unpub op at 4.

¹¹ *Id.*

¹² *Id.*, quoting *Navarette v California*, 572 US 393, 402 (2014).

¹³ Defendant relies heavily on *Sloan*, 450 Mich 160, overruled on other grounds by *Hawkins*, 468 Mich 488. There, the defendant was involved in a fatal car accident and taken to a hospital. *Sloan*, 450 Mich at 163-164. The police obtained a search warrant for a sample of the defendant's blood. *Id.* at 164. The affidavit stated only that the defendant appeared intoxicated. The Court in that case held that the affidavit "plainly failed to provide any basis to sustain a conclusion that probable cause existed." *Id.* at 171. The claim that it "appeared" to the officer that the defendant was "under the influence of intoxicating liquor" was "a mere conclusion or opinion of the affiant," devoid of any articulable facts to support it. *Id.* The Court found that under the circumstances, "it would be impossible for the magistrate to have independently concluded that there was probable cause to search." *Id.* In my view, *Sloan* is distinguishable because in this case there are additional facts stated in the affidavit apart from the conclusion that defendant appeared intoxicated.

¹⁴ *People v Goldston*, 470 Mich 523, 526 (2004); *United States v Abboud*, 438 F3d 554, 578 (CA 6, 2006), cert den 549 US 976 (2006).

¹⁵ *United States v Rose*, 714 F3d 362, 367 (CA 6, 2013), cert den 571 US 910 (2013).

panel held in regard to good faith as follows: "Finding indicia of probable cause in the current affidavit would permit the good-faith exception to swallow the exclusionary rule whole; every single motor vehicle accident, no matter the circumstances, would conceivably result in the issuance of a warrant to draw blood to test for intoxication."¹⁶ This is not analysis; it's hyperbole. Here, at the least, the affidavit indicates that defendant was driving recklessly, and reckless driving often results from impairment of the operator's abilities due to intoxicants. Officer Boatman obviously could have included several facts to bolster the probable cause stated in the affidavit. He could have mentioned that first responders informed him that defendant smelled of alcohol. He also could have mentioned that the victim smelled of alcohol and that it was likely that defendant had drunk from the bottle of whiskey the neighbor found on his lawn. Perhaps he could have elaborated on the reckless conduct described to him, for instance, that defendant was tailgating other cars and attempting to pass vehicles on the gravel shoulder of the road. But his failure to elaborate in his affidavit does not evince bad faith. Indeed, it is commonly said that one should never attribute to malice that which can be adequately explained by incompetence. After reviewing Boatman's preliminary examination testimony, I agree with the circuit court that there is no question that Boatman relied on the warrant in good faith. Accordingly, I would reverse the Court of Appeals' judgment and reinstate the circuit court's order denying defendant's motion to suppress.

Leave to Appeal Denied January 22, 2020:

CHEYNE V BOLES, No. 159838; Court of Appeals No. 343495.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE V DALRYMPLE, No. 160287; Court of Appeals No. 349614.

Summary Disposition January 23, 2020:

MAITLAND V JASKIERNY, No. 160137; Court of Appeals No. 348216. On order of the Court, the motion to strike is granted. The application for leave to appeal the July 11, 2019 order of the Court of Appeals is considered and, pursuant to MCR 7.305(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 trial court proceedings are stayed pending the completion of that 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. We do not retain jurisdiction.

¹⁶ *DeBruyne*, unpub op at 5.

MARKEL V WILLIAM BEAUMONT HOSPITAL, No. 160655; Court of Appeals No. 350655. On order of the Court, the motion for immediate consideration is granted. The application for leave to appeal the November 6, 2019 order of the Court of Appeals is considered and, pursuant to MCR 7.305(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 motion for stay is granted. Trial court proceedings are stayed pending the completion of that 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. We do not retain jurisdiction.

Summary Disposition January 24, 2020:

PEOPLE V JAMAL BENNETT, No. 157936; Court of Appeals No. 328759. On December 11, 2019, the Court heard oral argument on the application for leave to appeal the April 17, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals as to its conclusion that defendant failed to show that admission of the rap videos was outcome-determinative.

“[A] defendant has the burden of establishing that it is more probable than not that the error in question ‘undermined the reliability of the verdict,’ thereby making the error ‘outcome determinative.’” *People v Snyder*, 462 Mich 38, 45 (2000), quoting *People v Lukity*, 460 Mich 484, 495-496 (1999) (brackets omitted). The Court of Appeals here concluded that admission of the rap videos was not outcome-determinative because several witnesses had identified defendant as the shooter. If defendant’s theory of the case had been one of misidentification, then the overwhelming weight of the evidence demonstrating that defendant shot the victim may well have compelled the conclusion that admission of the rap videos was not outcome-determinative. However, defendant advanced a self-defense and a defense-of-others theory, supported largely by Sammie Butler-Coleman’s testimony that the victim and another man had been beating defendant’s friend at the time defendant fired the fatal shots. Thus, defendant’s state of mind, not his identity, was the principal question before the jury. And defendant has sustained his burden of showing that, viewing the trial as a whole, admission of the rap videos undermined the reliability of the verdict. These videos portrayed defendant as a ruthless and menacing threat to the community who would shoot upon the least provocation. Further, while other evidence in the record discounted defendant’s defense-of-others theory, the prosecutor relied heavily upon the videos to establish defendant’s state of mind and to satisfy the state’s burden of overcoming defendant’s prima facie claim that he shot in defense of another. To this point, the prosecutor focused a substantial portion of his closing argument upon the videos, replaying clips of them and drawing comparisons between the lyrics of songs in the videos and the shooting. Finally, the trial court’s instruction to the jury that it could rely upon the videos in

assessing defendant's motive and intent may well have exacerbated the prejudice caused by admission of the videos.

For the aforementioned reasons, we vacate defendant's convictions and remand this case to the Kent Circuit Court for further proceedings not inconsistent with this order.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered January 24, 2020:

DETROIT ALLIANCE AGAINST THE RAIN TAX V CITY OF DETROIT, No. 158852; Court of Appeals No. 339176. On order of the Court, the motion for leave to file supplemental authority is granted. The application for leave to appeal the November 6, 2018 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred in concluding that *Bolt v City of Lansing*, 459 Mich 152, 164 (1998), is distinguishable from this case on the basis that Detroit's sewer system is a combined system rather than a separate storm and sanitary sewer system. Const 1963, art 9, § 31. In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

Trappers Properties, *et al.*, 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.

PEOPLE V DEXTER TAYLOR, No. 159612; Court of Appeals No. 340028. On order of the Court, the application for leave to appeal the March 26, 2019 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

We further order the Wayne Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint William Branch, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court.

The appellant shall file a supplemental brief within 42 days of the date of the order appointing counsel addressing: (1) whether the other-acts evidence offered to show a common plan, scheme, or system contained a "striking similarity" to the charged act as required by *People v Denson*, 500 Mich 385, 403 (2017); (2) whether the other-acts evidence

was admissible under the “doctrine of chances,” see *People v Mardlin*, 487 Mich 609, 616-617 (2010); and (3) if the evidence was not offered for a proper purpose, whether its admission was harmless.

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant’s brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee’s brief. 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.

SANFORD V STATE OF MICHIGAN, No. 159636; Court of Appeals No. 341879. On order of the Court, the application for leave to appeal the April 9, 2019 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the plaintiff is entitled to compensation under the Wrongful Imprisonment Compensation Act, MCL 691.1751 *et seq.*, for time spent in a juvenile facility before he was convicted of a crime. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant’s brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee’s brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied January 24, 2020:

PEOPLE V MEJIA, No. 159422; Court of Appeals No. 339426.

MCCORMACK, C.J. (*dissenting*). I respectfully dissent from the Court’s decision to deny leave to appeal. I would grant leave to appeal to further review the defendant’s argument that both the question of the admissibility of child sexual abuse accommodation syndrome (CSAAS) under *Daubert v Merrell Dow Pharm.*, 509 US 579 (1993), and this Court’s decision allowing the admission of such evidence, *People v Peterson*, 450 Mich 349 (1995), are ripe for reconsideration. While I recognize that the majority of courts currently admit such evidence, recently courts around the country nonetheless have been grappling with troubling questions about the validity and reliability of such evidence. See, e.g., *State v JLG*, 234 NJ 265, 272 (2018) (concluding that, for the most part, “it is no

longer possible to conclude that CSAAS has a sufficiently reliable basis in science to be the subject of expert testimony” and therefore holding that “expert testimony about CSAAS in general, and its component behaviors other than delayed disclosure, may no longer be admitted at criminal trials”); see also *King v Commonwealth*, 472 SW3d 523, 530 (Ky, 2015) (concluding that “[t]he validity of the theory was not self-evident in 1985 and it is not self-evident today”). And as the New Jersey Supreme Court noted in *JLG*, 234 NJ at 291-292, “CSAAS is not recognized in the Diagnostic and Statistical Manual of Mental Disorders and has not been accepted by the American Psychiatric Association, the American Psychological Association, or the American Psychological Society.” I think it is important for this Court to join that conversation.

BERNSTEIN and CAVANAGH, JJ., join the statement of McCORMACK, C.J.

LUDOWESE V TROMBLEY-MARTIN, No. 160777; Court of Appeals No. 351488.

Summary Disposition January 29, 2020:

PEOPLE V GEESEY, No. 159788; Court of Appeals No. 348057. Pursuant to MCR 7.305(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 LARRY BAILEY, No. 160124; Court of Appeals No. 338351. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal at this time, we remand this case to the Court of Appeals for consideration of the issue not addressed by that court in its first or second review of this case—whether defendant’s trial counsel was ineffective for failing to investigate and present witnesses to support the theory of defense. We do not retain jurisdiction.

PEOPLE V WILLETT, No. 160149; Court of Appeals No. 348942. Pursuant to MCR 7.305(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 Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered January 29, 2020:

In re CHRISTOPHER ROSS, JR, MINOR, No. 158764; COURT OF APPEALS No. 331096. On order of the Court, the application for leave to appeal the August 21, 2018 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether appeals from juvenile adjudications for criminal offenses are governed by the time limits for civil cases or by the time limits for criminal cases, see MCR 7.305(C)(2); (2) whether the standard for granting a new trial in a juvenile delinquency case is the same as the standard for granting a new trial in a criminal case, compare MCR 3.992(A) with MCR 6.431(B); (3) whether juveniles who claim a deprivation of their due process right to counsel

must satisfy the two-part test set forth in *Strickland v Washington*, 466 US 668, 687 (1984); and (4) whether the Court of Appeals erred in reversing the trial court's decision to grant the respondent a new trial based on evidence that trial counsel did not obtain or present.

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Appellate Practice Section of the State Bar of Michigan, the Criminal Defense Attorneys of Michigan, the Prosecuting Attorneys Association of Michigan, the Juvenile Law Center, and the University of Michigan Law School Juvenile Justice Clinic 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 January 29, 2020:

PEOPLE V AL-ADILY, No. 158877; Court of Appeals No. 344586.

LIGHT V HENRY FORD HEALTH SYSTEM, No. 159588; Court of Appeals No. 339832.

PEOPLE V JACOBIE HALL, No. 159918; Court of Appeals No. 341245.

PEOPLE V KOHLS, No. 160111; Court of Appeals No. 349062.

STERLING BENEFITS, LLC V FISCHER, No. 160160; Court of Appeals No. 342529.

Summary Disposition January 31, 2020:

PEOPLE V GILMORE, No. 158716; Court of Appeals No. 334205. On December 11, 2019, the Court heard oral argument on the application for leave to appeal the September 25, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court for an evidentiary hearing regarding the amount of restitution.

Defendant pleaded guilty to organized retail crime and using a computer to commit a crime. In exchange, the prosecutor agreed to dismiss three other pending charges and a habitual-offender notice. The parties also agreed that defendant's sentence would be 3½ years of probation and that he would pay restitution of \$18,000.80. Defendant

disputed the amount of restitution and requested a restitution hearing. The trial court essentially refused, forcing defendant to accept the restitution amount to gain the benefits of the agreement. Defendant acquiesced. In establishing the factual basis of the offense, defendant admitted that he switched tags on merchandise in a store, obtaining a good he believed was valued at \$169 for some lesser amount. The presentence investigation report indicated the value could have been as much as \$199.

However, the court ultimately refused to follow the agreement at sentencing. The court told defendant the original agreement had been “stricken” and described the defendant’s alternative to facing trial:

Well, there is no actual offer, the only thing that’s on the table right now are guidelines except for the fact that the People are desirous of withdrawing the habitual fourth and dismissing Counts 3, 4, and 5 at the time of sentencing, that’s it.

Defendant agreed, and the court sentenced defendant to concurrent terms of 5 years of probation, and 2½ to 7 years in prison. The court also ordered defendant to pay \$18,000.80 in restitution. With no agreement in place regarding restitution, the court was required to resolve the dispute over the proper amount of restitution by a preponderance of the evidence. MCL 780.767(4). Because the trial court failed to do so, defendant is entitled to a remand for this determination.

Even if the error were unpreserved, the record evidence—the factual basis for defendant’s conviction and the information from the presentence investigation report—indicates the court plainly erred. The loss to the merchant for the charged offense was, at most, \$199. To the extent that the record contains information that defendant may have committed other offenses, restitution may not be imposed for uncharged conduct. *People v McKinley*, 496 Mich 410, 419-420 (2014) (holding that “any course of conduct that does not give rise to a conviction may not be relied on as a basis for assessing restitution against a defendant” under MCL 780.766(2)). We have little trouble seeing that the trial court erred, the error was plain, and that the error affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763 (1999). Further, the fairness of the proceeding was seriously affected given the trial court’s failure to conduct a restitution hearing under the circumstances. See *id.* at 763-764. We do not retain jurisdiction

PEOPLE V BONDS, No. 159764; Court of Appeals No. 346871. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of the defendant’s ineffective assistance of appellate counsel issue based on his argument under MCR 6.508(D)(3) that the 26-month delay between his arrest and trial deprived him of his right to a speedy trial. *People v Williams*, 475 Mich 245 (2006); *Barker v Wingo*, 407 US 514, 532 (1972). In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE V SARANTAY HOUSTON, No. 159858; Court of Appeals No. 339254. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II.B. of the judgment of the Court of Appeals addressing tool mark identification evidence, and remand this case to the Wayne Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). Contrary to the statement by the Court of Appeals in this case, the defendant's trial counsel was not required to choose between an alibi defense and challenging the expert testimony on firearms and ballistics, as challenging the prosecution's expert would not have undermined the defendant's alibi defense. 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.

MARKMAN, J. (*dissenting*). I respectfully dissent. A jury convicted defendant of assault with intent to commit great bodily harm, being a felon in possession of a firearm, carrying a concealed weapon, and possessing a firearm during the commission of a felony. Evidence supporting the verdict included the victim's identification of defendant as the shooter and testimony from a ballistics expert matching shell casings recovered from the scene to a firearm retrieved from a house frequented by defendant. Defense counsel presented five alibi witnesses who placed defendant at a birthday party at the time of the shooting. Defense counsel, however, did not challenge the ballistics expert's testimony. The Court of Appeals affirmed defendant's convictions, in part rejecting defendant's argument that counsel performed deficiently by not challenging the ballistics expert. This Court vacates that portion of the judgment of the Court of Appeals, with this Court stating that "challenging the prosecution's expert would not have undermined the defendant's alibi defense."

To obtain a new trial based on a claim of ineffective assistance of counsel, "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51 (2012). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the *strong presumption* that counsel's performance was born from a sound trial strategy." *Id.* at 52 (emphasis added). This Court reaches its conclusion that a challenge to the ballistics expert would not have undermined defendant's alibi defense without (a) first permitting an evidentiary hearing at which counsel could testify regarding any strategic reasons for not challenging the expert, and (b) according due deference to the presumption that counsel acted in pursuit of a sound trial strategy. However, I can think of at least three potentially sound reasons for counsel's decision not to have challenged the expert's testimony.

First, counsel may have concluded that challenging the expert through cross-examination would have proven fruitless or even potentially harmful to defendant's case. While some literature draws into question the reliability of ballistics-comparison methodology, an experienced expert in ballistics would likely be familiar with this literature and prepared to refute the contentions in the literature. Thus, the

expert's answers on cross-examination might well have undermined counsel's efforts to draw into question the direct testimony and could even have strengthened the authority of the expert's opinion. As the law school adage goes, an attorney should not ask a witness a question if the attorney does not know the witness's answer.¹

Second, assuming for the sake of argument that the literature relied upon by defendant on appeal accurately reflects the validity of ballistics-comparison evidence, reflects the validity of ballistics-comparison evidence, the views of scholars and the views of the public are not necessarily one and the same. Specifically, in the "Crime Scene Investigation" age, counsel could reasonably have concluded that a jury would be highly inclined to believe the ballistics expert's testimony despite potential flaws in the methodology supporting that testimony. And counsel may have worried further that an unsuccessful challenge to the ballistics expert's testimony would have (a) given the impression to the jury that defendant was advancing a scattershot defense rather than a defense focused upon the alibi testimony, and (b) compromised defense counsel's credibility in presenting that alibi defense.

Third, and most importantly, while challenging the ballistics expert's testimony might have undermined one of the prosecutor's pieces of evidence, it would not have refuted the victim's positive identification of defendant as the shooter. Rather, it would have suggested that defendant had employed a different firearm to shoot the victim. But if the jury believed the five alibi witnesses, the ballistics report might have actually helped defendant undermine the victim's identification. Notably, defendant's fingerprints were not recovered from the firearm. And while some papers and pictures linked defendant to the house from which the police had recovered the firearm, defendant's cousin lived in the house. Thus, counsel might have hoped that the jury would draw the inference that the victim had misidentified defendant for defendant's cousin—a cousin who bore a closer connection to the house than did defendant.

In light then of the "strong presumption" that counsel acted in accordance with a sound trial strategy and the three easily conceivable reasons for counsel not having challenged the ballistics expert, this

¹ Defendant also faults counsel for not having called his own ballistics expert. However, defendant fails to put forth evidence showing what favorable testimony such an expert would have provided. See *People v Carbin*, 463 Mich 590, 600 (2001) ("Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim."). Rather, the expert that defendant contends counsel should have called to testify, Steven Howard, is yet to have even reviewed the prosecutor's expert's report or the evidence supporting that report. Furthermore, while defendant may attribute this deficiency in his claim to the trial court not having allocated him \$1,500 to retain Mr. Howard, defendant's application for leave to appeal in this Court does not challenge that decision by the trial court.

Court has prematurely concluded that “challenging the prosecution’s expert would not have undermined the defendant’s alibi defense.”

PEOPLE V MCCOLLUM, No. 159963; Court of Appeals No. 337735. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Parts II, III, and V of the Court of Appeals judgment, and remand this case to the Oakland Circuit Court, which shall hold an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). If the trial court rules that the defendant was not denied his right to the effective assistance of counsel, the trial court shall resentence defendant in accordance with Part IV of the Court of Appeals judgment.

PEOPLE V CORZILIUS, No. 160030; Court of Appeals No. 348648. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for an evidentiary hearing to determine whether the defendant’s plea was understanding and voluntary. We do not retain jurisdiction.

Leave to Appeal Denied January 31, 2020:

DKE, INC V SECURA INSURANCE COMPANY, Nos. 158988 and 158989; Court of Appeals Nos. 333497 and 337834.

ZAHRA, J. (*dissenting*). I respectfully dissent from the Court’s decision to deny the application. Plaintiff, DKE Inc., sued its insurer, Secura Insurance Company, for denying coverage after plaintiff’s building was found to have been set on fire by Patrick Winter, the son of DKE’s owner. Even assuming that *United Gratiot Furniture Mart, Inc v Mich Basic Prop Ins Ass’n*¹ was properly decided and that the trial court erred by failing to instruct the jury that an arsonist must have had “complete dominance and control” over the affairs of DKE to have precluded insurance benefits for the property the arsonist has burned,² I believe,

¹ *United Gratiot Furniture Mart, Inc v Mich Basic Prop Ins Ass’n*, 159 Mich App 94 (1987).

² But for the unique procedural posture involving the law-of-the-case doctrine, I would question whether *United Gratiot* was properly decided. Specifically, I would question the soundness of its holding “that an insurance carrier may assert arson as a defense against a corporation’s claim of fire loss [only] if it is factually demonstrated that the individual who set or procured the setting of the fire *exercised complete dominance and control* over the affairs of the corporation.” *Id.* at 101 (emphasis added). As explained by the United States Court of Appeals for the Sixth Circuit in *K & T Enterprises, Inc v Zurich Ins Co*, 97 F3d 171, 177-178 (1996): It makes little sense to craft a rule that requires an insurance company to demonstrate that an arsonist completely controlled a corporation before allowing the insurance company to deny the corporation the right to collect on a fire insurance policy. First, it will be extremely

just as did the panel in *United Gratiot*, that the failure to precisely instruct the jury on this point of law is not an error that requires reversal of the jury verdict.

Significantly, in *United Gratiot*, the plaintiff argued that the corporate form should be disregarded only when the arsonist is the sole shareholder.³ The trial court rejected this argument, concluding that “dominance and control” was the appropriate standard, and denied the plaintiff’s motion for directed verdict. Later, the trial court “instructed the jury to ignore the corporate existence if it found that the alleged arsonist ‘controlled the management and the operation of the corporation.’”⁴ The jury instructions did not mention “dominance and control,” let alone “complete dominance and control.”⁵ These are phrases used by the panel in *United Gratiot* in the opinion affirming the trial court’s action.

In the present case, the trial court gave the following jury instructions:

Defendant has the burden of proof on the following proposition: (1) That Patrick Winter, to whom the property was en-

difficult for any insurance company to demonstrate that an arsonist had *complete* control over a corporation. . . . Second, such a rule would encourage some corporate officers deliberately to remain blissfully ignorant of any plans for arson by other corporate officers. Third, such a rule gives an incentive to a financially distressed corporation plotting arson of the corporate property to disperse control, or perhaps create formal titles giving the impression of dispersed control, in order to insure that fire insurance proceeds can be collected later. Fourth, and most distressingly, by making it more difficult for insurance companies to deny liability in cases of arson, it is clear that the ultimate effect of this rule would be to encourage arson for profit. For these reasons, the *K & T Enterprise* court surmised that there is “no reason to assume that the Michigan Supreme Court would extend *United Gratiot*, rather than limit it to its core holding.” *Id.* at 179. Accordingly, the *K & T Enterprise* court agreed with the insurer’s reading of *United Gratiot* as stating that “complete control of the corporation is a sufficient condition to proper denial of liability, but . . . the facts of that case do not require our court to conclude that complete control is a necessary condition for proper denial of liability.” *Id.* at 177.

³ *United Gratiot*, 159 Mich App at 97-98.

⁴ *Id.* at 102.

⁵ The trial court confessed that “the instructions as to this test of ‘dominance and control’ were scanty . . .” *Id.* at 103. The Court of Appeals held that “[w]hile we agree that the instruction could have been more specific, we do not believe reversal is required. If a jury charge is erroneous or inadequate, reversal is required only where failure to reverse would be inconsistent with substantial justice.” *Id.*

trusted, had dominion and control over the affairs of the corporation DKE Inc. and the property at 21751 W. Nine Mile Road[.]

* * *

The defendant insurance company is not required to pay for this loss if you find that a person in sufficient control of DKE committed arson.

* * *

Exactly how much control constitutes sufficient control is a decision left to your good judgment.

* * *

The fact that an alleged arsonist is not a stockholder of the corporation at the time of the fire does not in and of itself mean that the alleged arsonist was not exercising the requisite amount of dominion and control over the affairs of the corporation to preclude coverage of the claim.

* * *

If Patrick Winter exercised sufficient control over the corporation DKE's affairs, any . . . arson on his part would be imputed to the corporation.

DKE maintains that the above instructions do not follow the exact verbiage of *United Gratiot*, which refers to "complete dominance and control."⁶ In my view, comparison of the instructions in the present case

⁶ DKE relies on *Black's Law Dictionary* to give meaning to the words "complete" and "sufficient" as used by the Court of Appeals panel in *United Gratiot*. Preliminarily, resort to a dictionary is most useful in the interpretation of statutes, as we assume the Legislature accorded the plain and ordinary meaning to the words used to write the law. Dictionaries are far less helpful in defining words used by courts in the interpretation of statutes, contracts, or the common law, as such interpretations are largely driven by context and the application of the facts to the applicable law. Contrary to the assertions advanced by DKE, I conclude that resort to dictionaries is entirely unhelpful in understanding the holding in *United Gratiot*. First, resort to a legal dictionary is not an appropriate tool of interpretation to define words that do not have unique legal meaning. " 'An undefined statutory term must be accorded its plain and ordinary meaning. A lay dictionary may be

to a snippet from the *United Gratiot* opinion misses the point. DKE and the Court of Appeals majority fail to appreciate that sufficient control is premised on the instruction that “[d]efendant has the burden of proof on the following proposition: . . . That Patrick Winter, to whom the property was entrusted, had *dominion and control* over the affairs of the corporation DKE Inc. and the property at 21751 W. Nine Mile Road[.]” Thus, the issue is whether plaintiff was denied substantial justice when the trial court instructed the jury that defendant must show Patrick Winter exercised “sufficient dominance and control” instead of “complete dominance and control.” I view this as a distinction without much of a difference.

Further and more importantly, the Court has failed to recognize that this is a contract case, the outcome of which turns on the terms of the contract. Defendant denied coverage on the basis of a provision of the policy that states:

2. We will not pay for loss or damage caused by or resulting from any of the following:

* * *

f. Dishonesty

Dishonest or criminal acts by you, anyone else with an interest in the property, or any of your or their partners, employees, directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose:

- (1) Acting alone or in collusion with others;
- (2) Whether or not occurring during the hours of employment.

Although a provision may be added to a fire insurance policy, it must be consistent with the mandates of MCL 500.2833; any provision of a policy that is contrary to the provisions of MCL 500.2833 is void. The above exclusion is consistent with MCL 500.2833, which only specifically requires, in pertinent part, that fire insurance policies contain a provision stating “that the policy may be void on the basis of misrepresentation, fraud, or concealment.” MCL 500.2833(1)(c). Further, MCL 500.2236(1) requires that all “basic insurance policy” forms be filed with the Department of Insurance and Financial Services and be approved by

consulted to define a common word or phrase that lacks a unique legal meaning.’” *Hecht v Nat’l Heritage Academies, Inc*, 499 Mich 586, 621 n 62 (2016), quoting *Brackett v Focus Hope, Inc*, 482 Mich 269, 276 (2008). Second, it appears that DKE has engaged in some dictionary shopping, especially in regard to the word “control.” “Complete” is commonly defined as “having all necessary parts, elements, or steps.” *Merriam-Webster’s Collegiate Dictionary* (11th ed). “Sufficient” is commonly defined as “enough to meet the needs of a situation or a proposed end.” *Id.* I make this observation to highlight that the common definitions of “complete” and “sufficient” are not as strikingly dissimilar as DKE would suggest.

its director, the Commissioner, before a policy may be issued by an insurance company. See MCL 500.102. If the Commissioner fails to act within 30 days after the policy form is submitted, the form is deemed approved. MCL 500.2236(1).

Here, the Commissioner approved the policy and the policy is presumptively, if not conclusively, reasonable. On the other hand, the Commissioner has not approved any provision requiring that “misrepresentation, fraud, or concealment” be committed by someone with “complete dominion and control over the affairs of the corporation.” Indeed, I conclude that this standard is plainly contrary to MCL 500.2833 in that it precludes a determination of “misrepresentation, fraud, or concealment” if committed by someone who does not have “complete dominion and control over the affairs of the corporation.” Comparing the pertinent insurance contract language to the instructions provided the jury on the question of dominion and control, I cannot conclude that defendant was denied substantial justice. Accordingly, because the jury was adequately instructed, I would hold that the Court of Appeals erred by reversing the jury verdict.

MARKMAN, J., joins the statement of ZAHRA, J.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

Summary Disposition February 4, 2020:

PEOPLE V DEWEERD, No. 160259; Court of Appeals No. 349353. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

MARTIN V DEPARTMENT OF CORRECTIONS, No. 160276; Court of Appeals No. 348460. On order of the Court, the application for leave to appeal the August 16, 2019 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Chippewa Circuit Court for clarification of the grounds for its January 17, 2019 order of dismissal. On remand, the trial court shall provide sufficient explanation to facilitate appellate review. We do not retain jurisdiction.

PEOPLE V JAMES REED, No. 160319; Court of Appeals No. 349566. Pursuant to MCR 7.305(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: (1) whether the trial court erred in scoring Offense Variable 4 at 10 points for serious psychological injury to a victim; MCL 777.34(1)(a), and (2) whether defendant’s sentence was proportionate. 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 BEATY, No. 160328; Court of Appeals No. 349821. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Without limiting the review of the Court of Appeals on remand, the Court notes that the transcript of the May 9, 2019 resentencing appears to indicate

the trial court meant to use cell B-IV in the sentencing grid for Class A offenses as the basis for the departure sentence, but used cell C-IV instead.

PEOPLE V FISCHER TUCKER, No. 160338; Court of Appeals No. 349643. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the defendant's challenge to his score for Offense Variable 9, MCL 777.39. 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 Denied February 4, 2020:

PEOPLE V GERALD SHORT, No. 156653; Court of Appeals No. 337218.

MICHIGAN HEAD & SPINE INSTITUTE, PC V HASTINGS MUTUAL INSURANCE COMPANY, No. 158581; Court of Appeals No. 340656.

MARCHKE V CIVIL SERVICE COMMISSION, No. 158847; Court of Appeals No. 342969.

CLEMENT, J., not participating due to her involvement as chief legal counsel for the Governor.

HENRY FORD HEALTH SYSTEM V EVEREST NATIONAL INSURANCE COMPANY, No. 158904; reported below: 326 Mich App 398.

OMEGA REHAB SERVICES, LLC V EVEREST NATIONAL INSURANCE COMPANY, No. 159370; Court of Appeals No. 340297.

In re CONSERVATORSHIP OF MARILYN BURHOP, No. 159428; Court of Appeals No. 340771.

PEOPLE V RODRIGUEZ, No. 159457; Court of Appeals No. 347121.

PEOPLE V MARCUS FORD, No. 159481; Court of Appeals No. 336500.

PEOPLE V GRIMES, No. 159570; Court of Appeals No. 347493.

PEOPLE V MARLON JACKSON, No. 159621; Court of Appeals No. 347953.

LEAPHART V STATE OF MICHIGAN, No. 159624; Court of Appeals No. 343136.

PEOPLE V SUMPTER, No. 159652; Court of Appeals No. 347630.

THORNSBERRY V DETROIT TIGERS, INC, No. 159659; Court of Appeals No. 342322.

PAYNE V PAYNE, No. 159675; Court of Appeals No. 346694.

PEOPLE V HOLMAN, No. 159713; Court of Appeals No. 346292.

PEOPLE V JACK SMITH, No. 159733; Court of Appeals No. 347491.

PEOPLE V ROBERTSON, No. 159760; Court of Appeals No. 347972.

PEOPLE V TYREESE MOORE, No. 159781; Court of Appeals No. 346628.

PEOPLE V KROK, No. 159802; Court of Appeals No. 341288.

PEOPLE V BURKLOW, No. 159818; Court of Appeals No. 339590.

PEOPLE V DELMARTER, No. 159819; Court of Appeals No. 342300.

PEOPLE V NEEDRA ANDERSON, No. 159823; Court of Appeals No. 343402.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

VHS DETROIT RECEIVING HOSPITAL, INC V CITY OF DETROIT, No. 159875; Court of Appeals No. 341628.

PEOPLE V HOWELL, No. 159898; Court of Appeals No. 341383.

PEOPLE V DOSTER, No. 159926; Court of Appeals No. 342178.

PEOPLE V TRAVER, No. 159964; reported below: 328 Mich App 418.

PEOPLE V CORNELL, No. 159966; Court of Appeals No. 339990.

PEOPLE V HOLLAND, No. 159991; Court of Appeals No. 346974.

PEOPLE V FRANKLIN, No. 159999; Court of Appeals No. 347139.

PRICE V CALLIS, No. 160020; Court of Appeals No. 340734.

PEOPLE V ALDRIDGE, No. 160031; Court of Appeals No. 348948.

PEOPLE V HEAD, No. 160044; Court of Appeals No. 348008.

PEOPLE V DELEON, No. 160050; Court of Appeals No. 346625.

PEOPLE V DORIAN WILLIS, No. 160063; Court of Appeals No. 347549.

VIVIANO, J., did not participate because he presided over this case in the circuit court at an earlier stage of the proceedings.

PEOPLE V NUTTING, No. 160071; Court of Appeals No. 347074.

PEOPLE V GARCIA, No. 160074; Court of Appeals No. 344262.

PEOPLE V DANNIE SMITH, No. 160089; Court of Appeals No. 348180.

PEOPLE V WOLTER, Nos. 160092, 160093, and 160094; Court of Appeals Nos. 347910, 347911, and 347912.

PEOPLE V HUDSON, No. 160096; Court of Appeals No. 347742.

PEOPLE V DEMAL SIMMONS, No. 160098; Court of Appeals No. 341446.

PEOPLE V TERAH STAMPS, No. 160104; Court of Appeals No. 348140.

PEOPLE V SCHRAM, No. 160125; Court of Appeals No. 347407.

PEOPLE V BARRON, No. 160133; Court of Appeals No. 339508.

PEOPLE V HERMAN CHEESE, No. 160144; Court of Appeals No. 347624. On order of the Court, the application for leave to appeal the June 19, 2019 order of the Court of Appeals is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. We note that relief is not prohibited by MCR 6.502(G) because this appeal does not involve the denial of a motion for relief from judgment. Rather, this appeal involves only the defendant's motion to vacate the attorney fees assessed after the end of his direct appeal in an order separate from the judgment of sentence. The trial court properly denied this motion as previously litigated and lacking in merit. This Court's decision in *People v Comer*, 500 Mich 278 (2017), is inapplicable because the trial court imposed the assessment without amending the judgment of sentence.

PEOPLE V PHILLIP SMITH, No. 160147; Court of Appeals No. 348875.

PEOPLE V LAVALLEY, No. 160154; Court of Appeals No. 347966.

PEOPLE V MCRUNELS, No. 160158; Court of Appeals No. 349417.

PEOPLE V LARRY COLE, No. 160163; Court of Appeals No. 346915.

PEOPLE V BERST, No. 160174; Court of Appeals No. 348445.

PEOPLE V PHARMS, No. 160195; Court of Appeals No. 335439.

WHITE V ST JOHN MACOMB HOSPITAL, No. 160206; Court of Appeals No. 341093.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE V RASHED BROWN, No. 160212; Court of Appeals No. 340069.

PEOPLE V McCULLOUGH, No. 160214; Court of Appeals No. 347879.

PEOPLE V ISAAC HARRIS, No. 160219; Court of Appeals No. 347986.

PEOPLE V JUSTIN HUGHES, No. 160239; Court of Appeals No. 339441.

PEOPLE V ELLIS, No. 160240; Court of Appeals No. 347409.

PEOPLE V GAMET, No. 160244; Court of Appeals No. 348196.

PEOPLE V MAJOR-LANG, No. 160249; Court of Appeals No. 342706.

PEOPLE V WATSON, No. 160258; Court of Appeals No. 338110.

PEOPLE V AL-SHIMARY, No. 160269; Court of Appeals No. 348045.

PEOPLE V DUKES, No. 160273; Court of Appeals No. 342258.

PEOPLE V TERRENCE MOORE, No. 160274; Court of Appeals No. 348833.

PEOPLE V CASTANEDA, No. 160278; Court of Appeals No. 348727.

LAFOUNTAIN V DEPARTMENT OF CORRECTIONS, No. 160279; Court of Appeals No. 348069.

PEOPLE V SAWYER, No. 160288; Court of Appeals No. 348502.

SPECKIN FORENSICS, LLC V AUTO-OWNERS INSURANCE COMPANY, No. 160289; Court of Appeals No. 344012.

PEOPLE V LANG, No. 160297; Court of Appeals No. 338359.

PEOPLE V CHRISTOPHER RICHARDSON, No. 160299; Court of Appeals No. 349582.

PEOPLE V MARK GATES, No. 160313; Court of Appeals No. 349830.

PEOPLE V DEANDRE MARTIN, No. 160315; Court of Appeals No. 344493.

PEOPLE V POTTER, No. 160324; Court of Appeals No. 349478.

PEOPLE V SEAN THOMAS, No. 160327; Court of Appeals No. 341727.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE V LANCE, No. 160330; Court of Appeals No. 343960.

PEOPLE V JIMMIE WALKER, No. 160332; Court of Appeals No. 340719.

PEOPLE V CALVIN HAMMONDS, No. 160336; Court of Appeals No. 349625.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

MALCOM V HURON VALLEY CORRECTIONAL FACILITY WARDEN, No. 160353; Court of Appeals No. 349396.

NEWHOUSE V BARAGA CORRECTIONAL FACILITY WARDEN, No. 160371; Court of Appeals No. 349191. On order of the Court, the application for leave to appeal the October 7, 2019 order 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. Habeas corpus “is not available to test questions of evidence. . . .” *Kenney v Booker*, 494 Mich 852 (2013), quoting *In re Stone*, 295 Mich 207, 212 (1940). The relief the plaintiff seeks requires that he file a motion for relief from judgment in the Kalamazoo Circuit Court pursuant to subchapter 6.500 of the Michigan Court Rules. To the extent the plaintiff files such a motion to present claims of actual innocence, he should provide that court with his supporting evidence, including any high-quality images that support the plaintiff’s claim that his vehicle did not match the vehicle used by the perpetrator. If high-quality images are not available to the plaintiff, but are part of the record of the case, the plaintiff should direct the court to the place in the record where the images can be viewed.

PEOPLE V SLEEPER, No. 160389; Court of Appeals No. 348974.

PEOPLE V ARMSTEAD, No. 160390; Court of Appeals No. 349265.

PEOPLE V SWANDER, No. 160393; Court of Appeals No. 349789.

PEOPLE V ROBERT WRIGHT, No. 160394; Court of Appeals No. 346451.

PEOPLE V JORDAN, No. 160396; Court of Appeals No. 342997.

PEOPLE V MEDENDORP, No. 160397; Court of Appeals No. 349656.

PEOPLE V BEARDEN, No. 160399; Court of Appeals No. 349077.

PEOPLE V ROBERT JACKSON, No. 160403; Court of Appeals No. 349006.

PEOPLE V LABADIE, No. 160404; Court of Appeals No. 350276.

PEOPLE V KORYAL, No. 160407; Court of Appeals No. 343794.

PEOPLE V CULBERTSON, No. 160408; Court of Appeals No. 349765.

PEOPLE V KREASON, No. 160409; Court of Appeals No. 349758.

PEOPLE V JASON WEBB, No. 160411; Court of Appeals No. 349642.

PEOPLE V TILLMAN, No. 160417; Court of Appeals No. 348818.

PEOPLE V LEIGH, No. 160418; Court of Appeals No. 349004. On order of the Court, the application for leave to appeal the August 30, 2019 order 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. For purposes of MCR 6.502(G)(1), the Court notes that, although the defendant's motion has been styled as a motion for relief from judgment by the courts below, it should not be regarded as a motion for relief from judgment in any future case. The defendant actually filed a motion to correct presentence report, correct guidelines, and to resentence. The delayed application for leave to appeal to the Court of Appeals was properly denied, but due to the lack of merit in the grounds presented, not under the rules of MCR 6.501 *et seq.*

PEOPLE V WESLEY MOORE, No. 160419; Court of Appeals No. 348983.

PEOPLE V PENNEBAKER, No. 160440; Court of Appeals No. 349589.

PEOPLE V ARTINIAN, No. 160441; Court of Appeals No. 344332.

PEOPLE V DERREK BANKS, No. 160443; Court of Appeals No. 345161.

In re RONNIE DANTE THOMAS, No. 160444; Court of Appeals No. 348796.

PEOPLE V BENNIE BEARD, No. 160445; Court of Appeals No. 350086.

PEOPLE V RONALD BROWN, No. 160451; Court of Appeals No. 349373. On order of the Court, the application for leave to appeal the September 27, 2019 order of the Court of Appeals is considered. With regard to the defendant's claim of new evidence, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). In all other respects, leave to appeal is denied, because the defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE V SLATER, No. 160462; Court of Appeals No. 348046.

PEOPLE V BUTCHER, No. 160463; Court of Appeals No. 342894.
PEOPLE V ELOWSKY, No. 160474; Court of Appeals No. 349873.
PEOPLE V CARL FRYE, No. 160487; Court of Appeals No. 350025.
PEOPLE V CHRISTOPHER DAVIS, No. 160539; Court of Appeals No. 343435.
CREWS V CREWS, No. 160550; Court of Appeals No. 346440.
PEOPLE V MALCOM, No. 160555; Court of Appeals No. 349507.
PEOPLE V SADEGHI, No. 160572; Court of Appeals No. 350710.
PEOPLE V TONNIE JOHNSON, No. 160666; Court of Appeals No. 340782.

Superintending Control Denied February 4, 2020:

KELSO-GUYTON V ATTORNEY GRIEVANCE COMMISSION, No. 160405.
CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied February 4, 2020:

PEOPLE V DOWDY, No. 158098; Court of Appeals No. 343551. Leave to appeal denied at 504 Mich 977.

PEOPLE V BARSKI, No. 158228; Court of Appeals No. 341942. Leave to appeal denied at 504 Mich 975.

PEOPLE V BILLY HAMMONDS, No. 159084; Court of Appeals No. 336958. Leave to appeal denied at 504 Mich 957.

PEOPLE V PERCY TAYLOR, No. 159118; Court of Appeals No. 338601. Leave to appeal denied at 504 Mich 972.

PEOPLE V WHATELEY, No. 159189; Court of Appeals No. 339255. Leave to appeal denied at 504 Mich 972.

TURKISH V WILLIAM BEAUMONT HOSPITAL, No. 159272; Court of Appeals No. 339522. Leave to appeal denied at 504 Mich 963.

BERNSTEIN, J., did not participate because of his prior representation of a party in an unrelated matter.

PEOPLE V CHRISTOPHER WHITE, No. 159286; Court of Appeals No. 345625. Leave to appeal denied at 504 Mich 972.

PEOPLE V VENSON, No. 159385; Court of Appeals No. 339921. Leave to appeal denied at 504 Mich 958.

PEOPLE V MOSES, No. 159467; Court of Appeals No. 346210. Leave to appeal denied at 504 Mich 958.

HOLY TRINITY ROMANIAN ORTHODOX MONASTERY V ROMANIAN ORTHODOX EPISCOPATE OF AMERICA and ROMANIAN ORTHODOX EPISCOPATE OF AMERICA V HOLY ASCENSION ORTHODOX CHRISTIAN MONASTERY, Nos. 159494 and 159495; Court of Appeals Nos. 342844 and 342846. Leave to appeal denied at 504 Mich 972.

ABRAHAM V INCORP SERVICES, INC, No. 159535; Court of Appeals No. 342296. Leave to appeal denied at 504 Mich 972.

PEOPLE V MADDOX, No. 159555; Court of Appeals No. 346486. Leave to appeal denied at 504 Mich 972.

REIDENBACH V CITY OF KALAMAZOO, No. 159592; reported below: 327 Mich App 174. Leave to appeal denied at 504 Mich 959.

BURTON V CITY OF DETROIT, No. 159674; Court of Appeals No. 340592. Leave to appeal denied at 504 Mich 998.

PEOPLE V SWILLING, No. 159681; Court of Appeals No. 347888. Leave to appeal denied at 504 Mich 973.

PEOPLE V BUTTS, Nos. 159806 and 159807; Court of Appeals Nos. 348077 and 348080. Leave to appeal denied at 504 Mich 999.

BELL V DEPARTMENT OF CORRECTIONS, No. 159847; Court of Appeals No. 347945. Leave to appeal denied at 504 Mich 999.

JOHNSON V ZIYADEH, No. 159850; Court of Appeals No. 340866. Leave to appeal denied at 504 Mich 999.

PEOPLE V KOBASIC, No. 159902; Court of Appeals No. 346410. Leave to appeal denied at 504 Mich 1000.

LYNCH V STATE OF MICHIGAN, No. 160121. Superintending control denied at 504 Mich 974.

Summary Disposition February 5, 2020:

PEOPLE V WEHRLE, No. 159180; Court of Appeals No. 346173. By order of September 10, 2019, the prosecuting attorney was directed to answer the application for leave to appeal the January 2, 2019 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. In its consideration of this case, the Court of Appeals shall expressly address whether the information about the October 2018 interview with Christopher Wehrle that the prosecution has attached to its response in this Court may be properly considered on appeal.

PEOPLE V FURLONG, No. 159996; Court of Appeals No. 348555. Pursuant to MCR 7.305(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 SWIFT, No. 160213; Court of Appeals No. 348612. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate

defendant's sentence and remand this case to the Muskegon Circuit Court. Offense Variable 4 appears to have been scored based solely on the prosecutor's assertion. However, an attorney's statements are not evidence, *People v Ison*, 132 Mich App 61, 68 (1984), and offense variables must be scored based on a preponderance of the evidence, *People v Hardy*, 494 Mich 430, 438 (2013). Because a 10-point reduction for Offense Variable 4 would result in a lower sentencing range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82 (2006). We do not retain jurisdiction.

In re INGRAM, MINORS, No. 160533; Court of Appeals No. 347800. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment. We remand this case to that court which, while retaining jurisdiction, shall remand this case to the Wayne Circuit Court Family Division for that court to reconsider its December 3, 2018 order terminating respondent's parental rights to LJI and LMI. The circuit court shall be directed to specifically address: (1) whether there is a statutory basis to terminate respondent's parental rights to LJI and LMI, see *In re JK*, 468 Mich 202, 210 (2003); and (2) whether termination is in LJI's and LMI's best interests, taking into consideration, among other evidence, respondent's efforts towards sobriety, see *In re Moss*, 301 Mich App 76, 90 (2013). The circuit court may, in its discretion, receive proofs or hold an evidentiary hearing. The circuit court shall be directed to forward to the Court of Appeals a written opinion addressing the above issues within 42 days of the Court of Appeals remand order. The Court of Appeals shall expedite its consideration of this case. We do not retain jurisdiction.

In re INGRAM, MINORS, No. 160535; Court of Appeals No. 347801. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment. We remand this case to that court which, while retaining jurisdiction, shall remand this case to the Wayne Circuit Court Family Division for that court to reconsider its December 3, 2018 order terminating respondent's parental rights to LJI and LMI. The circuit court shall be directed to specifically address: (1) whether there is a statutory basis to terminate respondent's parental rights to LJI and LMI, see *In re JK*, 468 Mich 202, 210 (2003); and (2) whether termination is in LJI's and LMI's best interests, taking into consideration, among other evidence, respondent's efforts towards sobriety, see *In re Moss*, 301 Mich App 76, 90 (2013). The circuit court may, in its discretion, receive proofs or hold an evidentiary hearing. The circuit court shall be directed to forward to the Court of Appeals a written opinion addressing the above issues within 42 days of the Court of Appeals remand order. The Court of Appeals shall expedite its consideration of this case. We do not retain jurisdiction.

Reconsideration Granted February 5, 2020:

WIMMER V MONTANO, Nos. 159211, 159212, 159213, and 159214; Court of Appeals Nos. 340339, 340409, 340830, and 340996. Leave to appeal denied at 504 Mich 979. On order of the Court, the motion for

reconsideration of this Court's October 17, 2019 order is considered, and it is granted. We vacate our order dated October 17, 2019. The application for leave to appeal the February 5, 2019 and February 6, 2019 orders of the Court of Appeals is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to correct the record and for other relief is denied.

WIMMER V MONTANO, Nos. 159263, 159264, 159265, and 159266; Court of Appeals Nos. 340339, 340409, 340830, and 340996. Leave to appeal denied at 504 Mich 980. On order of the Court, the motion for reconsideration of this Court's October 17, 2019 order is considered, and it is granted. We vacate our order dated October 17, 2019. The application for leave to appeal the January 24, 2019 order of the Court of Appeals is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to correct the record and for other relief is denied.

Leave to Appeal Granted February 5, 2020:

LAW OFFICES OF JEFFREY SHERBOW, PC V FIEGER & FIEGER, PC, No. 159450; reported below: 326 Mich App 684.

Leave to Appeal Denied February 5, 2020:

AFHOLTER V MATUK, No. 157566; Court of Appeals No. 336059.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, PC.

PEOPLE V LAMPE, No. 159678; reported below: 327 Mich App 104.

ESTATE OF DANIEL GEORGE TRUEBLOOD V P & G APARTMENTS, LLC, No. 159720; reported below: 327 Mich App 275.

HUTCHINSON V INGHAM COUNTY HEALTH DEPARTMENT, No. 159798; reported below: 328 Mich App 108.

MCLEAN V BERGER REALTY GROUP, INC, No. 159962; Court of Appeals No. 341603.

PEOPLE V QUEZADA, No. 160252; Court of Appeals No. 342656.

Reconsideration Denied February 5, 2020:

WIMMER V MONTANO, Nos. 159175 and 159176; Court of Appeals Nos. 340339 and 340830. Leave to appeal denied at 504 Mich 979.

Abeyance Order Entered February 5, 2020:

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID V STATE OF MICHIGAN, No. 158751; reported below: 326 Mich App 124. On order of the Court, the motion for peremptory reversal is denied. By

order of June 24, 2019, leave to appeal the October 16, 2018 judgment of the Court of Appeals was granted, 504 Mich 896, and this case was scheduled for argument as part of the March 2020 session calendar. It now appears to this Court that the case of *Espinoza v Montana Dep't of Revenue*, cert gtd ____ US ____; 139 S Ct 2777 (2019) (Docket No. 18-1195), is pending before the United States Supreme Court and that the decision in that case may resolve an issue raised in the present case. Therefore, we adjourn the oral argument of this case, and we order that this case be held in abeyance pending the decision in *Espinoza*.

MARKMAN, J. (*dissenting*). I respectfully dissent to yet another delay in resolving the constitutionality of MCL 388.1752b, a significant school funding measure enacted by our Legislature in 2016. With oral argument now likely to be rescheduled to the next term of the Court, it will have been nearly five years from the time of the enactment of this measure that a determination of constitutionality may perhaps emerge. Even more troubling is that during the entirety of this period, the implementation of this law will have been precluded by the judiciary of this state—first, as the result of delay occasioned by this Court's decision to deny constitutional guidance to then-Governor Snyder who sought an advisory opinion in this regard; second, as the result of a preliminary injunction imposed by a judge of the Court of Claims; third, as the result of refusals by the Court of Appeals and this Court to review the preliminary injunction; fourth, as the result of a permanent injunction subsequently imposed by the Court of Claims; fifth, as the result of continuing litigation in the Court of Appeals; and finally, as the result of this Court having granted leave to appeal last summer and now choosing not to finally resolve the case until perhaps the Court's 2020–2021 term. If ultimately this Court holds MCL 388.1752b to be unconstitutional, *so be it*, but in the face of the lower court's ceaseless injunction, we have failed, in my judgment, to show a sufficient sense of urgency in order either to strike down the law or to allow the Legislature's will to be done. In other words, whether MCL 388.1752b is ultimately sustained or nullified, it is long overdue that the highest court of this state finally decide this matter so that the product of our representative process is no longer held in limbo. As United States Supreme Court Justice Samuel Alito has observed, “the longer an injunction [against a state defendant] . . . stays in place, the greater the risk that it will improperly interfere with a State's democratic processes.” *Horne v Flores*, 557 US 433, 453 (2009). See also MCR 7.305(B)(4)(b).

On behalf of the citizenry, legislative majorities in 2016 enacted MCL 388.1752b, presumably with the view that by reimbursing nonpublic schools for compliance costs associated with state-imposed “health, safety, or welfare” requirements, they were furthering in some manner the “health, safety, or welfare” of nonpublic school students. And if this law is ultimately deemed to be constitutional, nonpublic school students will have been deprived of benefits to which they were lawfully entitled for nearly five years. A student who was enrolled in a nonpublic elementary school in the fourth grade when the law was enacted will be enrolled in high school by the time this Court decides its constitutionality.

Today, merely two weeks after finally scheduling oral argument of this case, the Court adjourns this same argument because “[i]t now appears to this Court that the case of *Espinoza v Montana Dep’t of Revenue*, cert gtd ____ US ____; 139 S Ct 2777 (2019), is pending before the United States Supreme Court and that the decision in that case may resolve an issue raised in the present case.” While, indeed, *Espinoza* “may” help resolve an issue in the present case, it is also possible that *Espinoza* “may not” help, and it is also quite *certain* that resolution of issues will be helped—conceivably in a decisive manner—by the Supreme Court’s recent decision in *Trinity Lutheran Church of Columbia, Inc v Comer*, 582 US ____; 137 S Ct 2012 (2017), a case unaccountably unmentioned in our order granting leave to appeal. In order to allow this Court the benefit of the Supreme Court’s guidance in *Espinoza*, while also taking into consideration the extraordinary circumstances of the ongoing injunction, I would not postpone oral argument, but would instead proceed with such argument; hold our final decision in abeyance for *Espinoza*, which is to be decided no later than the end of June; and then issue our decision prior to the close of our term at the end of July. I would not further delay consideration of this case, especially when this Court should have been well aware of the potential connection between these cases at least seven months ago when the Supreme Court first granted certiorari to hear *Espinoza*, and at a time when it was at least conceivable that a thoughtful decision from this Court might have influenced the Supreme Court in *Espinoza*. See generally Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (New York: Oxford Univ Press, 2018).

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

Summary Disposition February 7, 2020:

PEOPLE V CANO-MONARREZ, No. 160285; Court of Appeals No. 343547. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals as to the scoring of Offensive Variable (OV) 17, and we remand this case to the Kent Circuit Court for resentencing. The prosecuting attorney has conceded that the trial court erred in scoring OV 17, MCL 777.47. Because correcting the OV score would change the applicable guidelines range, resentencing is required. *People v Francisco*, 474 Mich 82 (2006). 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 RICHARD BROWN, No. 160563; Court of Appeals No. 350327. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the June 25, 2019 order of the Lapeer Circuit Court denying the defendant’s motion to quash the bindover. MCL 766.12 provides that, at a preliminary examination, “[a]fter the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he have any, *shall* be sworn, examined and cross-examined” (Emphasis added.) In this case, the district court did not permit the defendant to

call witnesses. The district court's decision in this regard fell outside the range of principled outcomes and constituted an abuse of discretion. See *People v Shami*, 501 Mich 243, 250-251 (2018).

We remand this case to the 71-A District Court for further proceedings to allow the defendant to call witnesses. The motion to stay trial is granted pending completion of the proceedings ordered on remand.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered February 7, 2020:

LIVINGS V SAGE'S INVESTMENT GROUP, LLC, No. 159692; Court of Appeals No. 339152. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the plaintiff's employment is a relevant consideration in determining whether a condition is effectively unavoidable, *Hoffner v Lanctoe*, 492 Mich 450 (2012), and *Perkoviq v Delcor Homes-Lake Shore Pointe Ltd*, 466 Mich 11 (2002); and (2) whether there was a question of fact concerning whether the parking lot constituted an effectively unavoidable condition. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied February 7, 2020:

RESOURCE POINT, LLC V ADDOLUX, LLC, No. 158632; Court of Appeals No. 338338.

ZAHRA, J. (*dissenting*). I disagree with the Court's decision to deny defendant's application for leave. Because the Court of Appeals failed to defer to the trial court's assessment of witness credibility,¹ I would reverse in part the judgment of the Court of Appeals as to damages and remand this case to the Oakland Circuit Court for reinstatement of its damages award.²

Defendant contracted with plaintiff to provide Information Technology work for Gordon Food Service (GFS) from October 2012 through February 8, 2014 (referred to as the "first engagement"). The contract

¹ See MCR 2.613(C) and *In re Miller*, 433 Mich 331, 337 (1989).

² I agree with and would leave intact the portion of the Court of Appeals' opinion that concludes the trial court erred by denying plaintiff's request for attorney fees as contemplated by the noncompete agreement as part of the damages award.

included a noncompete agreement that expired on August 8, 2015. Defendant violated the noncompete agreement by soliciting work from GFS. Specifically, in June 2015, plaintiff contacted GFS so as to arrange additional work for defendant, but it learned that defendant had already directly solicited and obtained employment at GFS (referred to as the “second engagement”).

Plaintiff sued and, following a bench trial, the trial court found that defendant had breached the noncompete agreement and was liable to plaintiff for breach of contract. The more difficult issue was determining damages. The Court of Appeals provided this summary:

During the first GFS engagement, GFS paid [plaintiff] \$160 per hour of services; [plaintiff] in turn paid [defendant] \$115 an hour, leaving [plaintiff] with a profit of \$45 per hour. After six months, GFS increased the pay rate to \$180 per hour. [Plaintiff] paid [defendant] \$130 an hour, for a profit of \$50 per hour. Under both pay rates, [plaintiff] retained 28% of the GFS payment. During the second GFS engagement, [defendant] worked for a different GFS department. Under this contract, GFS paid [defendant] \$150 per hour. And from June 2015 through the time of trial, [defendant] had worked a total of 2,896 hours.^[3]

The Court of Appeals also summarized the disagreement about damages related to defendant’s work during the second GFS engagement:

[Plaintiff] provided evidence that it bore some overhead from negotiating the first contract between GFS and [defendant], but asserted that with the initial work under its belt, these costs would not be duplicated in a second placement between GFS and [defendant] . . . Accordingly, [plaintiff] asserted, its share of the payments during [defendant]’s second GFS engagement would have been “pure profit.” Overall, [plaintiff] sought \$180,800 in damages.^[4]

The trial court “took judicial notice that [plaintiff]’s overall profit margin was 12.5% and determined to award [plaintiff] only 12.5% of the payments [plaintiff] would have retained during [defendant]’s second GFS engagement, a total of \$22,600.”⁵ The trial court ruled that “this [c]ourt’s measure of damages is the . . . profit margin that [plaintiff] would have made on [defendant]’s job starting on June 8th of . . . 2015 and continuing through the four months, through May 25th of 2017”

³ *Resource Point LLC v Addolux LLC*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 338338), p 2.

⁴ *Id.*

⁵ *Id.*

The Court of Appeals vacated the \$22,600 damages portion of the trial court judgment and instead remanded the case for entry of a judgment awarding plaintiff \$147,588 in damages for lost profits. This is how the panel arrived at that figure:

As noted, the parties' noncompete agreement provided that [defendant] was required "to indemnify and hold harmless" [plaintiff] "for any and all loss, costs, and other liability incurred or threatened" as a result of [defendant]'s breach. To calculate [plaintiff]'s loss, the circuit court was required to determine the value of [defendant]'s contract for the second GFS engagement. [Plaintiff] presented evidence that at the time of trial, [defendant] had worked 2,896 hours for GFS, for an average of 38.61 hours per week. Other uncontroverted evidence established that [defendant]'s work would continue for at least another four months, or 16 weeks, under the second GFS engagement. Multiplying 38.61 hours per week by 16 weeks amounts to an additional 617.76 hours. Rounding that number and adding it to the hours [defendant] had already worked amounts to a total of 3,514 hours. The second GFS engagement was therefore worth 3,514 hours of work.

The value of the hours then becomes critical to determining [plaintiff]'s lost profits. [Plaintiff] presented evidence that GFS paid \$150 per hour under the second GFS engagement. Multiplying the total number of hours worked (3,514) by this hourly rate amounts to a total of \$527,100—i.e., the total value of the second GFS engagement was \$527,100.

[Plaintiff] would not have been entitled to the entire \$527,100, as it would have been required to turn a portion of this amount over to [defendant] as his compensation. Accordingly, the trial court was next required to calculate how much of the total contract value would have flowed into [plaintiff]'s pockets. To arrive at this figure, it is appropriate to consider past dealings between the parties involved. As noted, the undisputed evidence shows that [plaintiff] retained 28% of GFS's payment during [defendant]'s first GFS engagement. The evidence of these previous dealings allowed [plaintiff] to prove its damages with reasonable certainty. *Health Call of Detroit [v Atrium Home & Health Care Servs, Inc]*, 268 Mich App 83, 96 (2005)]. The proper measure of damages was 28% of the value of the contract for the second GFS engagement; 28% of \$527,100 amounts to a total of \$147,588 in lost profits.⁶

In my view, the discrepancy between the trial court and the Court of Appeals is attributable to determination of overhead. Plaintiff maintained there would be no overhead and that the referral fee for the second GFS engagement would have been 100% profit. The trial court understandably found this contention dubious and expressly rejected the testimony that supported this contention. Specifically, the court

⁶ *Resource Point LLC*, unpub op at 4.

found that Rita Mehta, plaintiff's vice president, was not credible. It is within the purview of the trier of fact to determine credibility, and great deference is given to the fact-finder on that issue. Having found Mehta not credible, the trial court calculated damages by applying plaintiff's 2015 profit margin to the gross income it claimed it would have received from the second GFS engagement. The use of the 12.5% profit margin properly accounted for the net profit loss. In my view, the trial court's methodology was proper and reasonable. The Court of Appeals improperly failed to defer to the trial court's assessment of witness credibility. I would reverse in part the judgment of the Court of Appeals as to damages and remand this case to the Oakland Circuit Court for reinstatement of its damages award.

MARKMAN, J., joins the statement of ZAHRA, J.

Motion to Vacate Granted February 14, 2020:

In re NJ PENDER, MINOR, No. 160151; Court of Appeals No. 345008. By order of November 27, 2019, the movants were directed to file a brief citing legal authority in support of their joint motion to vacate the decision of the Court of Appeals, vacate the trial court's order terminating the respondent-mother's parental rights, and remand to the Wayne Circuit Court with instructions to offer to transfer the case to New York. On order of the Court, the brief having been received, the application for leave to appeal the July 9, 2019 judgment of the Court of Appeals and joint motion are again considered. The joint motion is granted. MCR 7.316(A)(7). Because of the unique circumstances of this case, the Wayne Circuit Court's June 26, 2018 order terminating the respondent-mother's parental rights, and that part of the Court of Appeals July 9, 2019 unpublished opinion (Docket No. 345008) concerning the respondent-mother's parental rights, are vacated. See MCR 7.316(A)(7) (stating that the Supreme Court may "enter other and further orders and grant relief as the case may require"). The application for leave to appeal is dismissed. We remand this case to the Wayne 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 14, 2020:

LEAGUE OF WOMEN VOTERS OF MICHIGAN v SECRETARY OF STATE and SENATE AND HOUSE REPRESENTATIVES v SECRETARY OF STATE, Nos. 160907 and 160908; Court of Appeals Nos. 350938 and 351073. On order of the Court, the application for leave to appeal the January 27, 2020 judgment of the Court of Appeals and the motion to intervene are considered. We direct the Clerk to schedule oral argument on the application and the motion for March 11, 2020 at 9:30 a.m. MCR 7.305(H)(1).

The parties may file additional briefs by 5:00 p.m. on February 28, 2020, addressing: (1) whether this Court should grant the motion to intervene; (2) whether the Michigan Senate and the Michigan House of Representatives have standing to seek declaratory relief in the Court of

Claims; (3) whether the 15% cap on ballot proposal signatures per congressional district in 2018 PA 608 is constitutional; and (4) whether 2018 PA 608's requirements that paid petition circulators file a pre-circulation affidavit and check a disclosure box on the face of circulated petitions are constitutional.

The time allowed for oral argument shall be 30 minutes for each side. MCR 7.314(B)(2).

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 shall be filed by 5:00 p.m. on February 28, 2020.

Leave to Appeal Denied February 14, 2020:

HERRON V MONROE MOTORSPORTS, INC, No. 160906; Court of Appeals No. 350827.

Leave to Appeal Denied February 25, 2020:

PEOPLE V LIPSEY, No. 160662; Court of Appeals No. 349503.

Summary Disposition February 28, 2020:

In re CURRY, MINORS, Nos. 160626 and 160627; Court of Appeals Nos. 343669 and 350113. On order of the Court, the application for leave to appeal the November 12, 2019 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Oakland Circuit Court terminating respondent's parental rights, and we reverse the judgment of the Court of Appeals affirming the circuit court.

The trial court terminated respondent's parental rights to three minor children, TLC, SLC, and LAC. In 2016, LAC responded affirmatively to a leading question from her aunt indicating respondent had sexually abused her. The aunt reported the allegation to her mother (the children's maternal grandmother) who, in turn, reported the allegation to the children's mother. A referral of allegations of sexual abuse was reported to Child Protective Services (CPS), prompting a CPS worker to visit the home and meet with the mother and LAC. The mother agreed to bring all three children to Care House for a forensic interview and to prevent respondent from contacting the children. Based on an allegation that all three children had been sexually abused, in addition to an allegation that respondent and the children's mother threatened the children with a "whooping" if they discussed the allegation, a petition for temporary custody against both respondent and the children's mother was filed by the Department of Health and Human Services (DHHS). Following a hearing and upon a finding of reasonable cause that one or more of the allegations was true, the circuit court ordered the children to be taken into custody.

DHHS subsequently amended the petition against both parents seeking permanent custody of all three children. Several additional hearings were held and the circuit court eventually ruled that the aunt's statement regarding LAC's statement of abuse and the statement by LAC's sibling regarding respondent threatening a "whooping" were admissible under the "tender years" hearsay exception in MCR 3.972(C)(2). The case proceeded to trial.

Viewed in a light most favorable to the petitioner, the facts established in the circuit court record are as follows. In 2016, LAC's aunt was driving 3-year-old LAC and her 5-year-old cousin. The girls were playing with dolls in the backseat. The aunt later recalled that after the cousin said she was going to kiss her doll on its forehead, LAC said she was going to kiss her doll on the "kitty," a euphemism used in the family to refer to a vagina. The aunt asked, "[W]ho told her that?" and LAC answered that respondent had. The aunt then asked if respondent kissed LAC's vagina, and she said "yes." LAC would not repeat the statement in a forensic interview. However, in the interview, LAC did respond affirmatively to leading questions such as whether it was raining inside, and whether she was 10 years old. Additionally, though SLC never disclosed any abuse in her forensic interview, she said she would "get her butt whooped" for talking about touches to her butt or vagina. LAC's mother testified that when she told respondent about the statement, he said LAC was "exaggerating." LAC's mother told respondent he needed to talk with LAC and "let her know what good touches and bad touches are basically." Respondent denied any abuse to LAC's mother. Regarding the statement, LAC's mother testified, "I don't know who she did or didn't learn it from which is why I took her to the doctor to see what was going on." LAC's mother talked to LAC about the statement and "didn't know what to believe because she went back and forth."¹

In an order entered on November 14, 2017, following trial, the circuit court held that jurisdiction under MCL 712A.2(b)(1) and (2) had been established by a preponderance of the evidence as to respondent but that jurisdiction had not been established with respect to the children's mother. The circuit court also held that statutory grounds for termination of respondent's parental rights under MCL 712A.19b(3)(b)(i), (g) and (j) had been proven by clear and convincing evidence. In an order entered on April 12, 2018, the circuit court held that termination of respondent's parental rights was in the best interests of the children. Respondent appealed, and the Court of Appeals affirmed. We vacated the Court of Appeals judgment in part, and remanded the case to the circuit court to reconsider its order terminating respondent's parental rights and to apply the clear and convincing evidentiary standard to the allegations of sexual abuse. *In re Curry, Minors*, 503 Mich 1023 (2019). On remand, the circuit court held an evidentiary hearing at which one

¹ At the removal hearing, the CPS worker testified that all three children disclosed sexual abuse during the Care House interview. However, review of the interviews at the subsequent hearings evidenced that this allegation was not substantiated.

witness testified, and the court again terminated respondent's parental rights. The Court of Appeals affirmed once again. *In re Curry, Minors (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued November 12, 2019 (Docket Nos. 343669 and 350113).

The Court of Appeals correctly stated the applicable evidentiary standard and standard of review regarding termination:

Under MCL 712A.19b(3), petitioner has the burden of proving a statutory ground for termination by clear and convincing evidence. See MCR 3.977(A)(3) and 3.977(H)(3); *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2000).

"[T]he clear and convincing evidence standard [is] the most demanding standard applied in civil cases[.]" *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (brackets added). Evidence is clear and convincing when it

"produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted. [*Id.*, citing *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987).]

An appellate court "review[s] for clear error . . . the court's decision that a ground for termination has been proven by clear and convincing evidence." *In re Trejo*, 462 Mich at 356-357. "Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that the lower court made a mistake." *In re Dearmon*, 303 Mich App 684, 700; 847 NW2d 514 (2014). This Court must defer to the trial court's special opportunity to observe the witnesses. *Id.* [*In re Curry, Minors*, unpub op at 3.]

This record leaves us with a definite and firm conviction that a mistake has been made.

Respondent does not challenge the circuit court's initial authorization to take the children into custody, and we see no factual basis to question the circuit court's determination that reasonable cause existed to believe that one or more of the allegations of abuse were true. We disagree, however, with the circuit court's determination that a statutory basis to terminate respondent's parental rights was established by clear and convincing evidence. The statutory grounds for termination and the best-interest determination all turn on the factual finding regarding whether respondent sexually abused one of the children. That finding is based on a 3-year-old child's response to two open-ended

questions and one leading question asked by her aunt, and a 6-year-old child's statement that respondent threatened a "whooping" for discussing the allegations.

Regarding the initial statement, we note that the child did not repeat the statement in the forensic interview. But the child affirmatively responded to leading questions such as whether it was raining indoors and whether she was 10 years old. Appellate courts give deference to a trial court's opportunity to observe a witness, but the trial court did not actually observe the statement characterized by the aunt as alleging abuse.² Further, the trial court seemed to place the burden on respondent to disprove the statement. Finding respondent's various theories on why a 3-year-old might make such a statement unsatisfactory, the trial court concluded it had to take the statement at "face value." In doing so, the court shifted the burden to respondent to disprove the statement.

Regarding the indication that respondent threatened another child with a "whooping" for discussing the allegations, these are hearsay accounts from a 6-year-old. The record does not seem clear to us that whatever was said was an attempt at thwarting an investigation rather than an inartfully phrased instruction about what topics of discussion are generally appropriate.

Even assigning these two pieces of evidence the most weight they might be due, we cannot see how any reasonable trier of fact could consider this evidence "so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Martin*, 450 Mich at 227 (citations and quotation marks omitted). Consequently, we conclude the trial court abused its discretion. We remand this case to the Oakland Circuit Court, Family Division to determine whether a basis exists for the court's continuing jurisdiction and for further proceedings not inconsistent with this order. We do not retain jurisdiction.

MARKMAN, J., (*dissenting*). The majority provides a fair-minded recitation of the record upon which the trial court assumed jurisdiction and terminated respondent-father's parental rights, and its decision to reverse both the trial court and the Court of Appeals is not unreasonable. Nonetheless, I respectfully dissent.

Before considering whether termination of parental rights is in the best interest of a child, the trial court must find that clear and convincing evidence supports at least one statutory ground for termination. *In re Trejo*, 462 Mich 341, 355 (2000). Here, the trial court found that the evidence supported its conclusions that respondent-father had sexually abused LAC and that there was a reasonable likelihood the children would suffer additional injury or abuse if placed in his home. See MCL 712A.19b(3)(b)(i). And an appellate court reviews for clear error the trial court's determination that a statutory ground for termination has been shown. *In re Trejo*, 462 Mich at 356-357. "Clear error

² In addition, the aunt testified at trial that she did not like respondent, ranking her dislike for him a "10" on a scale of 1 to 10.

exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that the lower court made a mistake.” *In re Dearmon*, 303 Mich App 684, 700 (2014). In reviewing the record, an appellate court must “giv[e] due regard to the trial court’s special opportunity to observe the witnesses.” *In re BZ*, 264 Mich App 286, 296-297 (2004). Finally, for this Court to intervene, respondent-father was obligated to demonstrate that the Court of Appeals’ decision to affirm the trial court “is clearly erroneous and will cause material injustice[.]” MCR 7.305(B)(5)(a).

This admittedly is a difficult case. However, in light of the following, I am unable to concur with the majority that the trial court “clearly erred” when it found that “clear and convincing” evidence supported its conclusion that respondent-father sexually abused LAC. First, it is highly atypical, and indicative of sexual abuse, for a three-year-old to spontaneously suggest an act of oral sex. Second, in response to her aunt’s nonleading and open-ended question as to who gave her the idea to kiss her doll goodnight on the “kitty,” LAC answered “My Daddy.” Third, respondent-father initially responded to the allegation that he had sexually abused his daughter by professing that LAC was “exaggerating,” a somewhat odd response that could reasonably be viewed as an attempt by respondent-father to *minimize* the extent of his inappropriate conduct rather than to affirmatively *deny* the allegation. Fourth, while LAC did not restate the allegation in a forensic interview, a reasonable observer might ascribe this to intervening actions by LAC’s parents subsequent to the initial allegation to threaten one of LAC’s siblings with a “whooping” if the allegations were discussed any further. Fifth, LAC’s mother’s testified that, when she first discussed the allegation with LAC, the child “went back and forth” concerning the allegation, indicating that although LAC did not restate the allegation at the forensic interview, in much closer proximity to the initial comments to her aunt, the child *did* restate the allegation to her mother. Finally, I am unpersuaded by the majority’s effort to minimize the trial court’s conclusion that LAC’s aunt testified credibly. While the majority correctly points out that the aunt disliked respondent-father before the critical interaction with her niece, a close reading of the hearing transcript suggests nothing incompatible with the trial court’s conclusion that the aunt testified forthrightly, providing what information she possessed, presenting a straightforward and unembellished version of events, and acknowledging when she lacked adequate information.

Having considered the deference owed the trial court’s credibility determination, the available evidence, and the inferences that could reasonably have been drawn from such evidence by the trial court, I am *not* left with a “definite and firm” conviction that the court erred in terminating respondent-father’s parental rights. Nor am I convinced that respondent-father has shown that the Court of Appeals reached a “clearly erroneous” decision in affirming the trial court. Thus, while I appreciate the basis for the majority’s position, I do not believe the trial court’s (or the Court of Appeals’) positions to be unreasonable. Therefore, I respectfully dissent.

Summary Disposition March 3, 2020:

PARADISO V CITY OF ROYAL OAK, No. 159337; Court of Appeals No. 340757. Pursuant to MCR 7.305(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 *Wigfall v City of Detroit*, 504 Mich 330 (2019).

PEOPLE V JASON ROBINSON, No. 159804; Court of Appeals No. 348217. Pursuant to MCR 7.305(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 whether the St. Clair Circuit Court correctly scored Offense Variable (OV) 1, MCL 777.31, and OV 3, MCL 777.33. See *People v McGraw*, 484 Mich 120, 135 n 45 (2009).

Leave to Appeal Denied March 3, 2020:

PEOPLE V ROBERT JOHNSON, No. 158445; Court of Appeals No. 329742.

PEOPLE V FREDERICK YOUNG, No. 159072; Court of Appeals No. 344196. By order of December 23, 2019, the prosecuting attorney was directed to answer the application for leave to appeal the December 7, 2018 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. For purposes of MCR 6.502(G)(1), the Court notes that, although the defendant's motion has been styled as a motion for relief from judgment by the courts below, it should not be regarded as a motion for relief from judgment in any future case. The defendant actually filed a motion for a new trial under MCR 6.431, which was properly denied by the trial court for lack of merit. It was also untimely. MCR 6.431(A). The application for leave to appeal to the Court of Appeals was properly denied, but due to the lack of merit in the grounds presented, not under the rules of MCR 6.501 *et seq.* The order of the Court of Appeals is vacated to the extent that it is inconsistent with this order. The motion for peremptory reversal is denied.

PEOPLE V CLAY, No. 159138; Court of Appeals No. 339659.

PEOPLE V BEBEE, No. 159392; Court of Appeals No. 339760.

BODNAR V ST JOHN PROVIDENCE, INC, No. 159451; reported below: 327 Mich App 203.

PEOPLE V OWINGS, No. 159503; Court of Appeals No. 340111.

BACK IN MOTION CHIROPRACTIC, DC, PLLC V WESTFIELD INSURANCE COMPANY, No. 159658; Court of Appeals No. 341791.

GLOBAL PRODUCTS, INC V MAYSER POLYMER USA, INC, No. 159671; Court of Appeals No. 339451.

PEOPLE V CAFARELLI, No. 159694; Court of Appeals No. 340802.

PEOPLE V AVERY, No. 159708; Court of Appeals No. 341975.

LONG V FIEGER and KOTT-MILLARD V FIEGER, Nos. 159744 and 159745;
Court of Appeals Nos. 341412 and 341414.

PEOPLE V ANTONIO CUMMINGS, No. 159759; Court of Appeals No.
343433.

PEOPLE V RILEY, No. 159780; Court of Appeals No. 339564.

PEOPLE V ROCHE, No. 159794; Court of Appeals No. 346298.

PEOPLE V DINWIDDIE, No. 159892; Court of Appeals No. 347256.

PEOPLE V COCHRAN, No. 159900; Court of Appeals No. 338951.

PEOPLE V SEEKINS, No. 159951; Court of Appeals No. 333491.

PEOPLE V GROVE, No. 159969; Court of Appeals No. 339118.

PEOPLE V SOLOMON, No. 159972; Court of Appeals No. 346436.

JAWAD A SHAH, MD, PC V FREMONT INSURANCE COMPANY, No. 159979;
Court of Appeals No. 340441.

PEOPLE V CURTIS WOODS, No. 160005; Court of Appeals No. 348546.

PEOPLE V JEREMY WALKER, No. 160006; Court of Appeals No. 347350.

PEOPLE V CAVARI BROWN, No. 160061; Court of Appeals No. 342946.

PEOPLE V SALYERS, No. 160076; Court of Appeals No. 341162.

PEOPLE V HILLARD, No. 160100; Court of Appeals No. 348919.

PEOPLE V HOWARD, No. 160146; Court of Appeals No. 343819.

PEOPLE V ZACHARY BURNS, No. 160169; Court of Appeals No. 347940.

THE ROMANIAN ORTHODOX EPISCOPATE OF AMERICA V CARSTEA, No. 160185;
Court of Appeals No. 347497.

COMPOSTO V ALBRECHT, No. 160187; reported below: 328 Mich App 496.

PEOPLE V RYAN, No. 160232; Court of Appeals No. 348099.

MCCORMACK, C.J., did not participate because of her prior involve-
ment in a related case.

PEOPLE V MESSENGER, No. 160267; Court of Appeals No. 348976.

PEOPLE V YATOMA, No. 160277; Court of Appeals No. 343020.

PEOPLE V ALONZO, No. 160283; Court of Appeals No. 341973.

PEOPLE V MARK CARTER, No. 160296; Court of Appeals No. 345504.

PEOPLE V MERLO, No. 160300; Court of Appeals No. 350088.

SMITH V MERRITT, No. 160303; Court of Appeals No. 342594.

PEOPLE V KENNEY, No. 160304; Court of Appeals No. 339628.

- PEOPLE V TOMMY WILLIAMS, No. 160305; Court of Appeals No. 348844.
- PEOPLE V MALESKI, No. 160311; Court of Appeals No. 349351.
- PEOPLE V SHUKUR BROWN, No. 160348; Court of Appeals No. 344537.
- BARTLETT V STATE OF MICHIGAN, No. 160375; Court of Appeals No. 348294.
- DEPARTMENT OF TRANSPORTATION V HERNANDEZ, No. 160378; Court of Appeals No. 350330.
- PEOPLE V TERRENCE PERRY, No. 160381; Court of Appeals No. 342385.
- PEOPLE V MONCRIEF, No. 160426; Court of Appeals No. 344524.
- PEOPLE V JOHNNIE BROWN, No. 160438; Court of Appeals No. 343237.
- PEOPLE V ROGALSKI, No. 160465; Court of Appeals No. 349030.
- PEOPLE V GIUCHICI, No. 160475; Court of Appeals No. 350021.
- PEOPLE V ROBERT MCCOY, No. 160477; Court of Appeals No. 340306.
- PEOPLE V CHARLES MALONE, No. 160479; Court of Appeals No. 345775.
- PEOPLE V JOHN EVANS, No. 160481; Court of Appeals No. 349125.
- GRIEVANCE ADMINISTRATOR V FRIEDMAN, No. 160483.
- CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.
- PEOPLE V DABISH, No. 160486; Court of Appeals No. 342699.
- PEOPLE V NAVARRETE, No. 160507; Court of Appeals No. 343355.
- PEOPLE V BUTLER, No. 160516; Court of Appeals No. 349375.
- PEOPLE V BILLY MULLINS, No. 160522; Court of Appeals No. 345000.
- PEOPLE V BRIAN HALL, No. 160528; Court of Appeals No. 342010.
- PEOPLE V FITZGERALD, No. 160538; Court of Appeals No. 341775.
- PEOPLE V LAKENDRICK GATES, No. 160546; Court of Appeals No. 350246.
- PEOPLE V JARVIS GLENN, No. 160547; Court of Appeals No. 343994.
- CASTLE V BOSS EXOTICS, LLC, No. 160553; Court of Appeals No. 349371.
- PEOPLE V LECH, No. 160591; Court of Appeals No. 350544.
- PEOPLE V DONSHEY JONES, No. 160629; Court of Appeals No. 349253.
- BROOKS V BROOKS, No. 160709; Court of Appeals No. 351742.
- PEOPLE V FORTUNA, No. 160738; Court of Appeals No. 350786.

Superintending Control Denied March 3, 2020:

HOWERTON V ATTORNEY GRIEVANCE COMMISSION, No. 160608.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied March 3, 2020:

PEOPLE V CLARENCE McMILLEN, No. 156647; Court of Appeals No. 332089. Leave to appeal denied at 505 Mich 876.

PEOPLE V DOUGLAS JACKSON, No. 159436; Court of Appeals No. 342075. Summary disposition order entered at 504 Mich 955.

PEOPLE V TRAVIS CUNNINGHAM, No. 159792; Court of Appeals No. 346943. Leave to appeal denied at 504 Mich 999.

BELL V CITY OF SAGINAW, No. 159813; Court of Appeals No. 341858. Leave to appeal denied at 505 Mich 864.

PODEWELL V PODEWELL, No. 159837; Court of Appeals No. 341580. Leave to appeal denied at 505 Mich 870.

PEOPLE V WILLIAM SCHOLTES, No. 159881; Court of Appeals No. 341614. Leave to appeal denied at 505 Mich 870.

WHITE V CONSOLIDATED RAIL CORPORATION, No. 159906; Court of Appeals No. 347995. Leave to appeal denied at 504 Mich 1000.

PEOPLE V MICHAEL THOMPSON, No. 159930; Court of Appeals No. 347469. Leave to appeal denied at 504 Mich 1000.

PEOPLE V TIBBS, No. 159931; Court of Appeals No. 347255. Leave to appeal denied at 504 Mich 1000.

WHITE V DETROIT EAST COMMUNITY MENTAL HEALTH, No. 160201; Court of Appeals No. 348605. Leave to appeal denied at 505 Mich 863.

Summary Disposition March 6, 2020:

PEOPLE V ULRICH, No. 160387; Court of Appeals No. 349694. Pursuant to MCR 7.305(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 March 6, 2020:

AHMAD V UNIVERSITY OF MICHIGAN, No. 160012; Court of Appeals No. 341299. The parties shall address whether the documents sought by the plaintiff are within the definition of "public record" in § 2(i) of the Freedom of Information Act (FOIA), MCL 15.232(i). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

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.

BERNSTEIN, J., did not participate due to a familial relationship.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 6, 2020:

PEOPLE V KRUKOWSKI and PEOPLE V CODIE STEVENS, Nos. 160263 and 160264; Court of Appeals Nos. 334320 and 337120. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether there is sufficient evidence for a rational juror to conclude beyond a reasonable doubt that defendants committed the offense of second-degree child abuse, MCL 750.136b(3)(a) and MCL 750.136b(3)(b); and (2) whether the phrase “willful abandonment” in MCL 750.136b(1)(c) encompasses a parent’s failure to timely seek professional medical care for his or her child. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file supplemental briefs within 21 days of being served with the appellant’s brief. The appellees shall also electronically file appendices, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the respective appellees’ brief. The parties should not submit mere restatements of their application papers.

The total time allowed for oral argument shall be 40 minutes: 20 minutes for the appellant, and 20 minutes for the appellees, to be divided at their discretion. MCR 7.314(B)(2).

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 March 6, 2020:

MATHESON V SCHMITT, No. 160931; Court of Appeals No. 347022.

Leave to Appeal Denied March 11, 2020:

PEOPLE V GOGA, No. 160552; Court of Appeals No. 350532.

Leave to Appeal Denied March 13, 2020:

In re CC KEERL, MINOR, No. 160894; Court of Appeals No. 349384.

Summary Disposition March 18, 2020:

PEOPLE v PETTIFORD, No. 158027; Court of Appeals No. 343181. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for an evidentiary hearing, to determine whether the defendant's claim of newly discovered evidence entitles him to relief from judgment under MCR 6.508(D). *People v Johnson*, 502 Mich 541 (2018). We decline the prosecutor's request to stay proceedings on remand pending the completion of the Conviction Integrity Unit's investigation, although we do so without prejudice to the prosecutor seeking such relief from the trial court on remand. We do not retain jurisdiction.

PEOPLE v BARNER, No. 159231; Court of Appeals No. 345901. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Berrien Circuit Court for an evidentiary hearing. The court shall determine whether the defendant's trial counsel was ineffective in regard to the information and advice counsel provided to the defendant about the plea offer and, if trial counsel was ineffective, the court shall reconsider that portion of the defendant's motion for relief from judgment. We do not retain jurisdiction.

CITY OF WARREN v HOTI, No. 159627; Court of Appeals No. 346148. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *City of Warren v Marjana Hoti* (Court of Appeals Docket No. 346152). After *City of Warren v Marjana Hoti* is decided, the Court of Appeals shall reconsider this case in light of that case. The motion to expand record is denied.

CITY OF WARREN v HOTI, No. 159629; Court of Appeals No. 346152. Pursuant to MCR 7.305(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 motion to expand record is denied.

PEOPLE v THELONIOUS SEARCY, No. 160384; Court of Appeals No. 349169. Pursuant to MCR 7.305(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 March 18, 2020:

PEOPLE v KABONGO, No. 159346; Court of Appeals No. 338733. On order of the Court, the motion for miscellaneous relief is granted. The application for leave to appeal the December 27, 2018 judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether the prosecution's exercise of a peremptory challenge against prospective juror no. 2 violated *Batson v Kentucky*, 476 US 79 (1986); (2) whether the trial court erroneously precluded the defendant from exercising a peremptory challenge against prospective juror no. 5; (3) if so, whether such an error should be subject to automatic reversal or

harmless error review, *Rivera v Illinois*, 556 US 148, 162 (2009) (holding that a trial court's erroneous denial of a defendant's peremptory challenge, standing alone, is not a structural error under the federal constitution requiring automatic reversal, but that "[s]tates are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*") and compare, e.g., *People v Bell*, 473 Mich 275, 292-295 (2005) (stating in arguable dictum that harmless error review applies to such errors) with *Hardison v State*, 94 So 3d 1092, 1101 & n 37 (Miss, 2012) (plurality opinion) (citing "[a]t least five states" that have adopted an automatic reversal rule as a matter of state law and following those states); and (4) if so, whether reversal is warranted in this case.

The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1). 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.

Order Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered March 18, 2020:

PEOPLE V MAGNANT and PEOPLE V JOHN DAVIS, Nos. 159371 and 159373; Court of Appeals Nos. 341627 and 341621. The appellants shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether MCL 205.428(3) requires proof that the defendants knew that they were transporting cigarettes in a manner "contrary to" the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq.*, see generally *Rehaif v United States*, 588 US ____; 139 S Ct 2191 (2019); *Rambin v Allstate Ins Co*, 495 Mich 316, 327-328 (2014); (2) whether nonsupervisory employees fall within the definition of "transporter" under MCL 205.422(y); and (3) if so, whether the TPTA's definition of "transporter" satisfies due process by putting the defendants on fair notice of the conduct that would subject them to punishment, see *People v Hall*, 499 Mich 446, 461 (2016). In addition to the briefs, the appellants shall electronically file appendices conforming to MCR 7.312(D)(2). In the briefs, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the latter of the appellants' brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendices filed by the appellants. Replies, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The time allowed for oral argument shall be 30 minutes: 15 minutes for appellants, to be divided at their discretion, and 15 minutes for appellee. MCR 7.314(B)(2).

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. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *People v Magnant* (Docket No. 159371) only and served on the parties in both cases.

Leave to Appeal Denied March 18, 2020:

CAN IV PACKARD SQUARE LLC v PACKARD SQUARE LLC, No. 160223; reported below: 328 Mich App 656.

PEOPLE v HIBBLER, No. 160395; Court of Appeals No. 350122.

Leave to Appeal Granted March 20, 2020:

PEOPLE v LONNIE ARNOLD, No. 160046; reported below: 328 Mich App 592. The parties shall include among the issues to be briefed: (1) whether indecent exposure by a sexually delinquent person is a distinct felony “enumerated” in the Michigan Penal Code and subject to the sentencing guidelines, or whether the offense is subject to the sentencing guidelines regardless because it is set forth in MCL 777.16q as a listed felony; (2) whether, when the legislative sentencing guidelines provide for a penalty that is inconsistent with the penalty provided in the Penal Code for an offense, the sentencing guidelines are an amendment or repeal of inconsistent provisions of the Penal Code by implication such that the guidelines control, and if so, whether this comports with Const 1963, art 4, § 25; and (3) whether the rule of lenity is implicated, see *People v Hall*, 499 Mich 446, 458 n 38 (2016).

The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

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 March 20, 2020:

TINMAN v BLUE CROSS AND BLUE SHIELD OF MICHIGAN, No. 159416; Court of Appeals No. 338815.

BLACKWELL v FRANCHI, No. 159491; reported below: 327 Mich App 354.

MCCORMACK, C.J. (*concurring*). I concur in the majority’s decision to deny leave because I am not persuaded the Court of Appeals’ opinion merits further review.

The plaintiff was a guest at a holiday party hosted by the defendants in their home when she entered an unlit room and was injured from falling down an eight-inch step. We asked the Court of Appeals to

consider whether the defendants had a duty to warn the plaintiff about the step. *Blackwell v Franchi*, 502 Mich 918 (2018). The majority concluded there was a general duty to warn the plaintiff of a dangerous condition on their property and that whether the defendants breached that duty by failing to warn about an eight-inch step down in a dark room was a question for the jury to decide. *Blackwell v Franchi (On Remand)*, 327 Mich App 354, 357 (2019).

Our common law and the Restatement of Torts support the panel's unremarkable holding as to duty. As property owners, the defendants' duty to licensees is well settled: they have a duty to warn of conditions on their property that involve an unreasonable risk of harm to such licensees when they should expect that their licensees will not discover or realize the danger. *Preston v Sleziak*, 383 Mich 442, 453 (1970), citing Restatement Torts, 2d, § 342, overruled in part on other grounds by *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591 (2000).

The Court of Appeals majority used the analytic framework of general and specific standard of care rather than duty and breach. It held that "defendants had a general duty to plaintiff as a licensee and that whether defendants violated that duty by their specific actions or omissions is a question for the fact-finder." *Id.* at 357. This framework comes from our doctrine. In *Moning v Alfonso*, 400 Mich 425 (1977), we said:

While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care: whether defendants' conduct in the particular case is below the general standard of care, including—unless the court is of the opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy—whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable. [*Moning*, 400 Mich at 438 (citation omitted).]

Moning defined "general standard of care" as "reasonable conduct 'in light of the apparent risk,'" differentiating it from duty, which it defined as a "legal obligation." *Moning*, 400 Mich at 438. Modern negligence doctrine (including our own) more commonly uses the term "duty" to refer to the general standard of care. See, e.g., *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96 (1992) (explaining that "[o]nce a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for the jury"). And *Moning's* reference to the "specific standard of care," or whether the defendants' specific conduct met the "general standard of care," is more commonly referred to as "breach." *Moning*, 400 Mich at 438, 443.¹

¹ The Court of Appeals majority also cited Restatement Torts, 2d, § 342, p 210, to hold that the defendants had a general duty of care to the plaintiff. *Blackwell (On Remand)*, 327 Mich App at 357. The concurrence explained why that was correct, concluding that "Restate-

The Court of Appeals majority held that the defendants had a general duty to warn and that the specific standard of care (or whether the defendants' actions fell below the general standard of care) should be determined by a jury. *Blackwell (On Remand)*, 327 Mich App at 358, citing *Case v Consumers Power Co*, 463 Mich 1, 7 (2000). In other words, the defendants owed a duty to warn the plaintiff about a dangerous condition on the property that they could expect she would not discover. Whether the defendants' failure to warn of this particular condition was a breach of that duty, the panel also held, was a question of fact. This was not clear error.

Whether the specific hazard here—an eight-inch step into a dark room—qualifies as the kind of danger that should come with a warning is question about which reasonable people could disagree. The dissent thinks this Court should decide that it is not a danger that needs to come with a warning as a matter of law, citing *Garrett v W S Butterfield Theatres*, 261 Mich 262 (1933) and *Bertrand v Alan Ford, Inc*, 449 Mich 606 (1995), for support. In other words, the dissent believes a court should decide this particular question of breach as a matter of law. But neither case the dissent cites supports its view that the fact-bound question *here* can be decided as a matter of law.

Garrett was an ordinary negligence case, and it was not decided on a motion for summary disposition—instead, it was reversed after a jury verdict. *Garrett*, 261 Mich at 264. And the hazards have very little in common—in *Garrett*, the step was four and a half inches (not eight) and the room the plaintiff stepped into was brightly lit. *Id.* at 263.²

Bertrand consolidated two cases after separate trial courts granted summary disposition for defendants finding no genuine issues of material fact after plaintiffs alleged injuries caused by falling down steps. *Bertrand*, 449 Mich at 609. In one, a plaintiff fell down the second of two six- or seven-inch outdoor steps around noon, which she alleged was only dangerous because she “just did not see it.” *Id.* at 619. The plaintiff thus did not present any facts supporting that the step posed an unreasonable risk of harm, and this Court held that her claim was therefore properly dismissed by a judge because no jury could have found otherwise. In the other, this Court held there was a genuine issue of material fact because the step—which was clearly marked with yellow paint across its entire top corner—may have created an unrea-

ment Torts, 2d, § 342 controls the duty analysis in this case and defines the duty's parameters.” *Id.* at 364 (GLEICHER, J., concurring); see also *id.* at 362-363 (citing *Preston*, 383 Mich at 453; *Stitt*, 462 Mich 591; and *MacDonald v PKT, Inc*, 464 Mich 322, 335 (2001)).

² Different facts result in different outcomes. Compare this case with another ordinary negligence step case, *Dahlem v Hackley Union Nat'l Bank & Trust Co*, 361 Mich 609 (1960), in which this Court upheld a jury verdict in favor of a plaintiff who fell down a five- or six-inch step in a restroom. There, a heavy door with a spring that made the door close quickly apparently made the step dangerous enough to need a warning.

sonable risk of harm because of its placement near a vending machine and because of the way a nearby door hinged. *Id.* at 624. In other words, we decided that the question of whether the failure to warn of this particular step's danger was a question for the fact-finder. *Id.* at 624-625.

The unique facts in each of those cases (the premises cases and the ordinary negligence cases) and their holdings support the Court of Appeals' holding here. The plaintiff was injured when she entered a dark room and fell because she was surprised by an eight-inch step down. The plaintiff thus pled facts showing a more unique danger than an ordinary step encountered not in the dark. Whether the defendants should have warned her about it—whether they breached their duty—is a question for the fact-finder.

The Court of Appeals applied settled law to facts to determine that while there is a duty to warn a licensee of unreasonable dangers that are not discoverable upon casual inspection, there is a question of fact whether the defendants' failure to warn the plaintiff about this particular hazard breached that duty. There is nothing incorrect or remarkable about that holding.

VIVIANO, J., joins the statement of McCORMACK, C.J.

MARKMAN, J. (*dissenting*). I respectfully dissent. Plaintiff attended an informal Christmas party hosted by defendants at their home. When plaintiff arrived, she was directed by one of the defendants to place her purse in a small room adjoining the garage, commonly known as a "mudroom." Notwithstanding that the room was dark, and that there was a light switch immediately adjacent to the entranceway, plaintiff proceeded into the room without turning on the light or otherwise seeking to ascertain whether it was safe to enter. Plaintiff lost her balance and fell when she set foot into the room, which was about eight inches lower than the adjoining hallway.

Plaintiff sued defendants for her injuries on the basis of premises liability, arguing that defendants breached their duty to "warn, advise and instruct persons regarding potentially dangerous conditions on the premises." Defendants moved for summary disposition, which the trial court granted on the grounds that "reasonable minds could not differ that the alleged condition here [the step] was open and obvious. Moreover, there are no special aspects." Plaintiff appealed, and the Court of Appeals, in a split decision, reversed and remanded to the trial court for further proceedings, stating that "[t]he determination of whether defendants had a duty to warn plaintiff of the drop-off depends on how the conflicting testimony regarding whether the drop-off was open and obvious is resolved." *Blackwell v Franchi*, 318 Mich App 573, 579 (2017). Thereafter, defendants sought leave to appeal in this Court and we directed the scheduling of oral argument on whether to grant the application, instructing the parties to address "whether the appellants owed a duty to warn the appellee of the condition on the land at issue . . ." *Blackwell v Franchi*, 501 Mich 903 (2017). Ultimately, however, a majority of the Court declined to resolve this issue, deciding instead to remand to the Court of Appeals for consideration of the same issue, specifically, "whether defendants owed plaintiff a duty to warn

about the step because the plaintiff did not know or have reason to know of the condition and the risk involved, and it involved an unreasonable risk of harm . . .” *Blackwell v Franchi*, 502 Mich 918, 920 (2018) (quotation marks and citations omitted). On remand, and again in a split decision, the same panel reversed and remanded to the trial court for further proceedings. *Blackwell v Franchi (On Remand)*, 327 Mich App 354 (2019). The court majority asserted that

a reasonable person could conclude that the specific standard of care in this case included giving a warning to plaintiff and other licensees that upon entering the mudroom they would encounter an eight-inch drop-off that was not visible. Put in the terms of the remand order [from the Supreme Court], reasonable persons could disagree on whether the alleged condition, i.e., the nonvisible change in floor level, presented an unreasonable risk of harm . . . [*Id.* at 360-361.]

For the following reasons, I believe the Court of Appeals clearly erred in imposing a legal duty upon defendants.

First, the Court of Appeals, in a conclusory fashion, determined that a duty existed on defendant’s part, but it failed entirely to *analyze* the basis for this duty, as this Court directed it to do. Subsequently, the court assessed the *standard of care* that accompanied this asserted duty. Yet, duty and standard of care are considerably distinct concepts. *Moning v Alfonso*, 400 Mich 425, 436-437 (1977) (“While we all agree that the duty question is solely for the court to decide, the specific standard of care is not part of that question.”). The issue of legal duty “comprehends whether the defendant is under any obligation [in the first place] to the plaintiff to avoid negligent conduct; it does not include—where there *is* [such] an obligation—the *nature* of the obligation: the general standard of care and the specific standard of care.” *Id.* at 437 (emphasis altered). Thus, while Chief Justice MCCORMACK is correct that our “negligence doctrine . . . commonly uses the term ‘duty’ to refer to the general standard of care,” *ante* at 1002, that is only true to the extent that the overall *nature* of the duty, *if one indeed exists*, is defined by the general standard of care. That is, a court must *first* determine whether a duty exists, and only *if* the court finds that it does must it then determine the overall nature of that duty, i.e., the general standard of care. And *Moning* is not the only case to recognize the unremarkable proposition that “duty” and “general standard of care” are distinct legal questions. See, e.g., *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500 (1988) (“[T]he court decides the *questions* of duty and the general standard of care, and the jury determines what constitutes reasonable care under the circumstances.”) (emphasis added); *Ray v Swager*, 501 Mich 52, 63 n 13 (2017), quoting *Moning*, 400 Mich at 437 (“The elements of an action for negligence are (i) duty, (ii) general standard of care, (iii) specific standard of care, (iv) cause in fact, (v) legal or proximate cause, and (vi) damage.’ ”); *Case v Consumers Power Co*, 463 Mich 1, 6-7 (2000). Here, in determining that the “specific standard of care . . . included giving a warning to plaintiff,” *Blackwell (On Remand)*, 327 Mich App at 360-361, the Court of Appeals focused upon

“the nature of [defendant’s] obligation,” *Moning*, 400 Mich at 437, which is a function of the standard of care. At the same time, it neglected to focus upon the threshold inquiry—whether defendants were “under *any* obligation [in the first place] to the plaintiff to avoid negligent conduct,” *id.*, which is a function of defendant’s legal duty.

Second, for reasons more fully explained in my dissent when this case was earlier considered by the Court, see *Blackwell*, 502 Mich at 924 (MARKMAN, C.J., dissenting), the Court of Appeals here misapplied our common law by imposing a legal duty upon defendants. “[L]andowners are not insurers; that is, they are not charged with guaranteeing the safety of every person who comes onto their land.” *Hoffner v Lanctoe*, 492 Mich 450, 459 (2012). And in *Preston v Sleziak*, 383 Mich 442, 453 (1970), overruled in part on other grounds by *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591 (2000), this Court adopted § 342 of the Second Restatement of Torts, which sets forth in particular the legal obligations of a social host (a “licensor”) to a social guest (a “licensee”):

A possessor of land [licensor] is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

* * *

The possessor is entitled to expect that the licensee . . . will be on the alert to discover conditions which involve risk to him. Indeed, it is not necessary that the condition be such as the licensee would discover by the use of his senses while upon the land. [2 Restatement Torts, 2d, § 342, pp 210, 212 comment *f*.]

Accordingly, the host is entitled to expect that their guests will be aware of their surroundings and be able to recognize the existence of possible conditions that are not themselves immediately visible. Specifically relevant to this case, “[d]ifferent floor levels in private and public buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons.” *Garrett v W S Butterfield Theatres, Inc*, 261 Mich 262, 263 (1933). See also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614 (1995) (“[S]teps and differing floor levels [are] not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous.”).

Here, by allowing plaintiff to proceed to trial on the apparent assumption that she could not have anticipated and would not have been alerted to the possibility of a differing floor level in entering a

darkened room from the adjoining hallway, the Court of Appeals turns our common law on its head. Both *common* sense, and the *common* law, provide that the *commonplace* circumstances that obtained here do not give rise to liability on the part of a social host for injuries suffered by a guest where the guest has failed both to anticipate such circumstances and, as in the instant case, to ascertain the “lay of the land” by turning on the lights. See also *Brusseau v Selmo*, 286 Mich 171, 174 (1938) (“In the case at bar, plaintiff had notice of the darkened hallway. He could have had more light either by turning on the ‘switch’ or leaving the entrance door wide open, or by both. His failure to make use of appliances that would have lighted the stairway precludes his recovery.”).

Third, bearing in mind that “the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes,” *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 242 (2013) (quotation marks and citations omitted), the Court of Appeals’ decision is troubling in how it views the relationship between hosts and guests, veering away from legal rules that have long, and correctly, reflected, I believe, the “actual social customs and practices” of the people, *Woodman v Kera LLC*, 486 Mich 228, 277 (2010) (opinion by MARKMAN, J.). If this Court disfavors these rules, they should be changed straightforwardly so that the people need not guess what new rules are to prevail. By not doing so, the certain effect of decisions such as today’s will be to incentivize litigation as our law becomes increasingly confused and unsettled. In accordance with the Court of Appeals opinion, hosts can no longer operate upon the assumption that guests will not walk blindly into a darkened room without having exercised even a modicum of caution. Must guests now be personally escorted throughout the home? Must warning signs be installed apprising guests that they are encouraged to avail themselves of the benefits of electric lighting? And, of course, darkened rooms and unexpected steps and flooring levels are hardly the end to new lawsuits lying in wait. On what principled grounds should a host expect a guest to act with greater judgment in a wide realm of similarly looming household mishaps—sink and shower faucets configured to dispense hot water; ovens and stoves that heat up; throw rugs that are unstable; chairs capable of tipping over? In place of a clear, settled, and workable common-law rule—one premised upon the principle that social guests must exercise personal responsibility in navigating commonplace residential “risks” and “hazards”—what is the new rule that will supplant this?

It is true that “[t]he common-law does not consist of definite rules which are absolute, fixed, and immutable like the statute law, but . . . is a flexible body of principles” *Price*, 493 Mich at 243, quoting *Beech Grove Investment Co v Civil Rights Comm*, 380 Mich 405, 429 (1968). Nonetheless, the common law *is* composed of a set of longstanding and settled rules that must be consistently and faithfully applied unless the particular rule at issue is changed. See also *Price*, 493 Mich at 260 (“[W]hen it comes to alteration of the common law, the traditional rule must prevail absent compelling reasons for change. This approach

ensures continuity and stability in the law.”). Perhaps the greatest virtue of our common law is that it governs in a consistent and predictable manner countless numbers of ordinary social interactions that arise each day, sparing from the burdens of trial and the risks of financial liability citizens who have acted in a a reasonable and responsible and customary manner. Accordingly, I would reverse the Court of Appeals judgment and reinstate the trial court’s grant of summary disposition in favor of defendants.

ZAHRA, J., joins the statement of MARKMAN, J.

PEOPLE V GOSNICK, No. 161056; Court of Appeals No. 350636.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 23, 2020:

PEOPLE V OWEN, No. 160150; Court of Appeals No. 339668. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the arresting deputy made an objectively reasonable mistake of law regarding the applicable speed limit that justified the traffic stop of the defendant’s vehicle. See *Heien v North Carolina*, 574 US 54 (2014). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant’s brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee’s brief. The parties should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 23, 2020:

HAHN V GEICO INDEMNITY COMPANY, No. 158141; Court of Appeals No. 336583. On January 8, 2020, the Court heard oral argument on the application for leave to appeal the June 12, 2018 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.

MARKMAN, J. (*concurring in part and dissenting in part*). In an order directing the Clerk to schedule oral argument on Geico Indemnity Company’s application for leave to appeal, this Court asked for supplemental briefing on “(1) [whether] MCL 500.3012 permits the reformation of a non-Michigan insurance contract to comply with the require-

ments of the Michigan no-fault act, MCL 500.3101 *et seq.*]; and (2) [whether] *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38 (1998), was correctly decided, and if not, whether it should be overruled.” I concur with the Court’s denial of leave to appeal on these two questions. While Geico argues in its application for leave in this Court that MCL 500.3012 does not require reformation and that *Farm Bureau* was incorrectly decided, Geico did not raise these arguments in the trial court or in its application for leave to appeal in the Court of Appeals. Under our jurisprudence, a litigant must generally preserve an issue for appellate review by raising it in the trial court. *Walters v Nadell*, 481 Mich 377, 387 (2008). In discussing this requirement, this Court has stated:

The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. [*Id.* at 388 (citations omitted).]

Here, the rationale underlying preservation strongly favors not reaching the two questions presented in this Court’s order because: (1) the parties, up through Hahn’s supplemental briefing response, were still crafting their arguments regarding whether MCL 500.3012 permits reformation; and (2) Geico affirmatively relied upon *Farm Bureau* in the trial court. Finally, where Geico seeks leave to appeal from an interlocutory order denying summary disposition before the close of discovery, Geico cannot establish that a “miscarriage of justice,” “fundamental error,” or “egregious result” will follow from this Court’s enforcing the preservation requirement. *Napier v Jacobs*, 429 Mich 222, 233, 235 (2008).

However, I would grant leave to appeal on the narrower and preserved question of whether the insurance policy issued by Geico purported to be a Michigan insurance policy. *Farm Bureau* concluded that “the basic purpose of [MCL 500.3012] is to treat an insurance policy that an insurer issues *purporting* to be a Michigan policy that complies with Michigan law as such even if the written terms of the policy are inconsistent with Michigan law.” 233 Mich App at 41 (emphasis altered). Under this conclusion, if an insurance policy purports to be a Michigan policy but neither disclaims nor provides no-fault coverage in accordance with MCL 500.3101 *et seq.*, a court should reform the policy by reading no-fault coverage into the policy. In determining whether a policy purports to be a Michigan policy and thus is subject to reformation, the Court of Appeals focuses upon whether the insurer knew or should have known that the insured was a Michigan resident. See *id.* at 43-44 (policy did not purport to be Michigan policy where insurer had reason to believe insured was Indiana resident); see also *Auto-Owners Ins Co v Integon Nat’l Ins Co*, unpublished per curiam opinion of the

Court of Appeals, issued September 17, 2015 (Docket No. 321396), pp 5-7 (declining to reform policy where evidence did not show insureds were Michigan residents at time insurer issued the policy); *Gordon v Geico Gen Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2012 (Docket No. 301431), p 4 (policy purported to be Michigan policy where, given representations by insured, insurer “knew, or should have known, that it was dealing with a Michigan resident who would at least be traveling frequently to Michigan”); *Williams v Allstate Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2002 (Docket No. 229005), pp 2-3 (declining to reform policy where there was “no evidence from which to conclude that [the insurer] reasonably should have known that [the insureds] were Michigan residents”).

An insurer’s knowledge of the insured’s residency may well be a useful consideration in determining whether a policy purports to be a Michigan policy. However, I do not believe the insured’s residency constitutes a necessary or a sufficient condition in determining whether a policy purports to be a Michigan policy. As is evident from the facts of the instant case, some Michigan residents are required to obtain non-Michigan policies. See NC Gen Stat 20-309 (requiring North Carolina insurance if vehicle is registered in North Carolina). At the same time, some non-Michigan residents are required to obtain policies providing Michigan no-fault coverage. See MCL 500.3102(1) (requiring nonresident who operates a vehicle in Michigan for more than 30 days a year to procure Michigan no-fault insurance). And the parties have not identified any law of this state that requires an insurer to offer a person seeking insurance the complete range of in-state and out-of-state policies that he or she must obtain under the laws of Michigan and all other states. Cf. *Johnson v USA Underwriters*, 328 Mich App 223, 244-245 (2019) (allowing insurer to sell optional or supplemental insurance coverage apart from required Michigan no-fault coverage). Thus, in my opinion, when the trial court embarks upon determining whether a policy “purports” to be a Michigan policy, it must, in addition to assessing the insured’s residency, further consider: (1) the representations and interactions between the insured and the insurer when forming the policy, (2) the language of the policy, and (3) any other circumstance that reasonably bears upon the intentions of the insured and the insurer in purchasing and delivering the policy. Such an analysis would provide a more complete and accurate framework than does *Farm Bureau* and its progeny for determining whether the parties intended to form a *Michigan* insurance policy subject to reformation under MCL 500.3012.

Thus, while I concur with the denial of leave on the two questions identified in this Court’s order directing the Clerk to schedule oral argument on Geico’s application for leave to appeal, I respectfully dissent from our denial of leave on the more narrow and preserved question of whether the policy issued by Geico “purports” to be a Michigan policy. Furnishing a coherent framework for determining whether a policy purports to be a Michigan policy would have provided lower courts with some much needed statutory clarification and guid-

ance. It is regrettable that we pass up the opportunity to do so after having taken the time to hear oral argument on Geico's application for leave to appeal.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

BAUER V HAMMON, No. 159342; Court of Appeals No. 339703.

PEOPLE V STANLEY, Nos. 160109 and 160110; Court of Appeals Nos. 340464 and 340465.

MARKMAN, J., would grant leave to appeal as to the prosecutor's cross-appeal in Docket No. 160110 to assess whether sufficient evidence has been presented to sustain defendant's conviction for conspiracy to commit armed robbery.

STOWELL V GROVER, No. 160196; Court of Appeals No. 348157.

PEOPLE V TIETZ, No. 160261; Court of Appeals No. 342613.

Summary Disposition March 25, 2020:

ROBERTSON V JOHNSON, No. 159531; Court of Appeals No. 337961. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals. Whether the plaintiff has stated a viable claim against defendant U-Haul Co. of Michigan (U-Haul), and if so the basis for that claim, cannot be reviewed on appeal where the complaint itself fails to make any allegations or state any claim against U-Haul. Under these circumstances, U-Haul was entitled to summary disposition. See MCR 2.116(C)(8), (I)(1). We therefore reverse the April 10, 2017 judgment of the Wayne Circuit Court and remand this case to that court for entry of an order granting summary disposition to U-Haul, without prejudice to the plaintiff's opportunity to amend the complaint pursuant to MCR 2.116(I)(5). We do not retain jurisdiction.

PEOPLE V REESE, No. 159791; Court of Appeals No. 348186. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Allegan Circuit Court for correction of the judgment of sentence. The prosecuting attorney has conceded that the defendant's 200-month minimum sentence violates the two-thirds rule of *People v Tanner*, 387 Mich 683, 690 (1972), and MCL 769.34(2)(b). Under that rule, because the statutory maximum for third-degree criminal sexual conduct, see MCL 750.520d(2), as elevated by the habitual offender statute, MCL 769.10(1)(a), is 270 months, the longest minimum sentence that the defendant could receive is 180 months, or 15 years. The judgment of sentence is to be amended accordingly. We further order the trial court to ensure that the corrected judgment of sentence is transmitted to the Department of Corrections. In all other respects, leave to

appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V BLAIR, No. 160678; Court of Appeals No. 347885. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment and the February 13, 2019 order of the Berrien Circuit Court denying the defendant's motion to suppress evidence. We remand this case to the trial court to reconsider the defendant's motion with the record as expanded by the Court of Appeals to include the video evidence, and for the trial court to specifically address: (1) whether the Berrien County Deputy Sheriff who impounded the vehicle complied with the Sheriff's Department Policies and Procedures governing towing and impounding, including Section V of those policies, (2) whether the Deputy "acted in bad faith or for the sole purpose of investigation," *Colorado v Bertine*, 479 US 367 (1987), and (3) if so, whether that renders the search unconstitutional under either the state or federal constitutions. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 25, 2020:

RIVERA V SVRC INDUSTRIES, INC, No. 159857; Court of Appeals No. 341516. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the record supports plaintiff's contention that her communication with defendant's chief operating officer demonstrated that she was "about to report" a violation or a suspected violation of a law, see MCL 15.362; (2) whether plaintiff's communications with defendant's counsel constituted a "report" pursuant to MCL 15.362 where (a) defendant's counsel initiated contact with plaintiff (rather than plaintiff contacting him), and (b) defendant's counsel was aware of plaintiff's allegations prior to their conversation; (3) whether the Whistleblowers' Protection Act (MCL 15.361 *et seq.*) is plaintiff's exclusive remedy in this case; and (4) whether the record supports plaintiff's contention that her protected activity caused her firing, that is, whether plaintiff has sufficient evidence beyond the temporal proximity of the events to show causation, see *Wurtz v Beecher Metro Dist*, 495 Mich 242 (2014). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's briefs. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied March 25, 2020:

PEOPLE V TERRY WILLIAMS, No. 160928; Court of Appeals No. 350091.

Summary Disposition March 27, 2020:

PEOPLE V CANTU, No. 157714; Court of Appeals No. 335696. By order of May 28, 2019, the application for leave to appeal the March 13, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Turner* (Docket No. 158068). On order of the Court, the case having been decided on January 17, 2020, 505 Mich 954 (2020), the application is again considered and, pursuant to MCR 7.305(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 Kent Circuit Court for further proceedings not inconsistent with this order. At the resentencing for first-degree murder held pursuant to MCL 769.25a and *Miller v Alabama*, 567 US 460 (2012), the trial court had jurisdiction to consider the defendant's arguments regarding his sentences for kidnapping and assault with intent to murder. *Turner, supra*. On remand, the trial court shall consider the defendant's arguments regarding the validity of these sentences and exercise its discretion whether to resentence him for those convictions, in particular "if it finds that the sentence was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense." *Id.* We do not retain jurisdiction.

PEOPLE V RONALD WILLIAMS, No. 158853; reported below: 326 Mich App 514. By order of April 5, 2019, the application for leave to appeal the November 29, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Turner* (Docket No. 158068). On order of the Court, that case having been decided on January 17, 2020, 505 Mich 954 (2020), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals holding that the defendant was not entitled to resentencing, and we remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order. The defendant was not required to file a motion for relief from judgment to challenge his sentence for second-degree murder that was imposed concurrently to his sentence for first-degree murder committed when he was less than 18 years old. *People v Turner, supra*. The trial court had jurisdiction to consider his arguments concerning his second-degree murder sentence at the resentencing for first-degree murder held pursuant to MCL 769.25a and *Miller v Alabama*, 567 US 460 (2012). On remand, the trial court shall consider whether the sentence for second-degree murder was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole for first-degree murder. If so, the trial court may exercise its discretion to resentence the defendant for second-degree murder. In all other re-

spects, 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 O'NEAL, No. 159785; Court of Appeals No. 346673. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the August 16, 2018 order of the Wayne Circuit Court dismissing the defendant's motion for relief from judgment, and we remand this case to the trial court for reconsideration of that motion. The trial court dismissed the defendant's motion as successive under MCR 6.502(G). However, the motion is not prohibited by MCR 6.502(G) because the defendant's prior motion for relief from judgment was filed before August 1, 1995. Further, in determining whether the alleged grounds for relief were previously decided against the defendant, the trial court shall note that the defendant raises ineffective assistance of counsel claims in his current motion that were not raised previously. The motion to remand for an evidentiary hearing is denied. We do not retain jurisdiction.

PEOPLE v JASON KEISTER, No. 159912; Court of Appeals No. 340931. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment holding that the admission of the expert testimony of Dr. Angela May was not plain error. Her testimony was plainly contrary to *People v Smith*, 425 Mich 98 (1986), *People v Peterson*, 450 Mich 349 (1995), and *People v Thorpe*, 504 Mich 230 (2019). We remand this case to the Court of Appeals for consideration of whether the prejudice prong of the plain-error test was satisfied, and, if so, whether reversal of the defendant's convictions is warranted. See *People v Carines*, 460 Mich 750, 763-764 (1999). 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 MCNEAL, No. 160203; Court of Appeals No. 348752. Pursuant to MCR 7.305(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 Wayne Circuit Court for further proceedings not inconsistent with this order. The defendant was not required to file a motion for relief from judgment to challenge his sentence for second-degree murder, imposed concurrently to his sentence for a first-degree murder committed when he was under the age of 18. See *People v Turner*, 505 Mich 954 (2020). The trial court had jurisdiction to consider his arguments regarding his second-degree murder sentence at the resentencing for first-degree murder held pursuant to MCL 769.25a and *Miller v Alabama*, 567 US 460 (2012). On remand, the trial court shall consider the defendant's arguments regarding the validity of his second-degree murder sentence and exercise its discretion whether to resentence him for that conviction, in particular "if it finds that the sentence was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense." *Turner, supra*. We do not retain jurisdiction.

BARAGWANATH V AMC SAULT STE MARIE, INC, No. 160360; Court of Appeals No. 348628. Pursuant to MCR 7.305(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 27, 2020:

HINDENACH V OLIVET COLLEGE, No. 159509; Court of Appeals No. 340540.

MUHAMMAD V GRESLEY, Nos. 159566 and 159567; Court of Appeals Nos. 341745 and 343236.

PEOPLE V KEATING, No. 159575; Court of Appeals No. 340693.

PEOPLE V HILTON, No. 159576; Court of Appeals No. 348109.

PEOPLE V CORDELL JONES, No. 159774; Court of Appeals No. 348764.

PEOPLE V DICKEY, No. 159808; Court of Appeals No. 348113.

PEOPLE V COOPER, No. 159822; Court of Appeals No. 335212.

HELLER V DEJONG, No. 159862; Court of Appeals No. 345164.

WILSON V BRK, INC, No. 159904; reported below: 328 Mich App 505.

WILSON V GABITES, No. 159938; Court of Appeals No. 342477.

PEOPLE V LEONARD KING, No. 159950; Court of Appeals No. 346794.

PEOPLE V ARMSTRONG, No. 159960; Court of Appeals No. 347837.

SUNNYSIDE RESORT CONDOMINIUM ASSOCIATION, INC V BECKMAN, No. 159965; Court of Appeals No. 341116.

PEOPLE V WHITMORE, No. 159988; Court of Appeals No. 340114.

FARM BUREAU INSURANCE COMPANY V TNT EQUIPMENT, INC, No. 160009; reported below: 328 Mich App 667.

In re MARGARET E WHITE TRUST, No.160036; Court of Appeals No. 344361.

PEOPLE V RUSSELL-TAYLOR, No. 160053; Court of Appeals No. 340029.

CESARINI V FCA US LLC, No. 160054; Court of Appeals No. 342674.

PEOPLE V BRIAN BRADFORD, No. 160068; Court of Appeals No. 348824.

PEOPLE V SHAW, No. 160122; Court of Appeals No. 349278.

PEOPLE V KIM HARVEY, No. 160128; Court of Appeals No. 338991.

PEOPLE V WENDELL EDWARDS, No. 160168; Court of Appeals No. 348744.

PEOPLE V REGINALD WALKER, No. 160179; Court of Appeals No. 348737.

PEOPLE V DEMETRIUS MOORE, No. 160180; Court of Appeals No. 349172.

TAYLOR V UNIVERSITY PHYSICIAN GROUP, No. 160183; reported below: 329 Mich App 268.

PEOPLE V LAROSE, No. 160234; Court of Appeals No. 347626.

TALAN V STEWART, No. 160243; Court of Appeals No. 342268.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

COPPOLA V EDWARD ROSE & SONS, LLC, No. 160266; Court of Appeals No. 343172.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

SPINE SPECIALISTS OF MICHIGAN, PC V GEICO INDEMNITY COMPANY, No. 160306; Court of Appeals No. 343683.

PEOPLE V CAIN, No. 160337; Court of Appeals No. 348562.

PEOPLE V DEBRUYN, No. 160341; Court of Appeals No. 348334.

PEOPLE V KNOX, Nos. 160368 and 160369; Court of Appeals Nos. 342165 and 342179.

PEOPLE V VITONN BALDWIN, No. 160372; Court of Appeals No. 343203.

PEOPLE V TAAMNEH, Nos. 160379 and 160380; Court of Appeals Nos. 342452 and 342453.

PEOPLE V MARK WASHINGTON, No. 160385; Court of Appeals No. 344003.

PEOPLE V LEONARDROW SMITH, No. 160391; Court of Appeals No. 348845.

PEOPLE V DEANGELO JONES, No. 160412; Court of Appeals No. 350851.

PEOPLE V SEDLMEYER, No. 160413; Court of Appeals No. 349908.

TOWN CENTERS DEVELOPMENT CO, INC V PND INVESTMENTS, LLC, No. 160420; Court of Appeals No. 343247.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE V EARL DAVIS, No. 160422; Court of Appeals No. 349611.

PEOPLE V MEAD, No. 160424; Court of Appeals No. 341688.

PEOPLE V WALTON, No. 160428; Court of Appeals No. 343148.

PEOPLE V GREGORY TUCKER, No. 160429; Court of Appeals No. 343351.

HAWKINS V NORFOLK SOUTHERN RAILWAY COMPANY, No. 160442; Court of Appeals No. 340338.

SLAGA V TOTAL HEALTH CARE, INC, No. 160446; Court of Appeals No. 340968.

MOORE V MOORE, No. 160454; Court of Appeals No. 343266.

PEOPLE V PRAHL-SIX, No. 160455; Court of Appeals No. 350411.

STEVENSON V AUTO CLUB INSURANCE ASSOCIATION, No. 160458; Court of Appeals No. 342805.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE V AARON MILLER, No. 160472; Court of Appeals No. 340175.

HARPER V ASHGROVE APARTMENTS, No. 160482; Court of Appeals No. 345299.

PEOPLE V PROCHE, No. 160488; Court of Appeals No. 349330.

PEOPLE V COWLES, No. 160490; Court of Appeals No. 336178.

HARPER V ASHGROVE APARTMENTS, No. 160491; Court of Appeals No. 345299.

PEOPLE V MARTELL MOORE, No. 160497; Court of Appeals No. 344801.

WILMINGTON SAVINGS FUND SOCIETY FSB V SCOTT, No. 160504; Court of Appeals No. 344903.

PEOPLE V CORKER, Nos. 160505 and 160506; Court of Appeals Nos. 350425 and 350427.

PEOPLE V COREY MANNING, No. 160508; Court of Appeals No. 348967.

PEOPLE V RONALD WILLIAMS, No. 160509; Court of Appeals No. 350308.

PEOPLE V HENRY, No. 160511; Court of Appeals No. 349772.

PEOPLE V KENNARD, No. 160512; Court of Appeals No. 349027.

PEOPLES V CITY OF DETROIT BOARD OF ZONING APPEALS, No. 160518; Court of Appeals No. 348711.

PEOPLE V WALDRON, No. 160521; Court of Appeals No. 350356.

PEOPLE V KILLING, No. 160526; Court of Appeals No. 350076.

PEOPLE V NOEL, No. 160536; Court of Appeals No. 350005.

PEOPLE V WOGOMAN, No. 160540; Court of Appeals No. 349316.

PEOPLE V BRADLEY BEARD, No. 160542; Court of Appeals No. 349469.

PEOPLE V COLUMBUS MILLER, Nos. 160548 and 160549; Court of Appeals Nos. 350139 and 350140.

PEOPLE V BETTS, No. 160556; Court of Appeals No. 350593.

PEOPLE V EDMUNDSON, No. 160560; Court of Appeals No. 350218.

TIA CORPORATION V PEACEWAYS, No. 160566; Court of Appeals No. 348696.

PEOPLE V FLAKIEWICZ, No. 160570; Court of Appeals No. 342463.

LAMKIN V HARTMEIER, No. 160576; Court of Appeals No. 326986.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

In re ENGEL, No.160577; COURT OF APPEALS No. 345169.

PEOPLE V CRAIG HILL, No. 160579; Court of Appeals No. 349875.

PEOPLE V JAMES TAYLOR, No. 160581; Court of Appeals No. 350145.

DAWN REO, LLC V MURPHY, No. 160595; Court of Appeals No. 342701.

PEOPLE V RUZA, No. 160609; Court of Appeals No. 349858.

PEOPLE V BRADLEY, No. 160618; Court of Appeals No. 350868.

PEOPLE V ORT, No. 160621; Court of Appeals No. 350472.

PEOPLE V MICHAEL BOONE, No. 160625; Court of Appeals No. 350454.

PEOPLE V JOHN BROWN, No. 160631; Court of Appeals No. 345399.

PEOPLE V DARYL DAVIS, No. 160633; Court of Appeals No. 350453.

PEOPLE V McADAMS, No. 160634; Court of Appeals No. 344506.

PEOPLE V DUNMIRE, No. 160639; Court of Appeals No. 343444.

PEOPLE V SAIN, No. 160640; Court of Appeals No. 350704.

PEOPLE V MEDINA, No. 160643; Court of Appeals No. 350547.

PEOPLE V RUTHERFORD, Nos. 160644 and 160645; Court of Appeals Nos. 343185 and 343188.

PEOPLE V BONDS-CARRERA, No. 160659; Court of Appeals No. 350970.

PEOPLE V BEAUDIN, No. 160663; Court of Appeals No. 350534.

PEOPLE V ROSS, No. 160671; Court of Appeals No. 350412.

PEOPLE V MELLE, No. 160672; Court of Appeals No. 350721.

In re MLA FULTON, MINOR, No. 160679; Court of Appeals No. 350996.

PEOPLE V McBRIDE, No. 160680; Court of Appeals No. 350480.

PEOPLE V RIDENOUR, No. 160683; Court of Appeals No. 342748.

PEOPLE V NODARSE, No. 160686; Court of Appeals No. 344865.

PEOPLE V WHITLOW, No. 160693; Court of Appeals No. 342778.

PEOPLE V MELISSA MANNARINO, No. 160703; Court of Appeals No. 343747.

PEOPLE V MELISSA MANNARINO, No. 160705; Court of Appeals No. 343748.

PEOPLE V STANAWAY, No. 160706; Court of Appeals No. 343757.

PEOPLE V MELISSA MANNARINO, No. 160708; Court of Appeals No. 346271.

PEOPLE V LOWRY, No. 160723; Court of Appeals No. 339794.

In re GEETER, No. 160727; Court of Appeals No. 350482.

In re TERRELL, No. 160728; Court of Appeals No. 350598.

PEOPLE V JAYMES MILLER, No. 160734; Court of Appeals No. 343756.

Superintending Control Denied March 27, 2020:

PLATER V ATTORNEY GRIEVANCE COMMISSION, No. 160610.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

KIZER V ATTORNEY GRIEVANCE COMMISSION, No. 160731.

MARKMAN, J., did not participate because of discussions he had as Chief Justice with the State Court Administrative Office concerning aspects of the dispute.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Application for Leave to Appeal Dismissed March 27, 2020:

PATTERSON V ST JOSEPH MERCY HOSPITAL, No. 160863; Court of Appeals No. 350135. On order of the Chief Justice, the motion of defendants-appellants to dismiss the application for leave to appeal is granted. The application for leave to appeal is dismissed without prejudice to defendants-appellants raising and pursuing the same application issues to be presented in the pending cross-appeal in this matter.

Complaint for Superintending Control Dismissed March 27, 2020:

KIZER V JUDICIAL TENURE COMMISSION, No. 160750. On order of the Court, the complaint for superintending control is considered, and it is dismissed for the reason that there is no “proceeding” before the Judicial Tenure Commission within the meaning of MCR 9.211(C). The motion to unseal file is denied.

MARKMAN, J., did not participate because of discussions he had as Chief Justice with the State Court Administrative Office concerning aspects of the dispute.

Reconsideration Denied March 27, 2020:

PEOPLE V TROY HITE, No. 157674; Court of Appeals No. 342618. Leave to appeal denied at 505 Mich 940.

WHEELER V CITY OF LIVONIA, No. 158910; Court of Appeals No. 338704. Leave to appeal denied at 505 Mich 940.

PEOPLE V WALTER KELLY, No. 159605; Court of Appeals No. 340033. Summary disposition order entered at 505 Mich 933.

PEOPLE V ERNEST GORDON, No. 159934; Court of Appeals No. 346695. Leave to appeal denied at 505 Mich 870.

PEOPLE V JOHN WILSON, No. 160126; Court of Appeals No. 343990. Leave to appeal denied at 505 Mich 942.

PEOPLE V CARNELL BATES, No. 160141; Court of Appeals No. 347304. Leave to appeal denied at 505 Mich 943.

PEOPLE V GRAM BENTON, No. 160145; Court of Appeals No. 348913. Leave to appeal denied at 505 Mich 946.

PEOPLE V DARNELL BATES, No. 160155; Court of Appeals No. 347279. Leave to appeal denied at 505 Mich 943.

In re TIPPINS, No. 160329; Court of Appeals No. 349398. Leave to appeal denied at 505 Mich 948.

PEOPLE V MICHAEL DEARDOFF, No. 160510; Court of Appeals No. 348609. Leave to appeal denied at 505 Mich 884.

Summary Disposition April 3, 2020:

PEOPLE V MUNTEAN, No. 158932; Court of Appeals No. 334952. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court. The defendant's sentences for torture, unlawful imprisonment, and aggravated domestic violence should not have been made consecutive to the felony-firearm sentence because none of those offenses was a predicate felony for the charged felony-firearm offense. *People v Clark*, 463 Mich 459 (2000). On remand, the trial court shall either amend the judgment of sentence to make those sentences concurrent, or resentence the defendant. We further order the trial court to ensure that the amended judgment of sentence is transmitted to the Department of Corrections. 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.

Leave to Appeal Denied April 3, 2020:

In re IR HUGO, MINOR, No. 160798; Court of Appeals No. 347785.

In re VUOCOLO, MINORS, No. 160979; Court of Appeals No. 349238.

Summary Disposition April 15, 2020:

PEOPLE V HAILEY, No. 157987; Court of Appeals No. 342283. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), and reconsideration of the defendant's motion for relief from judgment. We further 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 at the evidentiary hearing. The motion to extend time for filing a reply is granted. The motions to remand and for miscellaneous relief are denied in all other respects. We do not retain jurisdiction.

PEOPLE V TAUREAN CARTER, No. 160228; Court of Appeals No. 349181. Pursuant to MCR 7.305(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 Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 15, 2020:

PEOPLE V SINDONE, No. 159709; Court of Appeals No. 340328. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the defendant's convictions under MCL 750.73 and MCL 750.79(1)(d)(vi) violate double jeopardy. Specifically, the appellant shall address: (1) whether the Legislature expressed a clear intent to allow or disallow dual convictions for both crimes based on the same conduct, and (2) if not, whether the same-elements test requires vacating the lesser conviction. See *People v Miller*, 498 Mich 13, 19 (2015). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. 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 15, 2020:

PEOPLE V BERNARD, No. 159022; Court of Appeals No. 344682.

PEOPLE V MARCUS MARTIN, No. 159443; Court of Appeals No. 347375.

In re ESTATE OF LOUIS G BASSO, JR, No. 159896; Court of Appeals No. 342370.

PEOPLE V CORRIDORE, No. 160130; Court of Appeals No. 338670.

PEOPLE V HARGROVE, No. 160270; Court of Appeals No. 344352.

BROWN V WOLAN, No. 160340; Court of Appeals No. 340533.

SWITALSKI V CLEVINGER, No. 160414; Court of Appeals No. 348793.

PEOPLE V ALEXANDER, No. 160484; Court of Appeals No. 350196.

Summary Disposition April 17, 2020:

PEOPLE V VICK, No. 159259; Court of Appeals No. 344396. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Kent Circuit Court's June 4, 2018 order denying relief from judgment on the basis of the affidavit of Kenneth Jackson, and we remand this case to the trial court for reconsideration of the defendant's motion under MCR 6.504(B). On remand, the trial court shall determine whether the new evidence presented in that affidavit is credible and whether the impact of the new evidence, in conjunction with the evidence that would be presented on retrial, which would include newly discovered evidence presented in previous motions for relief from judgment, would make a different result probable on retrial. *People v Johnson*, 502 Mich 541, 566-567, 571 (2018). In all other respects, leave to appeal is denied, because the defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion to appoint counsel is denied.

CRAMER V TRANSITIONAL HEALTH SERVICES OF WAYNE, No. 160312; Court of Appeals No. 347806. Pursuant to MCR 7.305(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 whether: (1) the Michigan Compensation Appellate Commission correctly concluded that the magistrate properly applied the four-factor test in *Martin v Pontiac Sch Dist*, 2001 Mich ACO 118, lv den 466 Mich 873 (2002), and the standard in *Yost v Detroit Board of Education*, 2000 Mich ACO 347, lv den 465 Mich 907 (2001); (2) the *Martin* test is at odds with the principle that a preexisting condition is not a bar to eligibility for workers' compensation benefits and conflicts with the plain meaning of MCL 418.301(2); and (3) the Michigan Compensation Appellate Commission correctly concluded that the magistrate's lack of causation conclusion was supported by the requisite competent, substantial, and material evidence utilizing the proper standard of law. 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 KEVIN WHITE, No. 160676; Court of Appeals No. 346661. Pursuant to MCR 7.305(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 Court of Appeals for consideration of the issues raised by the prosecutor, but not addressed by that court in its initial review of this case. Contrary to the determinations of the trial court and the Court of Appeals, there is no record evidence that the defendant knew that the person to whom he delivered the controlled substance had moved from Macomb County to Livingston County and that the controlled substance would be consumed in Livingston County. Thus, the record does not support the Court of Appeals' holding that the defendant intended the felony or acts done in perpetration of felony to have an effect in Livingston County. See MCL 762.8; *People v McBurrows*, 504 Mich 308 (2019). We do not retain jurisdiction.

Leave to Appeal Granted April 17, 2020:

BUHL V CITY OF OAK PARK, No. 160355; reported below: 329 Mich App 486. The parties shall address: (1) whether the Court of Appeals erred in concluding that the January 2017 amendment to MCL 691.1402a(5), see 2016 PA 419, applies retroactively; (2) whether 2016 PA 419 “attaches a new disability with respect to transactions or considerations already past,” *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 571 (1982); (3) whether the Court of Appeals erred in creating and applying a “Brewer restoration rule,” in determining that 2016 PA 419 applies retroactively, see *Brewer v A D Transp Express, Inc*, 486 Mich 50 (2010); and (4) whether it makes a difference that the amendment was enacted before plaintiff filed her complaint when the amended statute states, “In a civil action, a municipal corporation . . . may assert . . . a defense that the condition was open and obvious.” MCL 691.1402a(5). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

CAVANAGH, J., did not participate because of her prior involvement as counsel for a party.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 17, 2020:

PEOPLE V CEASOR, No. 159948; Court of Appeals No. 338431. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether he was denied the effective assistance of trial counsel due to counsel's failure to seek funds from the circuit court to hire an expert witness or to otherwise obtain and present the testimony of an expert witness. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being

served with the appellee's brief. The parties should not submit mere restatements of their application papers.

MCCORMACK, C.J., not participating because of her prior involvement in this case as counsel for a party.

Leave to Appeal Denied April 17, 2020:

BOMAN V CATHOLIC DIOCESE OF GRAND RAPIDS, No. 158201; Court of Appeals No. 338458.

CAVANAGH, J. (*dissenting*). I dissent from the Court's order denying leave to appeal in this case. I believe this Court should consider whether the Court of Appeals erred by affirming summary disposition of plaintiff's claims based on direct negligence and vicarious liability arising from the sexual abuse of plaintiff by defendant Abigail Simon, an employee of schools operated by defendant Catholic Diocese of Grand Rapids, while plaintiff was still a minor.

In order to sustain his claim of direct negligence, plaintiff was required to establish (1) a duty owed by defendants to plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72, (2005). While the Court of Appeals recognized that teachers stand *in loco parentis* to their students and hence owe a duty to exercise reasonable care over the students in their charge, *Gaincott v Davis*, 281 Mich 515, 518-519 (1937), the Court of Appeals concluded, without any analysis, that the doctrine of *in loco parentis* did not extend to defendants in this case—the Diocese, administrators, and coaches. It is not at all clear to me that, while the law imposes “surrogate parent” status on teachers and an obligation to protect children placed in their care, the law does not impose the same or similar status and obligation on adults in defendants' positions who have similar relationships to minor students as teachers. The nature and extent of the doctrine of *in loco parentis* are jurisprudentially significant issues warranting consideration by this Court.

The Court of Appeals concluded that, even assuming that the doctrine of *in loco parentis* extended to defendants, plaintiff could not maintain his negligence claim because Ms. Simon's sexual molestation of plaintiff was not reasonably foreseeable to defendants. Foreseeability of the risk or danger is a requirement for the existence of a duty to protect an identifiable person or class of people from criminal conduct. *Hersh v Kentfield Builders, Inc*, 385 Mich 410 (1971). “Foreseeability . . . depends upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions.” *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 406 (1977). As we observed in *Schultz v Consumers Power Co*, 443 Mich 445, 452 n 7, “[a] plaintiff need not establish that the mechanism of injury was foreseeable or anticipated in specific detail. It is only necessary that the evidence establishes that some injury to the plaintiff was foreseeable or to be anticipated.” Importantly, where reasonable minds could differ, foreseeability is a question for the jury. *Samson*, 393 Mich at 407.

Citing *Brown v Brown*, 478 Mich 545 (2007), the Court of Appeals concluded that Ms. Simon's abuse of plaintiff was not reasonably foreseeable. But in *Brown*, in contrast to this case, the perpetrator did not display any *conduct* toward the victim that would have put defendant on notice of the eventual sexual assault; rather, the perpetrator engaged only in "lewd" and "tasteless" sexual comments directed at the victim. See *Brown*, 478 Mich at 562 (characterizing the issue in that case as "whether an employer is entitled to judgment as a matter of law when the sole basis for imposing liability for an employee's rape of a third party is the employee's lewd and offensive *comments*"); see also *id.* at 547-548 (holding that "where an employee has no prior criminal record or history of violent behavior indicating a propensity to rape, an employer is not liable *solely on the basis of the employee's lewd comments* for a rape perpetrated by that employee if those comments failed to convey an unmistakable, particularized threat of rape") (emphasis added). Here, the record shows that Ms. Simon engaged in inappropriate and troubling conduct that was known to (indeed, sometimes observed by) the assistant football coach and associate athletic director at West Catholic, the dean of students at West Catholic, the principal at West Catholic, and others at Catholic Central. For example, the principal at West Catholic testified that she had concerns about Ms. Simon's behavior at school, having observed inappropriate conduct during Ms. Simon's study hall class:

But there was very—it was very apparent that there were issues of students as far as physical personal space that were not what I would consider to be healthy for a tutor or teacher/student relationship.

* * *

But it didn't take very long for us to notice that there were other issues. Students would come to her desk and they would always be looking at her computer. It was all the males, and they would be uncomfortably close to Mrs. Simon [sic]. So our dean of students got in the habit of walking in there on a regular basis, and then of course the students would scatter. I would occasionally walk in there, and of course our administrative assistant has kind of the evil eye look and would give that to the students surrounding the desk.

A teacher at West Catholic informed the principal that he observed Ms. Simon acting "too friendly" to male students in particular. In fact, this teacher told the principal that, had a male teacher acted the same way toward female students, he would not be allowed to work at the school. A coach, the dean of students, and the principal at West Catholic all observed an incident in which Ms. Simon was sitting alone with a male student during mass, describing her "blatant [show] of affection [toward the student]" and "[seeking] him alone out to sit next to" as troubling, inappropriate, and unhealthy.

While the Court of Appeals characterized this evidence as Ms. Simon having “personal space” or “class management” or “professionalism” issues, whether that is an accurate characterization or whether Ms. Simon’s conduct was more accurately characterized as victim grooming and predation of minors that foreseeably led to the sexual molestation of plaintiff is an issue warranting further consideration by this Court. See *Hersh*, 385 Mich at 413 (“The employer’s knowledge of past *acts* of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonesty or querulousness, will lead to such result.”) (citation omitted).

Likewise, I believe that whether plaintiff has raised a genuine issue of material fact as to the Catholic Diocese of Grand Rapids’ vicarious liability for Ms. Simon’s sexual assault of plaintiff warrants further review. Under *Hamed v Wayne Co*, 490 Mich 1, 12 (2011), an employer may be held vicariously liable for an employee’s criminal conduct when “an employer had (1) actual or constructive knowledge of prior similar conduct and (2) actual or constructive knowledge of the employee’s propensity to act in accordance with that conduct.” To satisfy the first prong of this test, there must be sufficient similarity between the prior conduct of the employee and the conduct at issue as to lead a reasonable employer to recognize the prior conduct as an “inevitable prelude” to criminal sexual conduct or as conduct that would “inexorably lead to criminal sexual conduct.” *Brown*, 478 Mich at 555; see also *Hamed*, 490 Mich at 16 (holding that a plaintiff’s prior aggressive conduct was insufficient to put a defendant on notice for purposes of vicarious liability because it would not “inevitably lead to acts of criminal sexual conduct”). As discussed earlier, I believe this Court should consider whether the record evidences conduct by Ms. Simon that a jury could find to have been sufficiently similar to, or an “inevitable prelude” to, the sexual molestation of plaintiff as to put the Diocese on notice that she posed a threat of criminal conduct to a specific victim or victims.

MCCORMACK, C.J., and BERNSTEIN, J., join the statement of CAVANAGH, J.

PEOPLE V SHOULDERS, No. 159642; Court of Appeals No. 342408.

MARKMAN, J. (*dissenting*). I respectfully dissent because I would not deny leave to appeal but instead would remand for resentencing. Contrary to MCL 769.34(3)(a), which provides that “[t]he court shall not use an individual’s . . . race . . . to depart from the appropriate sentence range,” the trial court here expressly referenced defendant’s race in order to justify its departure sentence below the legislative guidelines. For this reason alone, resentencing is warranted. Furthermore, however, the sentence of probation imposed, in my view, constitutes an abuse of sentencing discretion in light of the intrinsic seriousness of the offense at issue—operating a motor vehicle while intoxicated causing death, MCL 257.625(4). That is, for this offense, the sentencing guidelines *always* provide for a sentence of imprisonment, even where *all* other offense variables (beyond Offense Variable 3, which is necessarily

scored at 50 points) are scored at zero and *all* prior record variables are also scored at zero. See MCL 777.12f; MCL 777.33(2)(c); MCL 777.64.

KUHLGERT V MICHIGAN STATE UNIVERSITY and OSTENDORF V MICHIGAN STATE UNIVERSITY, Nos. 159865, 159866, and 159867; reported below: 328 Mich App 357.

MARKMAN, J. (*concurring*). At issue here is whether the injuries sustained by Elisabeth Ostendorf were subject to the exclusive-remedy provision, MCL 418.131(1), of the Worker's Disability Compensation Act, MCL 418.101 *et seq.* In my view, the Court of Appeals was correct in concluding that her injuries were not subject to this provision on the basis of MCL 418.161(1)(b) of the Act, which provides that "[n]ationals of foreign countries employed pursuant to section 102(a)(1) of the mutual educational and cultural exchange act of 1961, Public Law 87-256, 22 USC 2452, shall not be considered employees under this act." As the Court of Appeals explained, "22 USC 2452(1)(a) is not limited to those educational exchange employees paid directly by the State Department. Instead, by its plain language, the statute also applies to those employees [such as Ostendorf] who are indirectly financed by that entity through its [exchange visitor programs]." *Kuhlgert v Mich State Univ*, 328 Mich App 357, 369 (2019).

I thus see no reason to decide whether the Court of Appeals was also correct in concluding that her injuries were not subject to the exclusive-remedy provision because they were not "receive[d] . . . arising out of and in the course of employment," MCL 418.301(1), where she was injured while walking to her vehicle on the premises of her employer after leaving the building in which she worked. See generally *Simkins v Gen Motors Corp (After Remand)*, 453 Mich 703 (1996).

Accordingly, because I agree with the Court of Appeals that Ms. Ostendorf's injuries were not subject to the exclusive-remedy provision of the WDCA, I concur with our order denying leave to appeal.

In re A SCHEPPERLY, MINOR, No. 161006; Court of Appeals No. 349473.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 21, 2020:

PEOPLE V ALTANTAWI, No. 160436; Court of Appeals No. 346775. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the juvenile defendant was subjected to a "custodial interrogation" without being advised of his *Miranda* rights. *Miranda v Arizona*, 384 US 436, 444 (1966). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days

of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 21, 2020:

PEOPLE V ROBBIE TAYLOR, No. 160343; Court of Appeals No. 341307.

PEOPLE V WATKINS, No. 160480; Court of Appeals No. 340906.

MCCORMACK, C.J. (*concurring*). I concur in the order denying leave to appeal but write separately to address the Court of Appeals' analysis of defendant Watkins's claim that he was denied effective assistance of counsel.

On the third day of the defendants' joint trial for first-degree premeditated murder, a juror sent a note to the trial court stating that the juror believed supporters of the two defendants were "eyeballing" the jury from the gallery in an attempt to intimidate. Addressing the note, the court stated it would keep vigilant watch for any further attempts at juror intimidation. And outside the presence of the jury, the court warned the defendants and their attorneys that the behavior needed to stop.

The next day of trial, counsel for codefendant Taylor moved the court to replace the juror who had submitted the note, arguing that the juror was "tainted." The court denied the motion without prejudice. The court explained that it would reconsider the matter if it appeared that further efforts to intimidate the jury were made or if the spectators' behavior biased the jury. Taylor's attorney argued that the next appropriate remedy would be a mistrial, to which the court stated, "I have no basis for entertaining anything like that at this point."

Following lunch recess that same day, a different juror informed the court that on the previous day of trial he had been approached in the restroom by a man whom the juror recognized as a spectator. The juror reported that this man asked him "if it was going up or down[.]" The court addressed this matter on the record but outside the presence of the remaining jurors. The solicited juror said that he did not know whether the spectator was associated with either defendant and that while the interaction made him feel "[a] little uncomfortable," he did not believe it would affect his judgment. The trial continued and the defendants were convicted as charged.

In his appeal as of right, defendant Watkins argued that trial counsel should have requested a mistrial after these incidents were brought to counsel's attention and that the failure to request a mistrial amounted to ineffective assistance of counsel. The Court of Appeals rejected this argument, stating:

Given the gang-violence overtones of this case, a reasonable trial attorney might just as well have decided not to move for a mistrial because the spectators' attempts to intimidate the jury might have been *successful*. In other words, counsel might have reasonably believed that it was more likely that the intimidation tactics would work against at least *one* juror than it was those tactics would prejudice the *entire* jury pool to vote against convicting Watkins. Therefore, Watkins has failed to rebut the strong presumption that his trial counsel employed effective strategy in deciding not to move for a mistrial. [*People v Watkins*, unpublished per curiam opinion of the Court of Appeals, issued September 12, 2019 (Docket No. 340906), p 8.]

This hypothesis about defense counsel's motives is unsupported and unnecessary. Whether to move for a mistrial is generally a strategic decision for which counsel is afforded wide latitude. But there is no reason to assume that counsel viewed jury-intimidation efforts to his client's advantage. In my view, such reasoning comes too close to imputing an endorsement of such tactics to defense counsel. And I find the panel's making that logical leap in this case especially suspect, given that it denied the defendant's motion to remand to the trial court for a *Ginther* hearing.

Speculation as to counsel's motivation isn't necessary to evaluate the defendant's claim for relief. Defendant Watkins has not presented this Court with any evidence that the jury's overall ability to render an impartial verdict was compromised such that the trial court would have been compelled to grant a mistrial, had one been requested. By the time the restroom incident was brought to the trial court's attention, the court had already explained, in clear terms that very morning, that the court would *not* entertain a mistrial unless there were continued attempts to intimidate the jury or evidence of actual juror bias, neither of which occurred. Given this record, I conclude that defendant Watkins has not shown a reasonable probability that a motion for a mistrial would have been granted. I therefore concur in the order denying his application for leave to appeal.

GREAT LAKES CAPITAL FUND FOR HOUSING LIMITED PARTNERSHIP XII v ERWIN COMPANIES, LLC, No. 160569; Court of Appeals No. 349916.

In re SCHWARTZ, MINORS, No. 160987; Court of Appeals No. 349666.

In re PRATER/HICKMAN, MINORS, No. 161046; Court of Appeals No. 348001.

Summary Disposition April 22, 2020:

PEOPLE v OLNEY, No. 159390; reported below: 327 Mich App 319. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the defendant's argument that MCL 768.27c does not apply to preliminary examinations. We do not retain jurisdiction.

HOULE V EMC DEVELOPMENT, No. 160423; Court of Appeals No. 348480. Pursuant to MCR 7.305(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 April 22, 2020:

PEOPLE V VARNER, No. 159748; Court of Appeals No. 333535.

MADISON V AAA OF MICHIGAN, No. 160466; Court of Appeals No. 342868.

MARKMAN, J. (*concurring*). Plaintiff brought this suit in district court against defendant. Although plaintiff's complaint asserted a claim limited to \$25,000, plaintiff presented proof of damages totaling \$144,480. The jury returned a verdict in favor of plaintiff in the amount of \$41,280. That verdict was reduced to the district court's jurisdictional limit of \$25,000. The circuit court affirmed, but the Court of Appeals reversed, holding that the district court lacked jurisdiction given that plaintiff's damages far exceeded the district court's \$25,000 jurisdictional limit. See MCL 600.8301(1) ("The district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed \$25,000.00.").

In *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 213 (2016), this Court held that "the allegations in the complaint establish the amount in controversy." I wrote a concurring opinion in which I agreed with the majority "that 'amount in controversy' as used in MCL 600.8301(1) refers to the 'prayer for relief set forth in the plaintiff's pleadings'" and "that a trial court may be ousted of subject-matter jurisdiction when 'fraud upon the court is apparent' from pleadings made in 'bad faith.'" *Id.* at 224 (MARKMAN, J., concurring). I wrote separately "only to identify circumstances that, in my view, might raise questions concerning 'bad faith' pleading and thereby warrant dismissal of a case for lack of jurisdiction." *Id.* I explained that "the critical inquiry in assessing bad faith is whether the plaintiff clearly intended to litigate a case inconsistent with the amount in controversy pleaded." *Id.* at 237. That is, the critical inquiry is "what type of case the plaintiff intended, when filing his or her pleading, to litigate." *Id.* Finally, I agreed with the majority that "because the present record does not sufficiently reflect that plaintiff's allegations were made in bad faith, because 'defendant made no allegation of bad faith in the pleadings,' and because 'there has been no finding of bad faith by the district court,' I believe that this Court currently lacks a basis to conclude that plaintiff pleaded in bad faith." *Id.* at 227 n 2 (citation omitted).

In the instant case, this Court, relying on *Hodge*, reversed the Court of Appeals, reinstated the judgment entered in the district court, and remanded to the district court for further proceedings. On remand, defendant filed a motion for relief from judgment arguing that the district court lacked subject-matter jurisdiction because plaintiff's counsel acted in bad faith by alleging an amount of damages in the complaint that he knew would be exceeded by the proofs. The district court found

that plaintiff's attorney had acted in bad faith and dismissed the case. The circuit court reversed, concluding that the law-of-the-case doctrine barred the district court from overruling this Court's ruling regarding subject-matter jurisdiction. The Court of Appeals affirmed, not because of the law-of-the-case doctrine, but because defendant's claim of bad faith was untimely.

The last time this case was before this Court, it was in a similar posture as *Hodge* in the sense that the record did not sufficiently reflect that plaintiff's allegations were made in bad faith, defendant had made no allegation of bad faith in the pleadings, and there had been no finding of bad faith by the district court. Now, defendant has made an allegation of bad faith in the pleadings and the district court has made a finding of bad faith. However, in my opinion, the record still does not sufficiently reflect that plaintiff's allegations were made in bad faith. Neither plaintiff nor plaintiff's trial attorney testified about why the case was filed in district court. Instead, the only additional evidence that we have is plaintiff's appellate attorney's testimony, in which he surmised that plaintiff's trial attorney probably filed in district court because he thought that he had a better chance of prevailing in the district court. However, this is mere speculation. Accordingly, I continue to believe that this Court lacks a sufficient basis to conclude that plaintiff pleaded in bad faith. Therefore, I concur in this Court's order denying leave to appeal.

In re LIPSCOMB, No. 160767; Court of Appeals No. 351259.

Summary Disposition April 24, 2020:

PEOPLE V JOHNNY KENNEDY, No. 160320; Court of Appeals No. 323741. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment holding that the defendant's constitutional challenge is unpreserved. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . ." *Strickland v Washington*, 466 US 668, 684-685 (1984). Because a criminal defendant's interest in expert assistance under *People v Kennedy*, 502 Mich 206, 228 (2018), is grounded in due process, and the defendant's motion for expert assistance in the trial court asked for relief under US Const, Am VI, his due-process challenge was preserved. We vacate the remainder of the Court of Appeals judgment and remand this case for reconsideration under the standard for preserved constitutional error. *People v Anderson (After Remand)*, 446 Mich 392, 405-406 (1994). We do not retain jurisdiction.

Leave to appeal granted April 24, 2020:

PEARCE V EATON COUNTY ROAD COMMISSION, No. 158069; reported below: 324 Mich App 549. By order of December 4, 2018, the application for leave to appeal the June 7, 2018 judgment of the Court of Appeals was

held in abeyance pending the decision in *W A Foote Mem Hosp v Mich Assigned Claims Plan* (Docket No. 156622). On order of the Court, the case having been decided on October 25, 2019, 504 Mich 985 (2019), the application is again considered, and it is granted. The parties shall address: (1) whether *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016), lv den 500 Mich 919 (2016), was correctly decided, and if so (2) whether *Streng* “clearly established a new principle of law” and thereby satisfied the threshold question for retroactivity set forth in *Pohutski v City of Allen Park*, 465 Mich 675, 696 (2002), compare *Pohutski*, 465 Mich at 696-697 (citations omitted) (“Although this opinion gives effect to the intent of the Legislature that may be reasonably be inferred from the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretations set forth in [*Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139 (1988) and [*Li v Feldt (After Remand)*, 434 Mich 585 (1990)].”) with *Wayne Co v Hathcock*, 471 Mich 445, 484 (2004) (“Our decision today [overruling *Poletown Neighborhood Council v Detroit*, 410 Mich 616 (1981)] does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963.”). See also *Chevron Oil v Huson*, 404 US 97, 106 (1971) (citations omitted) (holding that a decision establishes a new principle of law, such that it may be applied retroactively, if it “overrul[es] clear past precedent on which litigants may have relied . . .”); and if so (3) whether *Streng* should be applied retroactively under the “three factor test” set forth in *Pohutski*.

We further order that this case be argued and submitted to the Court together with the case of *Brugger v Midland Co Bd of Road Commissioners*, Docket No. 158304, at such future session of the Court as both cases are ready for submission.

The total time allowed for oral argument shall be 60 minutes: 30 minutes for appellants and 30 minutes for appellees, to be divided at their discretion. MCR 7.314(B)(1).

The Negligence Law Section of the State Bar of Michigan, Michigan Association of Counties, and Michigan Municipal League 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. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Estate of Brendon Pearce v Eaton County Road Commission*, Docket No. 158069, only and served on the parties in both cases.

MARKMAN J. (*concurring*). I concur with our orders granting leave to appeal in this case and in *Brugger v Midland Co Bd of Rd Comm'rs*, Docket No. 158304. I write separately only to encourage the parties and any amici, when addressing the issue of the retroactivity of *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016), lv den 500 Mich 919 (2016), to address the relevance of the tension identified in *Pohutski v City of Allen Park*, 465 Mich 675 (2002), between “the general rule . . . that judicial decisions are given full retroactive effect” and the exception

to that rule of “a more flexible approach . . . where injustice might result from full retroactivity [of a corrected interpretation of the law],” *id.* at 695-696, as well as what consideration should be given to any asserted “injustice” that might result to the prevailing party in cases in which the new rule is applied prospectively only.

BRUGGER V MIDLAND COUNTY BOARD OF ROAD COMMISSIONERS, No. 158304; Court of Appeals No. 337394. By order of December 4, 2018, the application for leave to appeal the May 15, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *W A Foote Mem Hosp v Mich Assigned Claims Plan* (Docket No. 156622). On order of the Court, the case having been decided on October 25, 2019, 504 Mich 985 (2019), the application is again considered, and it is granted. The parties shall address: (1) whether *Streng v Bd of Mackinac Co Rd Comm’rs*, 315 Mich App 449 (2016), lv den 500 Mich 919 (2016), was correctly decided, and if so (2) whether *Streng* “clearly established a new principle of law” and thereby satisfied the threshold question for retroactivity set forth in *Pohutski v City of Allen Park*, 465 Mich 675, 696 (2002), compare *Pohutski*, 465 Mich at 696-697 (citations omitted) (“Although this opinion gives effect to the intent of the Legislature that may be reasonably be inferred from the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretations set forth in [*Hadfield v Oakland Co Drain Comm’r*, 430 Mich 139 (1988) and [*Li v Feldt (After Remand)*, 434 Mich 585 (1990)].”) with *Wayne Co v Hathcock*, 471 Mich 445, 484 (2004) (“Our decision today [overruling *Poletown Neighborhood Council v Detroit*, 410 Mich 616 (1981)] does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963.”). See also *Chevron Oil v Huson*, 404 US 97, 106 (1971) (citations omitted) (holding that a decision establishes a new principle of law, such that it may be applied retroactively, if it “overrul[es] clear past precedent on which litigants may have relied . . .”); and if so (3) whether *Streng* should be applied retroactively under the “three factor test” set forth in *Pohutski*.

We further order that this case be argued and submitted to the Court together with the case of *Estate of Brendon Pearce v Eaton County Road Commission*, Docket No. 158069, at such future session of the Court as both cases are ready for submission. The total time allowed for oral argument shall be 60 minutes: 30 minutes for appellants and 30 minutes for appellees, to be divided at their discretion. MCR 7.314(B)(1).

The Negligence Law Section of the State Bar of Michigan, Michigan Association of Counties, and Michigan Municipal League 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. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Estate of Brendon Pearce v Eaton County Road Commission*, Docket No. 158069, only and served on the parties in both cases.

MARKMAN J. (*concurring*). I concur with our orders granting leave to appeal in this case and in *Estate of Brendon Pearce v Eaton Co Rd Comm*, Docket No. 158069. I write separately only to encourage the parties and any amici, when addressing the issue of the retroactivity of *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016), *lv den* 500 Mich 919 (2016), to address the relevance of the tension identified in *Pohutski v City of Allen Park*, 465 Mich 675 (2002), between “the general rule . . . that judicial decisions are given full retroactive effect” and the exception to that rule of “a more flexible approach . . . where injustice might result from full retroactivity [of a corrected interpretation of the law],” *id.* at 695-696, as well as what consideration should be given to any asserted “injustice” that might result to the prevailing party in cases in which the new rule is applied prospectively only.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 24, 2020:

PEOPLE V URIBE, No. 159194; Court of Appeals No. 338586. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether Dr. Guertin’s testimony about the complainant’s statements to him was admissible under the medical treatment exception to the hearsay rule, see *People v Garland*, 286 Mich App 1 (2009), and *People v Shaw*, 315 Mich App 668 (2016); (2) whether Dr. Guertin’s testimony was contrary to this Court’s decision in *People v Thorpe*, 504 Mich 230 (2019), and/or *People v Harbison*, 504 Mich 230 (2019); and (3) if error occurred, whether reversal of the defendant’s convictions is warranted.

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant’s brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee’s brief. The parties should not submit mere restatements of their application papers.

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 April 24, 2020:

PEOPLE V GNAT, No. 159427; Court of Appeals No. 340978.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the Court’s order denying leave to appeal. Defendant and the trial court have

identified serious questions about prosecutorial misconduct in this case and about appellate review of prosecutorial misconduct more generally, and these questions merit this Court's review.

Defendant was convicted of sexually assaulting his daughter, SG. Trial testimony consisted of the complainant and defendant's ex-wife recounting a prolonged history of emotional abuse, and the complainant recounting sexual abuse. Additionally, a jailhouse informant testified that defendant admitted kissing his daughter in a sexual manner. The trial court specifically limited testimony that might merely repeat the complainant's allegations. Defendant did not testify, but defense counsel argued that the allegations were concocted to interfere with his visitation.

The prosecutor made two problematic arguments in closing. First, the prosecutor said of the complainant, "She's told me on a couple of different occasions. She testified in a lower court in front of a different judge . . . She's been questioned in a lower court by two lawyers, myself and a different lawyer than [defense counsel]." Second, the prosecutor argued:

I have been a prosecutor for almost 14 years and in the last few years these are the only kinds of cases that I try. . . . And what I found is that in every case, no matter what kind of crime it is, victims lose something, whether it's money, whether it's property, whether it's time healing from wounds or sometimes a loved one, but these cases are different. These cases cause victims to lose a lot more than those things that I just listed for you. They lose a sense of trust in themselves and in the people that should be taking care of them and making sure that they are safe. They lose a sense of self about them. They question the decisions they make, and no doubt [SG] is no different. Did she make the right decision to not tell her mom the very first time that something happened? Did she make the right decision to appease her father to insure that her mother wasn't harmed in some way? They question everything about what they did from the beginning of the contacts all the way until they disclose. And so that sense of self, that sense of trust in themselves is shaken to the core.

Defense counsel objected that the prosecutor had argued facts not in evidence by stating the complainant had previously been interviewed and testified, that the prosecutor had vouched for the complainant by implying the case had been previously reviewed, and that the prosecutor had vouched for the complainant by invoking the prosecutor's 14 years of experience. The trial court found the objections compelling:

It does appear to me to be a problem in talking about the fact that the case comes to the jury after [SG] has talked to all of these people including me, the Prosecutor, and another judge. It does, does certainly approach the line or go over the line as to trying to persuade the jury that this matter has already been looked at by others, other people have already made the determination that

Mr. Gnat is guilty and therefore you should do the logical thing and also find that he is guilty because all of these other people can't be wrong. It's a problem.

The next one is when the prosecutor was saying that I'm an experienced prosecutor and these cases are different. There was no testimony in the record and, indeed the prosecutor could not take the stand and say that I'm a Prosecuting Attorney, I've tried a lot of these cases, these cases are different, the victims of these cases suffer a particular type of harm that is far different than the victims in other cases. . . .

However, the trial court declined to rule on the objections, saying, "We should proceed to the remainder of the arguments, proceed to get a verdict and then if the verdict is not guilty all of these matters are moot. . . . And I'm not deciding that one way or the other right now." The jury convicted defendant, and the trial court revisited the matter at sentencing:

Let's say, I agree with you, as I do, that those were improper comments by the prosecutor. She certainly should not have talked about all of her years of experience as a prosecutor, as soon as that phrase came out, I felt the hair on the back of my neck stand up, as I could not believe I was hearing that from an experienced, highly ethical, well qualified assistant prosecuting attorney. But she said it and obviously she can't take it back, there's nothing that anybody could do to take it back.

Also then when she talked about, that this victim told the story previously to a judge, . . . it was clear that, as your motion indicates, that she was vouching for the credibility of the victim by putting before the jury matters that were not in evidence. I agree.

The trial court noted that no curative instruction had been requested. Defense counsel stated that he did not think "a curative instruction at that point . . . would've been enough," and the trial court responded, "I . . . tend to agree with you that if the damage is sufficient to be reversible error, that no instruction at that point would've done any good . . ." The court further opined, "I realize that that kind of curative or cautionary instruction is almost meaningless in terms of what the jury would make of it." The court went on:

. . . I looked at all of the appellate cases, well, obviously I couldn't look at all of them, but page after page on my Westlaw, talked about prosecutorial misconduct, talked about vouching for witnesses, and it's like ninety nine point nine percent of the cases from the Court of Appeals come back affirming the conviction anyway because they regard it as harmless error. . . .

Now, I did make the remark that maybe the reason why assistant prosecutors in prosecutor's offices throughout the State fall into these errors so often is that there's no real sanction for it, because the trial judge feels constrained to deny the motion

because the judge doesn't want to put the victim through another trial and also the great weight of the evidence, as it is in this case, appears to me to be in favor of the prosecutor. And, so, the trial judges do not dismiss or grant new trials and the Court of Appeals almost routinely affirms. That does appear to me to be a problem because it means that there never seems to be any sanction to cause prosecutor's offices to take seminars, think about this, sit down, figure out, not to introduce these types of arguments.

Nonetheless, the court concluded, "although these errors are troubling, I do not think that it introduced into the trial such error as to overcome the great weight of the evidence which favored conviction."

Prosecutors have the responsibility of "a minister of justice, not simply that of an advocate." *People v Jones*, 468 Mich 345, 354 (2003). See also MRPC 3.8. This responsibility informs a prosecutor's methods of advocacy. As the United States Supreme Court has stated, "it is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v United States*, 295 US 78, 88 (1935). Said another way, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Id.* We have made clear that foul blows include "vouch[ing] for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *People v Bahoda*, 448 Mich 261, 276 (1995); arguing facts not in evidence, *People v Lusk*, 225 Mich 642, 644-645 (1923); and asking a jury to sympathize with a complainant, see *People v Reid*, 295 Mich 572, 575 (1940).

Defendant argues that the prosecutor landed all three kinds of these foul blows, and the trial court agreed. The trial court noted that no curative instruction was given and also opined that any curative instruction would have been "essentially meaningless." The trial court observed that in the face of errors like these, convictions are "routinely" affirmed, that trial courts feel "constrained" to deny motions for mistrial for fear of forcing complainants to testify a second time, and that prosecutors face "no real sanction" for this type of conduct. Further, the trial court stated that in the absence of a sanction there was no incentive for "prosecutor's offices to take seminars, think about this, sit down, figure out, not to introduce these types of arguments."

The Court of Appeals affirmed, essentially giving three reasons. First, the Court of Appeals observed that the jury had been given the standard instruction that lawyers' arguments are not evidence. *People v Gnat*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2019 (Docket No. 340978), p 6. While it is true that jurors were given the standard jury instruction that lawyers' arguments are not evidence, no curative instruction was given. Given the trial court's agreement with defense counsel's statement that a specific curative instruction would not have "been enough," I do not see how the generic instruction could have been. Second, the Court of Appeals reasoned that "SG's testimony was strong, direct evidence of defendant's guilt." *Id.* If the question is whether multiple prosecutorial errors skewed the jury's view of SG's testimony, I cannot see how the observation that SG testified answers the question. Finally, the Court of Appeals said that it

“has previously declined to reverse a conviction where isolated, improper remarks did not cause a miscarriage of justice.” This is more of a conclusion than an argument, as whether a miscarriage of justice was caused is the question. And none of this addresses the trial court’s observations about how claims of prosecutorial conduct are being reviewed, and the possible consequences of that review.

It seems clear to me that this issue “involves a legal principle of major significance to the state’s jurisprudence,” MCR 7.305(B)(3). I would grant oral argument on the application and invite amicus curiae briefs from interested parties.

In re XD BERRY, MINOR, No. 161023; Court of Appeals No. 349143.

Summary Disposition April 29, 2020:

PEOPLE V PLULIK, No. 160478; Court of Appeals No. 350098. Pursuant to MCR 7.305(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 SUTTLES, No. 160499; Court of Appeals No. 348912. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the October 8, 2018 order of the Eaton Circuit Court denying the defendant’s motion for relief from judgment, and we remand this case to the trial court for reconsideration of the defendant’s motion. The trial court’s stated bases for denying the motion were that the motion was “untimely,” and “defendant has been released from prison and/or parole has been terminated, therefore this matter is moot.” MCR 6.502 does not contain a deadline by which motions for relief from judgment must be filed. Further, the prosecuting attorney concedes there is not a basis for finding that the defendant’s motion is moot. We do not retain jurisdiction.

JAMES TOWNSHIP V RICE, No. 160646; Court of Appeals No. 349558. Pursuant to MCR 7.305(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 April 29, 2020:

In re ESTATE AND TRUST OF ROBERT E WHITTON, No. 158425; Court of Appeals No. 341737.

SMITH V HERTZ SCHRAM, PC, No. 158583; Court of Appeals No. 337826.

PEOPLE V MATTI, No. 159462; Court of Appeals No. 346049.

PEOPLE V JOSHUA BOWMAN, No. 159626; Court of Appeals No. 339086.

PEOPLE V GUTHRIE, No. 159643; Court of Appeals No. 341269.

HUGHES V CITY OF LIVONIA, No. 159729; Court of Appeals No. 340447.

KICKHAM HANLEY PLLC v OAKLAND COUNTY, No. 159758; Court of Appeals No. 341076.

In re FREEMAN, No. 159854; Court of Appeals No. 346594.

PEOPLE v MARTIN JONES, No. 159890; Court of Appeals No. 340334.

PEOPLE v GARDINER, No. 159942; Court of Appeals No. 339631.

PEOPLE v VAYKO, No. 160002; Court of Appeals No. 347344.

MILLER v WB HOLDINGS, LLC, No. 160027; Court of Appeals No. 341139.

SWAIN v MILES TRUCKING & EXCAVATING COMPANY, No. 160037; Court of Appeals No. 347760.

PEOPLE v BATTS, No. 160079; Court of Appeals No. 340032.

PEOPLE v MARCHESI, No. 160080; Court of Appeals No. 347419.

PEOPLE v THREATT, No. 160101; Court of Appeals No. 339432.

PEOPLE v STURZA, No. 160107; Court of Appeals No. 341366.

In re LEWIS, MINOR, No. 160113; Court of Appeals No. 337716.

PEOPLE v VIRGIN, No. 160118; Court of Appeals No. 348969.

PEOPLE v SAMUEL CALHOUN, No. 160134; Court of Appeals No. 349993.

PEOPLE v ANTOINE SCOTT, No. 160167; Court of Appeals No. 339325.

PEOPLE v KENNETH JENKINS, No. 160202; Court of Appeals No. 337624.

ALLEN PARK RETIREES ASSOCIATION, INC v CITY OF ALLEN PARK, No. 160207; Court of Appeals No. 341567.

PEOPLE v PRINGLE, No. 160210; Court of Appeals No. 348902.

COBB v PARKS, No. 160211; Court of Appeals No. 342774.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v MACAULEY, No. 160215; Court of Appeals No. 339249.

PEOPLE v TRAVIS WILSON, No. 160224; Court of Appeals No. 340542.

VIVIANO, J., did not participate due to a familial relationship with a circuit court judge involved in this case.

PEOPLE v TODD ROBINSON, No. 160229; Court of Appeals No. 348424.

PEOPLE v DIALLO, No. 160255; Court of Appeals No. 342800.

PEOPLE v ERNEST, No. 160286; Court of Appeals No. 349453.

PACKARD v BROWN, No. 160331; Court of Appeals No. 344720.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

TRENKAMP V KEYSER, No. 160333; Court of Appeals No. 342479.

PEOPLE V CREWS, No. 160335; Court of Appeals No. 348741.

PEOPLE V LEVANDUSKI, No. 160345; Court of Appeals No. 341934.

PEOPLE V CHARLES BROWN, No. 160350; Court of Appeals No. 349574.

PEOPLE V RODNEY MARTIN, No. 160361; Court of Appeals No. 348507.

PEOPLE V RAWSON, No. 160362; Court of Appeals No. 349996.

PEOPLE V DUSTIN HAWKINS, No. 160366; Court of Appeals No. 339087.

PEOPLE V ROSAS, No. 160386; Court of Appeals No. 350614.

PEOPLE V TIMES, No. 160402; Court of Appeals No. 348550.

LANSING PARKVIEW, LLC V K2M GROUP, LLC, No. 160421; Court of Appeals No. 344192.

PEOPLE V JUSTIN BELL, No. 160434; Court of Appeals No. 345407.

PEOPLE V ALVAREZ, No. 160435; Court of Appeals No. 349913.

PEOPLE V BERLANGA, No. 160439; Court of Appeals No. 349332.

PEOPLE V DUDLEY, No. 160456; Court of Appeals No. 343081.

PEOPLE V RUSH, No. 160459; Court of Appeals No. 349890.

PEOPLE V PAGE, No. 160464; Court of Appeals No. 349098.

PEOPLE V HEATHER WATTS, No. 160473; Court of Appeals No. 349064.

PEOPLE V WINE, No. 160489; Court of Appeals No. 344610.

WILLIAMS V GRILLO-ROGERS, No. 160493; Court of Appeals No. 349390.

CITIMORTGAGE, INC V BAMBAS, No. 160500; Court of Appeals No. 348228.

CITIMORTGAGE, INC V BAMBAS, No. 160502; Court of Appeals No. 348275.

CITY OF STERLING HEIGHTS V MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT, No. 160520; Court of Appeals No. 342870.

VIVIANO, J., did not participate due to a familial relationship with counsel of record.

PARKER V DEARBORN PUBLIC SCHOOLS, No. 160523; Court of Appeals No. 344897.

PEOPLE V HAKOLA, No. 160524; Court of Appeals No. 349895.

PEOPLE V PHILLIPS, No. 160541; Court of Appeals No. 350060.

PEOPLE V KEVIN SMITH, No. 160558; Court of Appeals No. 336247.

BROOKS-JOHNSON V US BANK NATIONAL ASSOCIATION, No. 160564; Court of Appeals No. 344861.

PEOPLE V DARREN JOHNSON, No. 160567; Court of Appeals No. 349529.

RODRIGUE V COMPREHENSIVE MEDICAL CENTER, PLLC, No. 160573; Court of Appeals No. 349575.

PEOPLE V DEONTE MCCOY, No. 160580; Court of Appeals No. 342015.

PEOPLE V ROBERT PARKER, No. 160587; Court of Appeals No. 350511.

PEOPLE V HATHAWAY, No. 160589; Court of Appeals No. 349488.

ADKINS V GABOR, Nos. 160599 and 160600; Court of Appeals Nos. 342836 and 342838.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

In re LOUISE K VAN SLOOTEN REVOCABLE LIVING TRUST and *In re* MARION VAN SLOOTEN TRUST, Nos. 160601 and 160602; COURT OF APPEALS Nos. 345908 and 345909.

FORNER V DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, No. 160607; Court of Appeals No. 345617.

PEOPLE V MCNEES, No. 160611; Court of Appeals No. 349518.

ASKEW V INGHAM COUNTY SHERIFF, No. 160616; Court of Appeals No. 350201.

ABDULKARIM V RONALD S LEDERMAN, MD, PLLC, No. 160620; Court of Appeals No. 341950.

PEOPLE V PHILLIP HALL, No. 160623; Court of Appeals No. 342892.

PEOPLE V WILCOX, No. 160624; Court of Appeals No. 349406.

LUONGO V DUNCHOCK, No. 160637; Court of Appeals No. 346261.

PEOPLE V DENHOF, No. 160641; Court of Appeals No. 349438.

PEOPLE V TERAH STAMPS, No. 160642; Court of Appeals No. 350693.

PEOPLE V STEINER, No. 160647; Court of Appeals No. 349771.

PEOPLE V LATELY, No. 160652; Court of Appeals No. 350469.

PEOPLE V SAMUEL CALHOUN, No. 160653; Court of Appeals No. 349723.

PEOPLE V WIREMAN, No. 160654; Court of Appeals No. 350523.

PEOPLE V NICKLEBERRY, No. 160665; Court of Appeals No. 349389.

PEOPLE V CORSER, No. 160674; Court of Appeals No. 343635.

PEOPLE V VEGA, No. 160677; Court of Appeals No. 350468.

PEOPLE V DONALD WRIGHT, No. 160681; Court of Appeals No. 350848.

- PEOPLE V FOX, No. 160687; Court of Appeals No. 349693.
- PEOPLE V WASIKOWSKI, No. 160689; Court of Appeals No. 350920.
- PEOPLE V LONG, No. 160691; Court of Appeals No. 349757.
- ABBAS V CITY OF KALAMAZOO, No. 160692; Court of Appeals No. 349893.
- PEOPLE V LARRY HARRIS, No. 160695; Court of Appeals No. 344028.
- PEOPLE V CHRISTOPHER WOOD, No. 160697; Court of Appeals No. 342900.
- PEOPLE V BETHANY, No. 160699; Court of Appeals No. 350927.
- PEOPLE V BEMIS, No. 160700; Court of Appeals No. 345714.
- PEOPLE V MONTGOMERY, No. 160710; Court of Appeals No. 342247.
- PEOPLE V ELLEDGE, No. 160711; Court of Appeals No. 342464.
- PEOPLE V DUNCAN COLE, No. 160717; Court of Appeals No. 349720.
- PEOPLE V ALPHONSO WALKER, No. 160722; Court of Appeals No. 349849.
- PEOPLE V LAMONTE JOHNSON, No. 160724; Court of Appeals No. 344168.
- GAPPY V GAPPY, No. 160725; Court of Appeals No. 342861.
- PEOPLE V CRUZ, No. 160733; Court of Appeals No. 350720.
- PEOPLE V GERMAN, No. 160739; Court of Appeals No. 346638.
- BAUER V HOUSE OF REPRESENTATIVES, No. 160744; Court of Appeals No. 346862.
- PEOPLE V ORTIZ-NIEVES, No. 160745; Court of Appeals No. 342256.
- GRIEVANCE ADMINISTRATOR V MCCARTHY, No. 160746.
- CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.
- PEOPLE V DURBIN, No. 160748; Court of Appeals No. 345148.
- PEOPLE V LARKIN, No. 160749; Court of Appeals No. 341303.
- PEOPLE V PARISIAN-EAGLE, No. 160754; Court of Appeals No. 351361.
- PEOPLE V JASON GRAHAM, No. 160758; Court of Appeals No. 350990.
- PEOPLE V JILLEENE PARKER, No. 160759; Court of Appeals No. 351192.
- PEOPLE V BEAL, No. 160760; Court of Appeals No. 350954.
- PEOPLE V TIMOTHY JONES, Nos. 160761 and 160762; Court of Appeals Nos. 344198 and 344509.
- PEOPLE V AYOB, No. 160763; Court of Appeals No. 350770.
- PEOPLE V GRICE, No. 160764; Court of Appeals No. 351264.

PEOPLE V MCGOWAN, No. 160771; Court of Appeals No. 350328.
HILLS V POST, No. 160774; Court of Appeals No. 345038.
PEOPLE V KEVIN BOWMAN, No. 160779; Court of Appeals No. 350496.
PEOPLE V TURPIN, No. 160781; Court of Appeals No. 351129.
PEOPLE V TIMOTHY BALDWIN, No. 160784; Court of Appeals No. 349925.
PEOPLE V FLORES, No. 160789; Court of Appeals No. 351384.
PEOPLE V TERRANCE SCOTT, No. 160791; Court of Appeals No. 350804.
PEOPLE V JOEVIAIR KENNEDY, No. 160793; Court of Appeals No. 344784.
PEOPLE V DARRYL JACKSON, No. 160794; Court of Appeals No. 346739.
PEOPLE V PATTEN, No. 160801; Court of Appeals No. 343798.
PEOPLE V MARTIN GRAHAM, No. 160808; Court of Appeals No. 345144.
PEOPLE V WAYNE MOORE, No. 160811; Court of Appeals No. 345674.
PEOPLE V WAIRE, No. 160812; Court of Appeals No. 344785.
PEOPLE V HENDRIX, No. 160817; Court of Appeals No. 342462.
PEOPLE V BLOND, No. 160818; Court of Appeals No. 344434.
PEOPLE V MARSHALL, No. 160820; Court of Appeals No. 351189.
PEOPLE V HEARD, No. 160821; Court of Appeals No. 351023.
HICKS V HEALY, No. 160825; Court of Appeals No. 343015.
PEOPLE V WINSTON, No. 160833; Court of Appeals No. 350766.
PEOPLE V RICKY THOMAS, No. 160837; Court of Appeals No. 343884.
PEOPLE V OSWALD WILDER, No. 160840; Court of Appeals No. 350967.
PEOPLE V LAY, No. 160841; Court of Appeals No. 345202.
PEOPLE V WILSON-BEAUFORD, No. 160848; Court of Appeals No. 351003.
PEOPLE V NORMAN, No. 160861; Court of Appeals No. 351279.
PEOPLE V ARMOUR, No. 160862; Court of Appeals No. 351353.
PEOPLE V SERGIO HARE, No. 160867; Court of Appeals No. 344440.
PEOPLE V DAVID JOHNSON, No. 160868; Court of Appeals No. 344760.
PEOPLE V STEVEN SIMMONS, No. 160874; Court of Appeals No. 342842.
PEOPLE V JIMMY GREEN, No. 160896; Court of Appeals No. 350852.
PEOPLE V TYRONE HILL, No. 160900; Court of Appeals No. 350455.

DONALDSON V DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 160933;
Court of Appeals No. 352311.

PEOPLE V MAYO, No. 160938; Court of Appeals No. 351445.

PEOPLE V RAND GOULD, No. 160950; Court of Appeals No. 350471.

PEOPLE V SPILLER, No. 160952; Court of Appeals No. 351569.

PEOPLE V GARRY JACKSON, No. 160954; Court of Appeals No. 350702.

PEOPLE V HACKER, No. 160960; Court of Appeals No. 351551.

PEOPLE V COLON, No. 160964; Court of Appeals No. 350850.

PEOPLE V CLIFTON WITHERSPOON, No. 160969; Court of Appeals No.
350503.

PEOPLE V CLIFTON WITHERSPOON, No. 160971; Court of Appeals No.
350670.

PEOPLE V LAHDIR, No. 160977; Court of Appeals No. 345452.

PEOPLE V LEACH, No. 161010; Court of Appeals No. 348608.

PEOPLE V VISNER, Nos. 161029, 161030, and 161031; Court of Appeals
Nos. 347028, 347083, and 347084.

PEOPLE V LUBERDA, No. 161100; Court of Appeals No. 351747.

Superintending Control Denied April 29, 2020:

WILLIAMS V ATTORNEY GRIEVANCE COMMISSION, No. 160690.

CAVANAGH, J., did not participate due to her prior service as a member
of the Attorney Grievance Commission.

VONTZ V ATTORNEY GRIEVANCE COMMISSION, No. 160732.

CAVANAGH, J., did not participate due to her prior service as a member
of the Attorney Grievance Commission.

CULBERTSON V ATTORNEY GRIEVANCE COMMISSION, No. 160904.

CAVANAGH, J., did not participate due to her prior service as a member
of the Attorney Grievance Commission.

KELLEY V ATTORNEY GRIEVANCE COMMISSION, No. 160932.

CAVANAGH, J., did not participate due to her prior service as a member
of the Attorney Grievance Commission.

Reconsideration Denied April 29, 2020:

LOCKARD V MAYCO INTERNATIONAL, LLC, No. 159358; Court of Appeals
No. 341808. Leave to appeal denied at 505 Mich 941.

LEAPHART V STATE OF MICHIGAN, No. 159624; Court of Appeals No. 343136. Leave to appeal denied at 505 Mich 974.

PEOPLE V RAND GOULD, No. 160142; Court of Appeals No. 347625. Leave to appeal denied at 505 Mich 946.

PEOPLE V ROBERT MARTINEZ, No. 160143; Court of Appeals No. 348399. Leave to appeal denied at 505 Mich 946.

PEOPLE V HERMAN CHEESE, No. 160144; Court of Appeals No. 347624. Leave to appeal denied at 505 Mich 976.

PEOPLE V DEMARIO SIMPSON, No. 160221; Court of Appeals No. 349076. Leave to appeal denied at 505 Mich 947.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 1, 2020:

PEOPLE V ERICK ALLEN, No. 160594; reported below: 330 Mich App 116. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether this Court's holding in *People v Idziak*, 484 Mich 549 (2009), encompasses parolees who are arrested for a new offense but are not subject to a parole detainer; if so, (2) whether that part of *Idziak's* holding was correctly decided; and (3) whether the appellant has established plain error affecting his substantial rights. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. 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.

PEOPLE V CLEOPHAS BROWN, No. 160661; reported below: 330 Mich App 223. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether: (1) in a prosecution for carrying a concealed weapon under MCL 750.227(2), the prosecutor must establish that the defendant had notice under MCL 28.428 that his concealed pistol license had been suspended or revoked; and (2) the Court of Appeals erred in determining that if notice is required, the evidence demonstrated that the defendant was served with adequate notice that he could not legally possess a concealed pistol. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the

appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. 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.

PEOPLE V GREGORY WASHINGTON, No. 160707; reported below: 329 Mich App 604. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the trial court's act of resentencing the defendant while an application for leave to appeal was pending in this Court constituted a defect in subject-matter jurisdiction; and (2) if so, whether defects in subject-matter jurisdiction can be challenged in a successive motion for relief from judgment. Compare MCR 6.502(G)(2) (only permitting a second or subsequent motion for relief from judgment if it is based on a retroactive change in the law or on a claim of new evidence) and *In re Ives*, 314 Mich 690, 696 (1946) ("The question of jurisdiction of the subject-matter may be raised at any time."). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. 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 May 1, 2020:

HIGGINS V TRAILL, No. 160193; Court of Appeals No. 343664. On order of the Court, the application for leave to appeal the July 30, 2019 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.

MARKMAN, ZAHRA, and BERNSTEIN, JJ., would direct oral argument on the application.

VIVIANO, J., did not participate due to a familial relationship with a circuit court judge involved in this case.

PEOPLE V VIRGIL SMITH, No. 160351; Court of Appeals No. 349563.

CLEMENT, J. (*concurring*). I concur in the Court's denial of leave to appeal, but I write separately to note that I do so specifically because of the interlocutory posture of this case. The Court of Appeals denied leave to appeal because plaintiff failed to show a need for *immediate* appellate review, and this Court denies leave because it is not persuaded that the question presented should *now* be reviewed. I believe Justice MARKMAN has raised a number of fair concerns, which I take very seriously. I concur in denying leave not because I disagree with his concerns, but rather because I believe the development of a trial court record will facilitate appellate review of these issues.

MARKMAN, J. (*dissenting*). I once again dissent in this matter. Defendant, a former state senator, discharged a rifle at his ex-wife's car and into the air in her presence, and the prosecutor consequently charged him with felonious assault, MCL 750.82; domestic violence, MCL 750.81(2); malicious destruction of personal property (valued at \$20,000 or more), MCL 750.377a(1)(a)(i); and possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In February 2016, the prosecutor and defendant entered into a plea agreement whereby defendant would plead guilty to malicious destruction of personal property (valued at \$20,000 or more), serve 10 months in jail, serve five years of probation, resign his position as a state senator, not "hold elective or appointed office during full pendency of probation," and comply with other miscellaneous terms that are not relevant here.

The trial court accepted the agreement and defendant pleaded guilty. However, at sentencing, the trial court *sua sponte* ruled that the resignation and "bar to office" terms of the plea agreement were unconstitutional and thus invalid. The prosecutor promptly moved to vacate the plea, explaining at the motion hearing that "our position is if the Court could not go along with it then you should allow us the opportunity to withdraw the plea because that is not what we bargained for." The trial court nonetheless refused to allow the prosecutor to withdraw from the plea agreement and denied the motion. At about the same time, defendant resigned from the state senate. The prosecutor sought leave to appeal in the Court of Appeals, challenging both the trial court's decision *sua sponte* to invalidate the two terms of the agreement and, alternatively, its refusal to vacate the plea. The Court of Appeals granted leave in August 2016. However, in April 2017, the Court of Appeals dismissed the appeal, reasoning that "[b]ecause defendant voluntarily resigned his seat and appears to have no intention of running for public office during his term of probation, we decline to address the issues regarding the voiding of the plea agreement as moot." *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2017 (Docket No. 332288), p 2. In addition, the Court of Appeals ruled that vacating the plea despite the absence of these two terms would be "fundamentally unfair." *Id.* at 3.

Within hours of the Court of Appeals' decision, defendant filed petitions for a seat on the Detroit City Council (an election that he

ultimately lost in November 2017). The prosecutor sought leave to appeal in this Court, and we remanded to the Court of Appeals as on reconsideration granted. *People v Smith*, 501 Mich 851 (2017). On remand, the Court of Appeals affirmed the trial court in all respects in a split decision. *People v Smith (On Remand)*, 321 Mich App 80 (2017), rev'd in part 502 Mich 624 (2018). Judge RIORDAN in dissent would have concluded that the challenged terms of the agreement were not unconstitutional and, alternatively, that the trial court erred by refusing to vacate the plea. *Id.* at 104-105 (RIORDAN, P.J., dissenting). The prosecutor then sought leave to appeal in this Court, and we scheduled oral argument on the application. *People v Smith*, 501 Mich 852 (2017). Ultimately, a plurality of this Court adopted the rationale of a decision of the United States Court of Appeals for the Ninth Circuit concerning “public policy,” *Davies v Grossmont Union High Sch Dist*, 930 F2d 1390 (CA 9, 1991)—what I view to be an aberrant decision in support of an unusually broad exercise of the judicial power—in holding that the bar-to-office term was unconstitutional. *People v Smith*, 502 Mich 624, 634-635 (2018) (opinion by VIVIANO, J.). In addition, a majority of this Court held that the issue concerning the resignation term was moot and that the trial court had erred in not vacating the plea, and it accordingly remanded to the trial court for further proceedings. *Id.* at 628 (opinion by VIVIANO, J.); *id.* at 648-649 (CLEMENT, J., concurring). Justice ZAHRA and myself concurred with the majority only with respect to the mootness of the resignation term and dissented with respect to the invalidity of the bar-to-office term. *Id.* at 659 (MARKMAN, C.J., concurring in part and dissenting in part).

On remand, the prosecutor offered to accept defendant’s plea to malicious destruction of personal property (valued at \$20,000 or more) and felonious assault in exchange for the dismissal of the domestic violence and felony-firearm charges. The plea offer would have also required a “probationary period” but no additional jail time. Defendant then filed a motion to dismiss the case, asserting that the prosecutor, by requiring him to plead guilty to two felonies in the plea offer, was acting in a “vindictive” manner because he had run for a seat on the Detroit City Council. The trial court held that defendant established a prima facie case of actual prosecutorial vindictiveness on the basis of the following three facts: (1) for a period of time in 2016, the prosecutor refused to engage in plea bargaining in cases pending before the trial judge involved in this case; (2) the prosecutor informed the media in the early stages of this case that her office ordinarily does not dismiss felony-firearm charges when the firearm is discharged in the course of the crime but that she supported dismissal of that charge in this case because of defendant’s mental health issues; and (3) the prosecutor was upset that the trial court refused to enforce the entirety of the original plea agreement. The trial court thus ordered an evidentiary hearing, at which the prosecutor will presumably be required to testify as to the basis of her plea negotiations in this case. The prosecutor sought leave to appeal in the Court of Appeals, which the panel denied by a 2-1 vote, *People v Smith*, unpublished order of the Court of Appeals, entered August 15, 2019 (Docket No. 349563), and now seeks leave to appeal in this Court.

“It is a violation of due process to punish a person for asserting a protected statutory or constitutional right.” *People v Ryan*, 451 Mich 30, 35 (1996). “Such punishment is referred to as prosecutorial vindictiveness. There are two types of prosecutorial vindictiveness, presumed vindictiveness and actual vindictiveness.” *Id.* “Actual vindictiveness will be found only where objective evidence of an ‘expressed hostility or threat’ suggests that the defendant was deliberately penalized for his exercise of a procedural, statutory, or constitutional right.” *Id.*, quoting *United States v Gallegos-Curiel*, 681 F2d 1164, 1168 (CA 9, 1982). As the United States Supreme Court has explained, “for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is ‘patently unconstitutional.’” *Bordenkircher v Hayes*, 434 US 357, 363 (1978), quoting *Chaffin v Stynchcombe*, 412 US 17, 32 n 20 (1973). “But in the ‘give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.” *Bordenkircher*, 434 US at 363.

As an initial matter, it is questionable whether seeking a seat on the Detroit City Council, a right that is outside of the criminal justice system, constitutes the type of a “statutory or constitutional right” that can establish the basis for a claim of prosecutorial vindictiveness. See *Maddox v Elzie*, 345 US App DC 58, 67 (2001) (“In the prosecutorial context, the doctrine precludes action by a prosecutor that is designed to penalize a defendant for invoking any legally protected right *available to a defendant during a criminal prosecution.*”) (emphasis added); *United States v Raymer*, 941 F2d 1031, 1041 (CA 10, 1991), quoting *United States v Goodwin*, 457 US 368, 384 (1982) (“The question is whether the federal prosecution was ‘a direct and unjustifiable penalty for the exercise of a procedural right’ by the defendant.”). But even more pertinently, the three facts of this case specifically addressed by the trial court do not justify the extraordinary judicial action of requiring the prosecutor to justify in open court her rationale for engaging in a particular course of plea negotiations.

First, the fact that the prosecutor had instituted a “no plea” policy in the trial judge’s courtroom for a brief period of time in 2016 bears no logical relationship, one way or the other, to the alleged vindictiveness against defendant himself. It was the trial judge’s decision *sua sponte* to invalidate two terms of the plea agreement, but not to allow the prosecutor to withdraw from the agreement, that initially led to the prosecutor’s decision to institute a no-plea policy in that courtroom; defendant was entirely a bystander and could have felt no reasonable sense of aggrievement from the no-plea policy. Possibly the prosecutor’s decision was motivated by animus toward the trial judge, or, at least as possibly, the prosecutor was genuinely, and perhaps even rightly, concerned about entering into plea agreements before a judge who would *sua sponte* void their terms but not afford the prosecutor relief in reassessing the agreements.

Second, the fact that the prosecutor informed the news media in the early stages of this case that notwithstanding her office’s usual position of retaining felony-firearm charges where factually warranted, she

supported dismissal of the felony-firearm charge here because of defendant's mental health issues, is equally as irrelevant as the first fact referenced by the trial court. "Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Bordenkircher*, 434 US at 364, quoting *Oyler v Boles*, 368 US 448, 456 (1962) (alteration in original). There is nothing to suggest that the prosecutor here applied such an unjustifiable standard in declining to immediately dismiss the felony-firearm charge after this Court's remand to the trial court in 2018. Indeed, the plea offer from the prosecutor during the second round of negotiations would itself have resulted in dismissing the felony-firearm charge, as with the first round of negotiations, if defendant had accepted the plea offer and pleaded guilty to malicious destruction of personal property (valued at \$20,000 or more) and felonious assault. The notion that the prosecutor should be "punished," or even chastised, in the instant proceedings for having earlier apprised the public that she was seeking to accommodate a defendant with mental health issues is highly peculiar, to say the least.

Third, I have little doubt that the prosecutor was both disappointed and upset when the trial court sua sponte invalidated part of the original plea agreement but refused to allow the prosecutor to withdraw from the agreement. But prosecutors are no strangers to failing to prevail on issues in trial courts, as well as before appellate courts, without thereby being compelled to testify in open court concerning how, and why, they chose to proceed in a matter after having failed to prevail on some issue. If this "fact," without more, can justify an evidentiary hearing on alleged prosecutorial vindictiveness, I discern no reason why an evidentiary hearing would not arguably be warranted in every case in which a prosecutor failed to prevail on a significant case or issue in dispute.

In any event, the relief sought by defendant in his present motion—outright dismissal of the case—is illogical. Such relief would mean that he will have been convicted of *no* criminal offenses where the import of his argument is merely that he should be able to plead guilty to only *one* offense, that to which he was originally allowed to plead guilty, malicious destruction of personal property (valued at \$20,000 or more). That is, defendant argues that because the prosecutor was vindictive in requiring him to plead guilty to two offenses in the second round of plea negotiations when he was only required to plead guilty to one offense in the first round of negotiations, he should now be able to avoid responsibility for *any* offense. But as with any alleged violation of due process, the remedy should be tailored to the error. *United States v Sarracino*, 340 F3d 1148, 1177 (CA 10, 2003) ("[E]ven a showing of actual vindictiveness does not necessarily warrant dismissal of the indictment."). Thus, for example, where the prosecutor originally charges the defendant with a misdemeanor offense and then vindictively retaliates against the defendant for exercising his appellate rights by charging

him with a felony instead, the proper remedy is not complete dismissal of the case but rather precluding the prosecutor from proceeding with the felony charge. *Blackledge v Perry*, 417 US 21, 28-29 (1974) (“We hold, therefore, that it was not constitutionally permissible for the State to respond to Perry’s invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo.”). Consequently, it is doubtful that the appropriate relief for defendant, even where he has prevailed, is to dismiss the case or direct the prosecutor to offer a plea agreement on identical or similar terms to the original plea agreement—notwithstanding that the latter agreement is now entirely devoid of the two terms that were the principal subject of controversy in the previous round of litigation.

This final observation illustrates at its core the folly of the present proceeding. The prosecutor originally agreed to allow defendant to plead guilty to one felony, malicious destruction of personal property (valued at \$20,000 or more), serve 10 months in jail, resign from the state senate, and not hold public office for a five-year period. Subsequently, after the prosecutor was unable to receive the benefit of the bar-to-office term by a divided decision of this Court, she reoffered essentially the same plea agreement to defendant but replaced the bar-to-office term with a new, second felony charge, felonious assault. And the trial court reasons that such a replacement charge constitutes “vindictiveness”—in other words, that the process by which the prosecutor seeks, as best as she can, and in light of this Court’s earlier decision, to replicate the overall public interest she believes was served by the original agreement is somehow “vindictive.”

Such reasoning is circular and would render the holding of *People v Siebert*, 450 Mich 500 (1995), largely meaningless. In *Siebert*, we held that “a prosecutor may withdraw from a plea bargain that includes a sentence agreement when the court intends to impose a sentence lower than the agreement calls for.” *Id.* at 504. But under the instant reasoning of the trial court, if the prosecutor seeks to withdraw from the agreement after the court has indicated that it will impose a less severe sentence and revert to the *status quo ante* as nearly as possible, such conduct is “vindictive.” Thus, the prosecutor is effectively compelled to acquiesce in the less severe sentence, one that he or she presumably views as inadequate or disproportionate in some manner. Yet, as the United States Court of Appeals for the Fifth Circuit has aptly and rightly explained, “a prosecutor may, without explanation, refile charges against the defendant whose bargained-for guilty plea to a lesser charge has been withdrawn or overturned on appeal, provided that an increase in the charges is within the limits set by the original indictment.” *Jordan v Epps*, 756 F3d 395, 408 (CA 5, 2014).

The trial court here, first, invalidated several terms of a plea agreement entered into between the prosecutor and defendant, an invalidation never sought by either party; and, second, ordered the prosecutor to explain in open court the rationale for her subsequent plea offer to this defendant. The prosecutor objects that the latter decision is incompatible with what perhaps constitutes the fundamental authority of the executive branch of state government. See Const 1963, art 3, § 2;

Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 684 (1972) (“For the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers.”). For the reasons set forth herein, I would not deny leave to appeal but instead would reverse the trial court’s order for an evidentiary hearing concerning prosecutorial vindictiveness and remand to that court for further proceedings.

PEOPLE V WILLIAM WILLIAMS, No. 160985; Court of Appeals No. 344212.

GREAT LAKES CAPITAL FUND FOR HOUSING LIMITED PARTNERSHIP XII V ERWIN COMPANIES, LLC, Nos. 161238 and 161239; Court of Appeals Nos. 349763 and 349931.

Summary Disposition May 6, 2020:

PEOPLE V WILLIAM SMITH, No. 160410; Court of Appeals No. 348914. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court. The circuit court erred when it held in its December 19, 2018 opinion and order that the defendant’s claim of ineffective assistance of trial counsel was previously raised and decided by the Court of Appeals. The defendant raised a different claim of ineffective assistance of trial counsel on direct appeal. On remand, the circuit court shall reconsider the defendant’s claim of ineffective assistance of trial counsel. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE V STARNES, No. 160496; Court of Appeals No. 349096. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the March 29, 2019 order of the Ingham Circuit Court, and we remand this case to the circuit court for further proceedings. The defendant’s 2017 motion was improperly recharacterized as a motion for relief from judgment. The motion for relief from judgment in this case is the defendant’s first such motion, so he is not subject to the successive-motion bar of MCR 6.502(G). On remand, pursuant to MCR 6.502(D), the circuit court shall either return the motion to the defendant or adjudicate it as his first motion for relief from judgment. The motion to appoint counsel is denied. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 6, 2020:

PEOPLE V DARRELL WILDER, No. 160339; Court of Appeals No. 327491. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the harmless-error test of *People v Lukity*, 460 Mich 484 (1999), should be refined or amended in all cases, see generally *People v Parsley*, 500 Mich 1033, 1033 (2017) (LARSEN, J., concurring), or where the question turns on the evaluation of conflicting

testimony at trial. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. 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 issue presented in this case may move the Court for permission to file briefs *amicus curiae*.

Leave to Appeal Denied May 6, 2020:

PEOPLE V ODOM, No. 159779; reported below: 327 Mich App 297.

PEOPLE V KYLE JONES, No. 160029; Court of Appeals No. 339556. On order of the Court, the application for leave to appeal the June 6, 2019 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. This order is without prejudice to the defendant's ability to seek relief from judgment pursuant to MCR 6.500 *et seq.* based on any claim relating to the trial court's prohibition of cross-examination of the victim, and any examination of the defendant's stepson, regarding the children's alleged prior sexual conduct. The Court of Appeals deemed this issue to be waived; therefore, it should not be considered to have been "decided against the defendant" under the meaning of MCR 6.508(D)(2).

PEOPLE V NICHOL, No. 160585; Court of Appeals No. 343738.

Summary Disposition May 8, 2020:

PEOPLE V KATZMAN, No. 160596; reported below: 330 Mich App 128. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals stating that the United States and Michigan Constitutions are "coextensive" with regard to protection against unreasonable searches and seizures. See *People v Slaughter*, 489 Mich 302, 311 (2011) ("This Court has ruled that the Michigan Constitution is to be construed to provide the same protection as that secured by the Fourth Amendment, *absent compelling reason to impose a different interpretation.*") (internal quotation marks and citation omitted; emphasis added); see also *Sitz v Dep't of State Police*, 443 Mich 744 (1993). In all other respects, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court.

PEOPLE V CHANDLER, No. 161265; Court of Appeals No. 353445. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the April 14, 2020 order of the Oakland Circuit Court that denied the defendant's emergency motion to modify bail. The trial court abused its discretion by failing to give adequate consideration to Administrative Order No. 2020-1 (issued March 15, 2020), which directs courts to consider the public health factors arising out of the present public health emergency to mitigate the spread of COVID-19. The record does not support the trial court's conclusory determination that the defendant is likely to fail to appear for future proceedings; nor does it establish that he poses a danger to the public if granted pretrial release. We remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction.

CAVANAGH, J. (*concurring*). I concur in the Court's order vacating the trial court's order and reversing the Court of Appeals' judgment. I agree with Justice MARKMAN that under Administrative Order 2020-1, a trial court should balance existing legal factors with public health factors arising out of the present state of emergency in making pretrial detention decisions. Here, the trial court abused its discretion in balancing those factors. Defendant filed emergency motions to reduce his bail, citing reports that numerous inmates and corrections officers at the Oakland County Jail had tested positive for COVID-19 and emphasizing his particular susceptibility to COVID-19 due to his age and a seizure disorder (noting that he had suffered a seizure in the jail in February of 2020). Counsel for defendant informed the trial court that he could not obtain medical documentation of defendant's condition because he could not visit defendant in jail to obtain the necessary releases, and he suggested that the trial court question defendant directly about his condition. The trial court denied the motion without examining defendant. The trial court concluded that defendant was a flight risk, despite the fact that defendant had no history of absconding on bond or failing to appear for court, and based only on defendant's presumed incentive to avoid punishment—an incentive present in virtually every case. When these considerations are balanced with defendant's willingness and ability to post a reasonable personal-recognizance bond and his agreement to wear a GPS tether, I believe the trial court abused its discretion in light of Administrative Order 2020-1.

MARKMAN, J. (*dissenting*). I respectfully dissent from the present order vacating the trial court's order and reversing the Court of Appeals' judgment. Because I do not believe the trial court here abused its discretion, or that the Court of Appeals erred in affirming the trial court, I would deny leave to appeal.

Defendant has been charged as a fourth-offense habitual offender with being a felon in possession of a firearm, possessing a firearm during the commission of a felony, possessing a loaded firearm in a motor vehicle, and second-offense driving while his license was suspended. Defendant has been in the Oakland County Jail since January 3, 2020, unable to post the \$25,000 cash or surety bond set by the trial court. The trial court has since denied defendant's emergency motion to reduce bail, finding "the issue of his potential flight [to be] significant" because

“he knows that he is facing a mandatory two years if he’s convicted.” The court further determined that, given his prior convictions, defendant failed to persuade the court that he would not pose a threat to public safety if released. In a split decision, the Court of Appeals denied defendant’s emergency motion to review bail.

The majority concludes that the “trial court abused its discretion by failing to give adequate consideration to Administrative Order No. 2020-1 (issued March 15, 2020),” which directs courts to “take into careful consideration public health factors arising out of the present state of emergency . . . in making pretrial release decisions[.]” I disagree. The trial court here *did* specifically consider such factors and correctly observed that defendant did not present any evidence that he is particularly vulnerable to COVID-19. Rather, defendant summarily asserts that he suffers from seizures, but he has presented neither evidence in support of this assertion nor evidence explaining why any such seizures would render him more vulnerable to COVID-19.

The majority also concludes that the “record does not support the trial court’s conclusory determination that the defendant is likely to fail to appear for future proceedings; nor does it establish that he poses a danger to the public if granted pretrial release.” Again, I disagree. Defendant’s prior criminal history consists of stalking, fleeing and eluding, driving while under the influence of alcohol, and three counts of larceny in a building. His current charges involve him, while on probation, being in the possession of a loaded semi-automatic rifle while driving with a suspended license. Given both this habitual criminal history and the gravity of the present charges, I cannot agree that the trial court abused its discretion in finding either that defendant poses a danger to the community or that he poses a flight risk. It is not the purpose of Administrative Order No. 2020-1 to preclude the consideration of factors already long extant in our law to maintain public safety, but to require that consideration *also* be given to factors that are relevant to the present public health emergency. Such an assessment has been undertaken by the trial court and, in my judgment, it has not abused its discretion in so doing.

Where Administrative Order 2020-1 specifies that, “[d]uring the state of emergency, trial courts should be mindful that taking reasonable steps to protect the public is more important than strict adherence to normal operating procedures or time guidelines standards,” I do not understand the order to mean: (a) that trial courts are precluded in their pretrial release decisions from taking into account existing legal factors (e.g., risk to public safety and risk of flight) that are designed to “protect the public”; (b) that it constitutes an “abuse of discretion” by the trial court to balance existing factors, *required to be considered under law*, with newly added factors, *“urged” to be considered under an administrative order*; or (c) that “protection of the public” does not reasonably encompass the safeguarding of persons, not only who are incarcerated, but also persons who are *not* incarcerated (i.e., witnesses and members of the public) from the criminal conduct of persons being considered for pretrial release.

For these reasons, I would deny leave to appeal.

ZAHRA, J., joins the statement of MARKMAN, J.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 8, 2020:

SAUGATUCK DUNES COASTAL ALLIANCE V SAUGATUCK TOWNSHIP, Nos. 160358 and 160359; Court of Appeals Nos. 342588 and 346677. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the “party aggrieved” standard of MCL 125.3605 requires a party to show some special damages not common to other property owners similarly situated, see *Olsen v Jude & Reed, LLC*, 325 Mich App 170 (2018); (2) whether the meaning of “person aggrieved” in MCL 125.3604(1) differs from that of “party aggrieved” in MCL 125.3605, and if so what standard applies; and (3) whether the Court of Appeals erred in affirming the Allegan Circuit Court’s dismissal of appellant’s appeals from the decisions of the Saugatuck Township Zoning Board of Appeals. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file supplemental briefs within 21 days of being served with the appellant’s brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the latter of the appellees’ briefs. The parties should not submit mere restatements of their application papers.

The Environmental Law & Policy Center and National Trust for Historic Preservation in the United States are 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.

DEPARTMENT OF TALENT & ECONOMIC DEVELOPMENT/UNEMPLOYMENT INSURANCE AGENCY V GREAT OAKS COUNTRY CLUB, INC, No. 160638; reported below: 329 Mich App 581. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals correctly determined that it could not satisfy MCL 421.13m(2)(a)(i)(A) by reporting no employees or no payroll for the eight quarters before January 1, 2014. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant’s brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee’s brief. The parties should not submit mere restatements of their application papers.

The Labor Law and Business Law Sections of the State Bar of Michigan, the Michigan Chamber of Commerce, the Employers Association of West Michigan, and the Small Business Association of Michigan are invited to file briefs amicus curiae. Other persons or groups

interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 8, 2020:

PEOPLE V JUAN WALKER, No. 159757; reported below: 328 Mich App 429.

MARKMAN, J. (*dissenting*). In *Lafler v Cooper*, 566 US 156, 164 (2012), the United States Supreme Court held for the first time that where a defendant rejects a plea offer from the prosecutor as a result of the “ineffective advice” of defense counsel and the defendant is later convicted at trial, he or she may be entitled to relief under *Strickland v Washington*, 466 US 668 (1984). Here, the Court of Appeals concluded “that *Lafler* did not create a new rule [of constitutional law] and that it therefore applies retroactively to this case.” *People v Walker (On Remand)*, 328 Mich App 429, 449 (2019). While I have no present position as to whether the Court of Appeals erred in this regard, for the following two reasons, I would nonetheless grant leave to appeal to consider the issue of *Lafler* retroactivity.

First, there is a difference of contemporary judicial opinion concerning the Court of Appeals’ conclusion that “[t]he *Lafler* opinion did not create a new rule—it merely determined how the *Strickland* test applied to the specific factual context concerning plea bargaining.” *Id.* at 448. While it is true that the prevailing conclusion among the federal appellate courts is that *Lafler* applies retroactively because it was simply an “application” of *Strickland* and thus did not create a new rule, see, e.g., *Gallagher v United States*, 711 F3d 315, 315 (CA 2, 2013) (“Neither *Lafler* nor [*Missouri v Frye*, 566 US 134 (2012)] announced ‘a new rule of constitutional law’: Both are applications of *Strickland*”), the Utah Supreme Court concluded to the contrary that *Lafler* “announced a new rule” because the “holding of *Lafler*—that prejudice is possible even if a defendant has received a fair trial—decides an issue neither contemplated nor addressed by *Strickland*.” *Winward v Utah*, 355 P3d 1022, 1023, 1028 (Utah, 2015). See also Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U Pa J Const L 1161, 1163 (2012) (contending that *Lafler* “reflect[s] a seismic shift in Sixth Amendment jurisprudence”). In light of this difference of opinion, I believe that review of the Court of Appeals’ decision is warranted, even if this Court ultimately affirms that determination.

Second, as a substantive proposition, applying *Lafler* retroactively will result in the unavailability of a considerable amount of testimony and recollections from defense counsel of plea discussions occurring many years earlier, precisely because there is disagreement whether *Strickland* was viewed as foreshadowing the rule in *Lafler* and, as a result, relatively few attorneys prior to *Lafler* may have anticipated that their recollections in this regard might be of future constitutional consequence. In the instant case, for example, defendant was found guilty at his 2001 trial of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). He now asserts that defense

counsel never conveyed a plea offer to him prior to trial in which he would have been allowed to plead guilty to second-degree murder, MCL 750.317, and felony-firearm. And at the 2015 evidentiary hearing that followed, defense counsel testified—not unreasonably, in my judgment—that he had no memory as to whether he had conveyed the plea offer 14 years earlier. While this Court at an earlier stage of this case concluded that the trial court did not clearly err “in finding a reasonable probability that the defendant would have accepted the plea offer,” *People v Walker*, 503 Mich 908, 908 (2018), it strikes me as a questionable outcome that a convicted person would obtain relief (restoration of the original plea offer) despite the absence—an altogether predictable absence—of a critical element of the record, defense counsel’s recall after 14 years as to whether, and when, he or she presented a plea offer to a defendant.

It seems likely that more such cases will come before this Court, in which memories will have been long-lost; in which attorney records will have been long-discarded; in which attorneys will have passed; in which conversations once seen as mundane will have been transformed into critical determinants of which long-settled convictions must be revised and rewritten; and in which relevant evidence will largely be derived from the unsubstantiated recollections of long-incarcerated criminal offenders. For these reasons, I would grant leave to appeal to address whether the Court of Appeals properly concluded that *Lafler* applies retroactively. In my judgment, this is a jurisprudentially significant issue with far-reaching constitutional and practical implications and it deserves our careful review.

ZAHRA, J., joins the statement of MARKMAN, J.

PEOPLE V FAUBERT, No. 161255; Court of Appeals No. 350706.

PEOPLE V MICHAEL JACKSON, No. 161264; Court of Appeals No. 345912.

Summary Disposition May 13, 2020:

PEOPLE V DAVID BARBER, No. 161277; Court of Appeals No. 352361. On order of the Court, the motion for immediate consideration is granted. The application for leave to appeal the April 28, 2020 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the April 17, 2020 order of the Antrim Circuit Court denying the defendant’s emergency motion for bond pending appeal. It is undisputed that MCL 770.9a(2) applies to the defendant’s motion. In addition, under Administrative Order No. 2020-1 (issued March 15, 2020), “[d]uring the state of emergency, trial courts should be mindful that taking reasonable steps to protect the public is more important than strict adherence to normal operating procedures” The trial court abused its discretion in its consideration of the existing statutory factors along with the public health factors arising out of the present state of emergency. The trial court did not address the first factor under MCL 770.9a(2)(a), and it is not obvious from the record that the defendant poses a danger to others. While the

trial court considered MCL 770.9a(2)(b), its conclusory determination that the defendant's appeal does not raise a substantial question of law or fact failed to consider the timing of the defendant's emergency motion and that the plain language of the statute does not require a showing of success on appeal. Finally, the trial court clearly erred in its factual determinations regarding the public health emergency. Contrary to the trial court's statements, there are many indications that incarcerated individuals are at a greater risk of COVID-19 infection. See, e.g., Executive Order 2020-62 (issued April 26, 2020) (directing the implementation of COVID-19 protocols to "provide essential protections to vulnerable Michiganders who work at or are incarcerated in prisons, county jails, local lockups, and juvenile detention centers across the state"). Moreover, the trial court clearly erred by failing to adequately consider the defendant's documented health conditions. Accordingly, we remand this case to the Antrim Circuit Court for reconsideration of the defendant's motion in light of this order and the defendant's current medical condition. We do not retain jurisdiction.

Summary Disposition May 15, 2020:

PEOPLE V SIEGEL, No. 160153; Court of Appeals No. 348111. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of: (1) whether the defendant knew or had reason to know the video he posted on Facebook "could cause 2 or more separate noncontinuous acts of 'unconsented contact' with the victim," see MCL 750.411s(1)(a), see also MCL 750.411s(8)(j) (defining "unconsented contact"); *Buchanan v Crisler*, 323 Mich App 163, 179-181 (2018) (providing examples of conduct typically supporting cyberstalking convictions under MCL 750.411s); and (2) if the defendant did not know or have reason to know that posting the video could cause two or more separate "unconsented contacts" with the victim, whether the defendant can obtain relief under MCR 6.500 *et seq.* 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 May 15, 2020:

PEOPLE V McFARLANE, No. 158259; reported below: 325 Mich App 507. On March 4, 2020, the Court heard oral argument on the application for leave to appeal the June 19, 2018 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.

MARKMAN, J. (*concurring*). The Court of Appeals concluded that the trial court plainly erred when, in a trial involving alleged child abuse, it allowed the prosecutor's expert witness to testify regarding the diagnosis of "abusive head trauma"—a medical diagnosis accepted by the American Academy of Pediatrics—and "definite pediatric physical

abuse,” a term the expert used interchangeably with “abusive head trauma.” *People v McFarlane*, 325 Mich App 507, 517, 520 (2018). In the judgment of the Court of Appeals, this diagnosis “[went] too far” by “implicat[ing] the defendant’s intent or knowledge when performing the act that caused the head trauma.” *Id.* at 523. That said, the Court of Appeals affirmed defendant’s conviction because the error did not affect his substantial rights. *Id.* at 526-527. While I concur with this Court’s order denying leave to appeal because the Court of Appeals, in my judgment, reached the correct result, I write separately to express why there was no “error” in the first place concerning the admission of the expert’s testimony.

Recently, this Court explained that “an examining physician, if qualified by experience and training relative to treatment of sexual assault complainants, can opine with respect to whether a complainant ha[s] been sexually assaulted when the opinion is based on physical findings and the complainant’s medical history.” *People v Thorpe*, 504 Mich 230, 255 (2019), citing *People v Smith*, 425 Mich 98, 110-112 (1986) (emphasis omitted). In *People v Harbison*, which was decided as a companion case to *Thorpe*, the prosecutor’s expert diagnosed the complainant with “‘probable pediatric sexual abuse.’” *Thorpe*, 425 Mich at 235. We held that this diagnosis was inadmissible at trial because it was *not* based on physical findings, but rather on “what the victim . . . told the physician.” *Id.* at 261-262 (quotation marks and citation omitted). Thus, in *Harbison*, the trial court plainly erred by admitting the diagnosis “because such testimony vouches for the complainant’s veracity and improperly interferes with the role of the jury.” *Id.* at 235. However, what was pointedly *not* asserted was that mere reference to a medical condition described as being the product of “*abuse*” “invades the province of the jury.”

In the instant case, unlike in *Harbison*, the expert’s diagnosis of “abusive head trauma,” or “definite pediatric physical abuse,” was in accord with *Harbison* because she based her findings entirely on a personal physical examination of the infant, as well as the infant’s full medical history. Specifically, she testified that she had conducted a thorough physical examination; reviewed the medical history, including X-rays, CT scans, MRIs, and lab reports; and had ordered further testing. After consideration of all the clinical facts, the expert provided what is widely accepted within the medical community to constitute a proper and legitimate medical diagnosis. She did not vouch for the veracity of the infant victim, she did not state or otherwise suggest who specifically caused the injuries, and she acknowledged that she could not opine as to precisely how the victim sustained her injuries. And as a result, the expert did not pass judgment on defendant’s guilt or otherwise invade the province of the jury in any way similar to the expert in *Harbison*. Thus, I do not believe the trial court “plainly erred,” or erred at all, by allowing the expert to testify concerning the diagnosis of medical harm suffered by the victim.

The Court’s denial of leave is ambiguous, and therein lies the problem. If it is the majority’s intention to adopt the Court of Appeals’ analysis that the trial court *erred* in some manner by permitting the

expert testimony, it might have been more prudent to have clearly stated so; in my judgment, the analysis of the Court of Appeals has no provenance in either *Harbison* or any other decision of this Court. However, if it is the majority's intention to conclude only that the Court of Appeals did not err by finding that the "substantial rights" of the defendant were unaffected by the expert's testimony, whether that testimony was proper or not, I again question whether it would have been more prudent to have stated this intention clearly, for the Court of Appeals' alteration of the law in a published opinion is of consequence for the prosecution of child abuse and "battered infant" cases. In agreement with the Prosecuting Attorneys Association of Michigan, I believe the Court of Appeals has introduced confusion into the realm of abusive head trauma cases by imposing upon expert witnesses seeking to testify in support of this diagnosis the obligation either to obscure a medically accurate description of the victim's condition or to run afoul of the standard of the Court of Appeals.

ZAHRA, J., joins the statement of MARKMAN, J.

CAVANAGH, J. (*concurring*). I agree with the Court of Appeals that expert testimony was erroneously admitted in this case, that the error was plain, and that the error did not affect the outcome of the trial. *People v McFarlane*, 325 Mich App 507, 518-527 (2018). I write separately to explain why the Court of Appeals decision, while not controlled by our decision in the companion cases of *People v Thorpe* and *People v Harbison*, 504 Mich 230 (2019), is nevertheless consistent with that decision and why this Court should deny leave rather than issue an opinion affirming the Court of Appeals.

The trial court in this case erred by allowing a prosecution expert to opine to the jury that the complainant had suffered "abusive head trauma" and "definite pediatric physical abuse." In *People v Smith*, 425 Mich 98, 115 (1986), we held that a physician could testify as to the results of a physical examination of a complainant in a sexual assault case, but that any opinion must be "based upon a proper factual foundation." That foundation was lacking in *Smith* because the expert's "opinion that the complainant had been sexually assaulted was based, not on any findings within the realm of his medical capabilities or expertise as an obstetrician/gynecologist, but, rather, on the emotional state of, and the history given by, the complainant." *Id.* at 112. In *Harbison*, *Thorpe's* companion case, we held that "an examining physician, if qualified by experience and training relative to treatment of sexual assault complainants, can opine with respect to whether a complainant ha[s] been sexually assaulted when the opinion is based on physical findings and the complainant's medical history." *Thorpe*, 504 Mich at 255. In both *Smith* and *Harbison*, physicians testifying as expert witnesses had opined on whether the complainant had been sexually assaulted based on the physician's opinions of the complainant's veracity, rather than physical evidence, which amounted to improper vouching for the complainant. *Smith*, 425 Mich at 112-113; *Thorpe*, 504 Mich at 262-263.

I agree with the Court of Appeals that, at least under *Smith* and *Harbison*, a physician may opine on whether physical injuries are the

result of human agency as long as that opinion is grounded in the physical findings of the examination.¹ But the terms “abusive head trauma” and “definite pediatric physical abuse” carry connotations greater than mere human agency. As the Court of Appeals explained:

The ordinary understanding of the term “abuse”—as opposed to neglect or carelessness—implies a level of willfulness and moral culpability that implicates the defendant’s intent or knowledge when performing the act that caused the head trauma. [*McFarlane*, 325 Mich App at 523.]

More than merely providing an opinion from which the jury could infer that the defendant possessed the requisite intent, the expert explicitly connected the terms to the defendant’s state of mind:

She repeatedly told the jury that KM’s injuries were “caused by definite pediatric physical abuse,” and she stated that “we know that abusive head trauma” causes these injuries because people confess to hospital staff and investigators or other family members after inflicting the injuries. She also agreed that KM had suffered previous abuse even though she was only nine weeks old. She further told the prosecutor that she was correct when the prosecutor noted that Brown looked at the totality of the circumstances before concluding that this case involved “child abuse.” [*Id.* at 524.]

The testimony as a whole went beyond the “proper factual foundation” required by *Smith* and was not based solely on the “physical findings” as required by *Harbison*.

Our decision in *Harbison* does not broadly sanction, without limitation, all expert testimony that a victim was abused as long as the expert’s opinion is based on physical findings and the complainant’s medical history. The question we decided in *Harbison* was whether the expert improperly vouched for a witness. The question the Court of Appeals decided in this case was whether the diagnostic labels “abusive head trauma” and “definite pediatric physical abuse” invade the province of the jury. *McFarlane*, 325 Mich App at 523. The Court of Appeals was correct that these diagnoses imply a level of willfulness and culpability that the jury alone is tasked to determine. *Id.* While the Court of Appeals explained that an expert opinion that trauma was inflicted or not accidental would be permissible if based on objective medical evidence, the challenged terminology “goes too far.” *Id.*

The terminology at issue here has the potential to confuse medical diagnosis with legal determination and is more prejudicial than probative in violation of MRE 403. The fact that the medical community has decided to use certain terminology for a diagnosis does not relieve the trial court of its obligation to ensure that overly prejudicial testimony is not admitted. Even the Prosecuting Attorneys Association of Michigan

¹ Any such opinion would of course be subject to challenge under MRE 702 and *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993).

admits that this terminology presents a risk of prejudice and juror confusion, offering a proposed jury instruction to lessen this risk. In this child abuse trial, where the diagnoses at issue suggested that the expert could and did determine that the defendant acted knowingly or intentionally and was criminally responsible for child abuse, the expert's testimony was admitted in error.

Further, I agree with the Court of Appeals that the error here was plain. *People v Carines*, 460 Mich 750, 763 (1999). As we said in *Harbison*, “[o]ur decision in *Smith* was unanimous and has never been called into question. *Smith* provides a very straightforward bright-line test that trial courts can readily observe.” *Thorpe*, 504 Mich at 262. But I also agree with the Court of Appeals that the error did not “affect[] the outcome of the lower court proceedings,” *Carines*, 460 Mich at 763, for the reasons the court discussed, *McFarlane*, 325 Mich App at 525-527.

I appreciate Justice MARKMAN's concern that our resolution of this case could create ambiguity. If the Court of Appeals had erred on its substantive determination as to the admissibility of the expert testimony, I agree that this Court's role would have been to clarify the state of the law. But, as explained earlier, I believe the Court of Appeals opinion is correct. Because the opinion below is published, it has precedential effect. MCR 7.215(C)(2). Consequently, I do not see an ambiguity that needs to be clarified.

MCCORMACK, C.J., joins the statement of CAVANAGH, J.

LINGENFELTER V FARM BUREAU GENERAL INSURANCE COMPANY, No. 159878; Court of Appeals No. 343292.

CAVANAGH, J. (*dissenting*). I respectfully dissent from this Court's order denying plaintiff's application for leave to appeal.

On May 6, 2016, plaintiff was riding in the front passenger seat of her fiancé's vehicle. Defendant ran a red light and struck the vehicle on the front passenger side, causing significant damage to the vehicle and deploying its airbags. There is no dispute that defendant caused the accident. Plaintiff, a retiree in her mid-70s, was taken by ambulance to the hospital where she was summarily discharged after CT scans and x-rays did not show any fractures or bleeding. However, plaintiff contends that the accident caused injuries to her right shoulder, neck, and back, as well as headaches and radiating pain.

Plaintiff filed a claim for first-party personal protection insurance benefits with Farm Bureau Insurance Company and a third-party negligence claim against defendant. At issue in this appeal is only plaintiff's third-party negligence claim. The trial court granted defendant summary disposition pursuant to MCR 2.116(C)(10), finding that plaintiff did not sustain an objectively manifested impairment that affected her general ability to lead her normal life. Plaintiff appealed, and the Court of Appeals majority affirmed over one judge's dissent.

A motion under MCR 2.116(C)(10) is properly granted where there is no genuine issue of material fact. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019). “A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.” *Id.* (quotation marks and citation omitted). The evidence must be

viewed in a light most favorable to the nonmoving party. *Id.* This Court reviews a trial court's decision on a motion for summary disposition de novo. *Id.* at 159.

Michigan's no-fault act, MCL 500.3101 *et seq.*, limits a defendant's tort liability for noneconomic damages resulting from a motor vehicle accident except where the "injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). Plaintiff alleges that as a result of the accident caused by defendant she has suffered serious impairment of body function and, therefore, is entitled to recover noneconomic damages. At the relevant times in this case, the no-fault act defined "serious impairment of body function" as an (1) "objectively manifested impairment," (2) "of an important body function," (3) "that affects the person's general ability to lead his or her normal life." MCL 500.3135(5) as amended by 2012 PA 158; see also *McCormick v Carrier*, 487 Mich 180, 195 (2010).¹

In this case, the trial court concluded that there was no genuine issue of material fact concerning the first and third prong of the "serious impairment of a body function" definition, and the Court of Appeals majority agreed. The sticking point seemed to be that before the accident plaintiff had an extensive history of medical problems. Notably, however, the aggravation of a preexisting condition can constitute a compensable injury under the no-fault act. *Fisher v Blankenship*, 286 Mich App 54, 63 (2009). In my opinion, preexisting conditions or not, viewed in a light most favorable to plaintiff, there was a question of fact concerning whether plaintiff suffered an objectively manifested impairment that affected her ability to lead her normal life.

As to the first prong, an "objectively manifested" impairment is one that is "evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function." *McCormick*, 487 Mich at 196. In essence, for a plaintiff to make this showing, he or she must present evidence establishing a physical basis for subjective complaints of pain. *Id.* at 198. Such a showing will generally, but not always, require medical documentation. *Id.*

Plaintiff did produce medical documentation of an objectively manifested impairment. This included an "Attending Physician's Report" authored by Dr. Rodney Gilreath, diagnosing plaintiff with traumatic injury to multiple areas, including her back and extremities.² The report

¹ MCL 500.3135(5) has recently been amended to expressly incorporate *McCormick's* interpretation of all three components of this definition. See 2019 PAs 21 and 22. That amendment went into effect on June 11, 2019, after the lower courts rendered their decisions. Accordingly, *McCormick* is the controlling authority in this case rather than the current version of MCL 500.3135(5).

² The Court of Appeals majority viewed this evidence as suspect, stating that it "contradicted" Dr. Gilreath's prior, postaccident diagnosis of plaintiff's back pain as "chronic." *Lingenfelter v Farm Bureau Gen Ins Co*, unpublished opinion of the Court of Appeals, issued May 23, 2019

indicates that the injuries were a result of the accident. It acknowledges plaintiff's past surgery, but indicates an increase in pain since the accident. Additionally, plaintiff presented the trial court with various imaging studies, indicating that she has objectively manifested medical conditions. While defendant provided evidence suggesting that plaintiff's injuries existed prior to the accident, "[a] trial court may not weigh evidence when ruling on a summary disposition motion . . ." *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 512 (2016). I would conclude that plaintiff's medical documentation was sufficient to create a question of material fact.

In regard to the third prong, an impairment "affects a person's ability to lead her normal life" if it has "an influence on some of the person's capacity to live in his or her normal manner of living." *McCormick*, 487 Mich at 202. This is a subjective inquiry that is person- and fact-specific and requires a comparison of the preincident and postincident life of the plaintiff. *Id.* The plaintiff does not have to show that he or she has actually ceased a preincident activity or lifestyle element, but must only show that his or her general *ability* to do so was affected. *Id.* Moreover, it is the person's ability to lead his or her normal life that is at the center of the inquiry, not that the actual manner of life has been affected. *Id.* Finally, there is no "express temporal requirement as to how long an impairment must last" after the accident. *Id.* at 203.

Similar to my conclusion on the first prong, I believe that the evidence presented by plaintiff also establishes a question of fact regarding whether any alleged impairment affected plaintiff's ability to lead her normal life. For example, plaintiff testified that before the accident she could walk two *miles* per day, but now she can only walk two *blocks*. She said that she can no longer perform housework. She stated that she has trouble sleeping because certain positions are uncomfortable as a result of her injuries. Some may view these limitations as a *de minimis* change in plaintiff's normal life, but given that the inquiry is subjective and centers on plaintiff's ability to live her normal life, a retiree in her late 70s with preexisting health problems might not.³ In my opinion, this was another question of fact properly left for the jury to resolve.

All that being said, I believe that plaintiff has pleaded sufficient facts to avoid summary disposition in regard to the three-prong test of

(Docket No. 343292), p 5. In other words, the majority seems to have concluded that Dr. Gilreath was not credible; however, "[t]he court is not permitted to assess credibility" when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161 (1994).

³ I also note that the panel majority cited *McDaniel v Hemker*, 268 Mich App 269, 282 (2005), for the proposition that "[s]elf-imposed restrictions based on real or perceived pain do not establish the extent of any residual impairment." *Lingenfelter*, unpub op at 3. I find this proposition highly suspect in light of *McCormick's* discussion of whether an impairment affects the person's general ability to lead his or her normal life. *McCormick*, 487 Mich at 200-203.

McCormick, and I would therefore vacate the Court of Appeals' judgment and remand to the trial court to consider whether defendant was both the factual and legal cause of plaintiff's injuries. See *Ray v Swager*, 501 Mich 52, 64 (2017).

BERNSTEIN, J., joins the statement of CAVANAGH, J.

PEOPLE V BAZZI, No. 159989; Court of Appeals No. 347765.

CAVANAGH, J. (*dissenting*). I respectfully dissent from this Court's order denying defendant's application for leave to appeal because defendant presented sufficient evidence to warrant a remand for a *Ginther*¹ hearing on his claim of ineffective assistance of counsel.

In 2013, defendant was convicted after a jury trial of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); and two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), from charges stemming from the sexual abuse of his niece. His conviction was affirmed on appeal, and this Court denied his application for leave to appeal. *People v Bazzi*, 499 Mich 928 (2016). In 2018, defendant filed his first motion for relief from judgment. The trial court denied the motion, and the Court of Appeals denied defendant's application for leave to appeal. Defendant now seeks leave to appeal in this Court.

In his motion for relief from judgment, defendant contended, among other things, that his attorneys were ineffective for failing to request an interpreter on his behalf. Defendant asserts that his primary language is Arabic and that he did not fully understand most of the trial proceedings, including plea negotiations. See *People v Gonzalez-Raymundo*, 308 Mich App 175, 188 (2014) ("The lack of simultaneous translation implicated defendant's rights to due process of law guaranteed by the United States and Michigan Constitutions.").

In support, defendant submitted four affidavits, the results of an English proficiency test, and the results of a polygraph examination. Two of the affidavits are from defendant's two trial attorneys; one of them avers that defendant's English comprehension "was very low," and the other says that defendant's English language comprehension "may have been compromised." Both state that they are not prepared to say with certainty that defendant fully understood the consequences of going to trial or his right to take the stand in his own defense. The polygraph examination results show that the examiner believed that defendant was being truthful when he responded "no" when asked whether he understood most of the trial because of language and whether his attorney thoroughly explained the prosecutor's plea offer.

This was more than sufficient to warrant a *Ginther* hearing on defendant's claim of ineffective assistance of counsel. I would remand to the trial court to hold such a hearing.

In re JONES/GILKES, MINORS, No. 161094; Court of Appeals No. 349555.

¹ *People v Ginther*, 390 Mich 436 (1973).

COMMUNITY MENTAL HEALTH PARTNERSHIP OF SOUTHEAST MICHIGAN V MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 161261; Court of Appeals No. 351236.

SHANNON V RALSTON, Nos. 161268 and 161269; Court of Appeals Nos. 350094 and 350110.

PEOPLE V ANTHONY WILLIAMS, No. 161286; Court of Appeals No. 353426.

Summary Disposition May 20, 2020:

PEOPLE V STEPHEN YOUNG, No. 159666; Court of Appeals No. 347219. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for an evidentiary hearing, to determine whether the defendant's claim of newly discovered evidence, which the defendant claims was suppressed in violation of *Brady v Maryland*, 373 US 83 (1963), entitles him to relief from judgment under MCR 6.508(D). *People v Johnson*, 502 Mich 541 (2018). We do not retain jurisdiction.

PEOPLE V DEANDRE HAYWOOD, No. 160753; Court of Appeals No. 345243. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the November 8, 2019 order of the Court of Appeals, and we remand this case to the Court of Appeals, as on reconsideration granted, for plenary consideration of the defendant's arguments, including the contention that in other cases, the Court of Appeals has remanded to the trial court for a determination whether to appoint appellate counsel for the defendant-appellee. See, e.g., *People v Skipp*, unpublished order of the Court of Appeals, issued July 11, 2018 (Docket No. 344349), *People v Adams*, unpublished order of the Court of Appeals, issued June 5, 2013 (Docket No. 316114), and *People v Nino*, unpublished order of the Court of Appeals, issued July 10, 2018 (Docket No. 344364). We do not retain jurisdiction.

PEOPLE V NINO, No. 160788; Court of Appeals No. 344364. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Haywood* (Docket No. 345243). After *Haywood* is decided, the Court of Appeals shall determine whether that opinion controls in this case and, if it does, reconsider this case in light of *Haywood*. We do not retain jurisdiction.

PEOPLE V BOYD, No. 160899; Court of Appeals No. 342166. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to consider whether appellate counsel was ineffective for failing to move the trial court for a *Ginther* hearing and trial counsel was ineffective for not calling the defendant as a witness to support a self-defense claim. On remand, the trial court shall order the State Appellate Defender Office, if feasible, to represent the defendant. The motion to expand the record is granted.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 20, 2020:

YANG V EVEREST NATIONAL INSURANCE CO, No. 160578; reported below: 329 Mich App 461. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether an insurer may cancel an insurance policy in compliance with MCL 500.3020(1)(b) by mailing a written notice of cancellation to the insured before the grounds for cancellation have occurred; and (2) whether the appellant's written notice of cancellation complied with the provision in the insurance policy that requires "at least 10 days notice by first class mail, if cancellation is for non-payment of premium." In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file supplemental briefs within 21 days of being served with the appellant's brief. The appellees shall also electronically file appendices, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the latter of the appellees' briefs. The parties should not submit mere restatements of their application papers.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

RICKS V STATE OF MICHIGAN, No. 160657; reported below: 330 Mich App 277. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred in holding that MCL 691.1755(4) applies in this case to bar the appellant from recovering wrongful conviction compensation based on a concurrent or consecutive conviction where the appellant was on parole for an earlier crime when he was wrongfully convicted, and his parole was revoked based on the wrongful conviction. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 20, 2020:

FORNER V ALLENDALE CHARTER TOWNSHIP SUPERVISOR, No. 159768; Court of Appeals No. 339072.

NYMAN V THOMSON REUTERS HOLDINGS, INC, No. 160376; reported below:
329 Mich App 539.

PEOPLE V BRACKNEY, No. 160726; Court of Appeals No. 350791.

CAVANAGH, J. (*concurring*). I concur in the Court's order denying defendant's application for leave to appeal. I write separately, however, to express that such denial is without prejudice to defendant's ability to file a motion for relief from judgment under MCR Subchapter 6.500 based on any claim relating to the issue of whether defendant was deprived of his Sixth Amendment right to the effective assistance of counsel when his trial attorney failed to file an interlocutory appeal of the trial court's order(s) denying defendant's motion to suppress evidence or negotiate a conditional plea, as well as the issue of whether appellate counsel was ineffective for not raising these issues on appeal.

PEOPLE V DON BROWN, No. 160795; Court of Appeals No. 343999.

SZEKELY V KINACHTCHOUK, No. 160807; Court of Appeals No. 344377.

In re BURGESS-EILF, MINOR, No. 160996; Court of Appeals No. 349352.

Leave to Appeal Granted May 22, 2020:

BOWMAN V ST JOHN HOSPITAL AND MEDICAL CENTER, Nos. 160291 and 160292; Court of Appeals Nos. 341640 and 341663. The parties shall address: (1) whether this Court's decision in *Solowy v Oakwood Hosp Corp*, 454 Mich 214 (1997), adopted the correct standard for application of the six-month discovery rule set forth in MCL 600.5838a(2); (2) if not, what standard the Court should adopt; and (3) whether the plaintiff in this case timely served her notice of intent and filed her complaint under MCL 600.5838a(2). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., and Michigan Health and Hospital Association are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 22, 2020:

SANDERS V TUMBLEWEED SALOON, INC, No. 158789; Court of Appeals No. 338937. On November 6, 2019, the Court heard oral argument on the application for leave to appeal the October 30, 2018 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 question presented should be reviewed by this Court.

CAVANAGH, J. (*concurring*). I concur in the denial order because I agree that the Court of Appeals majority did not commit error requiring reversal by reversing the trial court's order granting defendants summary disposition.

I write separately to address an aspect of the dramshop act, MCL 436.1801 *et seq.*, that was not specifically raised on appeal, but that I find relevant to whether plaintiffs complied with the plain language of the notice provision of that act. At the time of the appeal, MCL 436.1801(4) stated:¹

An action under this section shall be instituted within 2 years after the injury or death. A plaintiff seeking damages under this section shall give written notice to all defendants within 120 days *after entering an attorney-client relationship for the purpose of pursuing a claim under this section.* Failure to give written notice within the time specified shall be grounds for dismissal of a claim as to any defendants that did not receive that notice unless sufficient information for determining that a retail licensee might be liable under this section was not known and could not reasonably have been known within the 120 days. [Emphasis added.]

I believe plaintiffs satisfied this notice requirement as a matter of law. The plain language of the statute simply provides that notice must be given within 120 days of the formation of “an” attorney-client relationship for the purpose of pursuing a claim under the dramshop statute. In this case, there is no dispute that the complaint was filed within the two-year statute of limitations and that plaintiffs provided the requisite notice of the claim to defendants within 120 days of the formation of “an” attorney-client relationship with attorney Matthew Hanley.²

The statutory requirement for notice within 120 days of the formation of “an” attorney-client relationship does not specify that it must be the *first* attorney-client relationship. The use of the indefinite article “an” indicates that the statute does not refer to a particular attorney-client relationship, but rather any attorney-client relationship. See *Massey v Mandell*, 462 Mich 375, 382 n 5 (2000) (“‘The’ and ‘a’ have different meanings. ‘The’ is defined as ‘definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to

¹ The notice provision of the dramshop act was amended in 2019 and is now codified at MCL 436.1801(3). See 2019 PA 131, effective November 21, 2019. The changes to the text of the provision were minor and do not affect my analysis.

² Regardless of whether the dissent or the Court of Appeals is correct with respect to whether plaintiffs formed an attorney-client relationship with attorney Samuel Meklir for purposes of pursuing a dramshop action, defendants do not dispute that the notice provided by Hanley was sufficient under the statute and was provided within 120 days after the formation of an attorney-client relationship between Hanley and plaintiffs, and that Hanley filed the instant dramshop action on plaintiffs’ behalf within the two-year statute of limitations.

the indefinite or generalizing force of the indefinite article a or an). . . .’ *Random House Webster’s College Dictionary*, p 1382.”). Admittedly, this notice requirement functions differently than most. But that is because it is not tied to an easily identifiable, date-specific event, such as the date of the event giving rise to the claim. Rather, the notice requirement is tied to an event that can occur—indeed, is likely to occur—more than once: the formation of an attorney-client relationship for the purpose of pursuing a claim under the dramshop statute. Because plaintiffs notified defendants of the claim within 120 days of the formation of an attorney-client relationship, following which plaintiffs subsequently filed the instant claim, I believe the requirements of MCL 436.1801(4) were met.

The dissent points out that MCL 436.1801(4) (now MCL 436.1801(3); see 2019 PA 131) contemplates a plaintiff providing “notice” and not “notice[s]” to all defendants and that this use of the singular form of the word indicates, despite the lack of specific language, that the requisite notice must follow the formation of the *first* attorney-client relationship. This argument ignores the fact that, under MCL 8.3b, the singular can be read to include the plural (“Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number.”). See also MCR 1.107 (“Words used in the singular also apply to the plural, where appropriate.”) In addition, MCL 436.1801(4) requires that notice be given to “all” defendants, further indicating that the statute contemplates the possibility of more than a single notice.

The dissent further argues that the *context* in which “an attorney-client relationship” is used supports the interpretation of a singular notice and the formation of a singular attorney-client relationship. Specifically, the dissent argues that, construed together, the statute’s requirement that notice be given within 120 days of forming an attorney-client relationship and its provision that failure to provide that notice within that time period “shall be grounds for dismissal of a claim as to any defendants that did not receive that notice” necessarily means that “the statute requires plaintiffs to give one written notice within 120 days after entering into the *first* attorney-client relationship for purposes of pursuing a dramshop action—irrespective of the number of relationships plaintiffs ultimately enter into thereafter.” I fail to see how these provisions, read together, support the dissent’s conclusion. Neither the fact that a plaintiff must give notice within 120 days of forming “an” attorney-client relationship nor the fact that his or her claim is subject to dismissal for failing to give “that” notice illuminates the question of whether a singular notice or a singular attorney-client relationship is contemplated by the statute. Rather, as pointed out above, the statute uses the term “an” rather than “the” or “the first” when describing “attorney-client relationship” and, so long as the notice was given within 120 days of forming an attorney-client relationship and the claim was filed after that relationship was formed, the statute, strictly speaking, was complied with.

I disagree with the dissent's conclusion that the ability to reset the notice requirement by obtaining a new attorney eliminates the 120-day notice requirement altogether and renders the failure to comply "meaningless." The 120-day requirement still exists for each attorney-client relationship formed in pursuit of a dramshop claim. If a plaintiff does not comply with the notice requirement after entering an attorney-client relationship, then any dramshop claim that is pursued as a result of that attorney-client relationship is subject to dismissal as indicated in the statute. This is a result of the language tying the notice to the formation of "an" attorney-client relationship and, regardless of whether this is a wise policy choice, the language chosen by the Legislature allows it.

ZAHRA, J. (*dissenting*). I respectfully dissent from the majority's order denying leave in this case. Instead, I would reverse the Court of Appeals judgment and reinstate the trial court's order granting summary disposition in favor of defendants.

The dispositive question presented in this case is whether plaintiffs entered into an attorney-client relationship with attorney Sam Meklir. The trial court dismissed plaintiffs' claims, finding that Meklir and plaintiffs had an attorney-client relationship and that plaintiffs' notice under the dramshop act, MCL 436.1801 *et seq.*, was insufficient. A split panel of the Court of Appeals reversed. The majority concluded that there was "a genuine question of fact regarding the very existence of a relationship, if any, between plaintiffs and Meklir."¹ The dissenting judge, on the other hand, concluded that no material facts were in dispute and that "reasonable minds could not differ regarding the existence or the scope of the parties' attorney-client relationship."² I agree with the dissenting judge from the Court of Appeals.

I. THE UNCONTROVERTED AND MATERIAL FACTS

Plaintiffs, David and Heather Sanders, traveled from their home in northern Michigan to consult with attorney Sam Meklir about the injuries sustained by David after being attacked by two intoxicated men who had consumed alcohol at Chauncey's Pub and Tumbleweed Saloon, Inc. (defendants). Plaintiffs shared with Meklir pertinent information about the events that occurred December 2, 2014, the night David was assaulted. Plaintiffs looked to Meklir to "get things going" regarding their potential claims. After consulting with Meklir, plaintiffs believed that they had a cause of action. However, because their lawsuit needed to be filed in northern Michigan, Meklir, whose office is in Southfield, Michigan, informed plaintiffs he would not be the attorney who would litigate their claims. Meklir thereafter referred plaintiffs to their current attorney, Matthew Hanley, who practices in Traverse City,

¹ *Sanders v Tumbleweed Saloon, Inc*, unpublished per curiam opinion of the Court of Appeals, issued October 30, 2018 (Docket No. 338937), p 7.

² *Id.* at 1 (GLEICHER, J., dissenting).

Michigan. Also, after consulting with plaintiffs, Meklir sent the following letter to defendant Tumbleweed on February 3, 2015:

Please be advised that I represent Mr. David Sanders as a result of injuries he sustained while at the Highway Bar³ which occurred on December 2, 2014.

I understand that you have a videotaping system that would have recorded the activities, which occurred and during which, Mr. Sanders was injured.

We believe that the video evidence, which is in your possession, would be critically important.

We would ask that the tapes, discs, or digital storing device the events are kept on, be preserved and not subject to spoliation.

Our firm would be willing to view the information at your convenience.

I thank you in advance for your cooperation.

On November 30, 2015, Hanley also sent a letter to Tumbleweed. Hanley's correspondence purported to provide notice required under the dramshop act. Thereafter, Hanley filed a dramshop action on behalf of plaintiffs in Montmorency County.

II. ANALYSIS

The notice provision of Michigan's dramshop act requires plaintiffs to "give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a claim under this section."⁴ Failure to give such notice within the 120 days specified is grounds for dismissal.⁵ The parties agree that if plaintiffs entered into an attorney-client relationship with Meklir for purposes of pursuing a dramshop claim, plaintiffs' claims must be dismissed for failure to comply with the notice provisions of the dramshop act.

"The relation of attorney and client is one of agency."⁶ "Whether in any case an attorney is professionally employed depends on the relations and mutual understanding of the parties, on what was said and done, and all the facts and circumstances of the particular undertaking."⁷ The Court of Appeals majority needlessly looked outside Michigan

³ Tumbleweed is also known as the "Highway Bar" and the "Hi-Way." Further, David was actually injured at Chauncey's Pub, not Tumbleweed.

⁴ MCL 436.1801(4). The Legislature recently amended MCL 436.1801, moving the notice provision at issue to MCL 436.1801(3). See 2019 PA 131. This statement quotes the preamendment version of the statute.

⁵ *Id.*

⁶ *Fletcher v Bd of Ed of Sch Dist Fractional No 5*, 323 Mich 343, 348 (1948) (quotation marks and citation omitted).

⁷ *Case v Ranney*, 174 Mich 673, 682 (1913).

for authority regarding the creation of an attorney-client relationship. This Court has clearly stated that the attorney-client relationship “is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession.”⁸ “The rendering of legal advice and legal services by the attorney and the client’s reliance on that advice or those services is the benchmark of an attorney-client relationship.”⁹

Plaintiffs and Meklir entered into an attorney-client relationship for the purpose of pursuing a dramshop claim when they met in Meklir’s Southfield office, sometime before February 3, 2015, the date of Meklir’s correspondence to Tumbleweed. Plaintiffs consulted with Meklir in his capacity as a personal injury attorney to obtain legal advice and services. They confided in Meklir as an attorney, discussing the entire incident with him. Plaintiffs relied on Meklir to guide them on the best course of action going forward.

Plaintiffs’ contention that no attorney-client relationship existed because they did not *retain* Meklir as their attorney is not pertinent. No retainer agreement or formalized documentation is required to establish an attorney-client relationship.¹⁰ In fact, MCL 436.1801(4) does not require a plaintiff to formally retain an attorney to trigger the 120-day notice requirement.¹¹ A plain reading of MCL 436.1801(4) demonstrates the Legislature’s intent to require notice under a wider range of circumstances, including where, as here, formal retention of an attorney does not occur.¹² Plaintiffs drove from their home in northern Michigan to Meklir’s office in Southfield to consult with Meklir in his professional capacity as a personal injury attorney. Plaintiffs sought and received legal advice on how best to pursue their claims. This evidences an attorney-client relationship.¹³

⁸ *Macomb Co Taxpayers Ass’n v L’Anse Creuse Pub Sch*, 455 Mich 1, 11 (1997) (quotation marks and citation omitted).

⁹ *Id.*

¹⁰ *Id.*

¹¹ MCL 436.1801(4) (requiring a claimant to send notice “within 120 days after *entering* an attorney-client relationship for the purpose of pursuing” a dramshop claim, not 120 days after *retaining* an attorney to pursue that claim) (emphasis added).

¹² See *Johnson v Pastoriza*, 491 Mich 417, 436 (2012) (“We must give effect to the Legislature’s intent, and the best indicator of the Legislature’s intent is the words used. We must give every word its plain and ordinary meaning If the language is plain and unambiguous, then judicial construction is neither necessary nor permitted.”).

¹³ See *Macomb Co Taxpayers*, 455 Mich at 11; see also *Grace v Ctr for Auto Safety*, 72 F3d 1236, 1242 (CA 6, 1996) (“In determining whether an attorney-client relationship exists, . . . the focus is on the *client’s* subjective belief that he is consulting a lawyer in the lawyer’s profes-

Meklr's letter is a critical piece of evidence, but not because it establishes, by itself, the creation of an attorney-client relationship. Rather, the letter serves as a memorialization of what occurred during plaintiffs' consultation with Meklr in that it signifies that plaintiffs sought and received legal advice and services from Meklr in his capacity as a personal injury attorney.¹⁴ The letter demonstrates that Meklr learned the following information during his consultation with plaintiffs: (1) David sustained injuries, (2) where and when David sustained those injuries (purportedly at the Highway Bar on December 2, 2014), and (3) there was a videorecording system that might have recorded the incident. Meklr's focus on the bar also establishes that plaintiffs' likely cause of action was an action under the dramshop act. An attorney-client relationship may be implied from the conduct of the parties,¹⁵ and here, plaintiffs' conduct—as evidenced by Meklr's letter—demonstrates that plaintiffs entered into an attorney-client relationship with Meklr for the purpose of pursuing a dramshop claim.

Accepting as true plaintiffs' claim that Meklr acted unilaterally in sending this letter, their cause of action fares no better. While an attorney-client relationship may not be established unilaterally,¹⁶ plaintiffs' attorney-client relationship with Meklr was established *before* Meklr sent the letter. The letter simply documents the existence of that relationship.

Similarly, Meklr's affidavit is not material or genuine with regard to the establishment of an attorney-client relationship. Specifically, Meklr avers that after speaking "with them regarding a potential personal injury claim," he "informed the Sanders[es] that [he] would not be taking the case or representing them." But the mere fact that plaintiffs spoke with Meklr in his professional capacity regarding a potential personal injury claim is sufficient to establish an attorney-client relationship, even if that consultation did not result in the execution of a formal retainer agreement. A genuine question of fact is not created by Meklr's attestations that he did not represent the Sanderses and only sent the letter to Tumbleweed as a "favor" to plaintiffs. "Summary disposition cannot be avoided by conclusory assertions [in an affidavit] that are at odds . . . with . . . [the] actual historical conduct of a party."¹⁷

sional capacity and his intent is to seek professional legal advice.") (quotation marks and citation omitted).

¹⁴ See *Macomb Co Taxpayers*, 455 Mich at 11.

¹⁵ *Id.*; see also *Fletcher*, 323 Mich at 348 ("Courts are governed by what the parties said and did, and not merely by their unexpressed subjective intent.").

¹⁶ *Scott v Green*, 140 Mich App 384, 400 (1985) ("[A] unilateral act is not sufficient to create an attorney-client relationship, the attorney-client relationship being based in contract."), citing *Fletcher*, 323 Mich at 348.

¹⁷ *Aetna Cas & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548 (1993).

Notwithstanding Meklir's affidavit clearly contradicting his prior assertion in the letter that he "represent[ed]" David, Meklir's admission that he sent the letter, even as a favor to plaintiffs, nevertheless proves that Meklir acted on behalf of plaintiffs in sending it.¹⁸ That is, Meklir's admission confirms that he was acting pursuant to the attorney-client relationship he formed with plaintiffs, and that relationship did not dissolve simply because Meklir told plaintiffs that he would not take the case.

Plaintiffs also rely on their deposition testimony to argue that they did not consent to an attorney-client relationship with Meklir, and their lack of knowledge that Meklir sent the letter evidences the lack of mutuality required to form that relationship. Plaintiffs' deposition testimony does not create a genuine and material question of fact. As the United States Court of Appeals for the Sixth Circuit recently stated, while citing the decision of the Michigan Court of Appeals below for support: "[I]n every case where the existence of an attorney-client relationship is in dispute, one side will say a relationship existed, while the other side will say it did not."¹⁹ Here, notwithstanding plaintiffs' conclusory assertions that they did not retain Meklir, their testimony actually supports the existence, albeit brief, of an attorney-client relationship, as they testified they met with Meklir in his capacity as an attorney to obtain legal advice and services about the injuries sustained by David.

III. RESPONSE TO CONCURRENCE

The concurrence concludes that plaintiffs complied with the 120-day notice requirement under MCL 436.1801(4) because the statute only requires notice to be given after *an* attorney-client relationship is entered and "does not specify that it must be the *first* attorney-client relationship." First, the plain language of MCL 436.1801(4) belies this interpretation. MCL 436.1801(4) contemplates a plaintiff providing "notice to all defendants." The statute does not contemplate a plaintiff providing "notice[s] to all defendants." In fact, MCL 436.1801(4) expressly states that "[f]ailure to give written notice within the time specified shall be grounds for dismissal of a claim as to any defendants

¹⁸ See *Wigfall v Detroit*, 504 Mich 330, 340 (2019) ("[I]n determining whether an agency has been created, we consider the relations of the parties as they in fact exist under their agreements or acts and note that in its broadest sense agency includes every relation in which one person acts for or represents another by his authority.") (quotation marks and citations omitted); see also *Fletcher*, 323 Mich at 348 ("An attorney at law need not be in court or preparing to go into court, to be engaged in work as an attorney. In a legal sense, an attorney at law often acts as an agent or representative.").

¹⁹ *Cohen v Jaffe Raitt Heuer and Weiss, PC*, 768 F Appx 440, 444 (CA 6, 2019), citing *Sanders*, unpub op at 4-6 (opinion of the Court).

that did not receive *that* notice . . .”²⁰ Clearly, MCL 436.1801(4) contemplates that a plaintiff must send one notice to all defendants.²¹

Further, the concurrence’s interpretation of MCL 436.1801(4) fails to take into account the *context* in which “an attorney-client relationship” is used.²² Again, MCL 436.1801(4) makes clear that plaintiffs “shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing” a dramshop action. The consequences of plaintiffs’ “[f]ailure to give written notice within the time specified shall be grounds for dismissal of a claim as to any defendants that did not receive that notice.”²³ When these two clauses are read in context with one another, the statute requires plaintiffs to give one written notice within 120 days after entering into the *first* attorney-client relationship for purposes of pursuing a dramshop action—irrespective of the number of relationships plaintiffs

²⁰ Emphasis added.

²¹ The concurrence relies on MCL 8.3b and MCR 1.107 in contending that the singular word “notice” can import the plural form of “notices.” But such construction is only permissible to the extent it does not conflict with the Legislature’s intent. See MCL 8.3 (“In the construction of the statutes of this state, the rules stated in [MCL 8.3a to 8.3w] shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature.”); MCR 1.107 (“Words used in the singular also apply to the plural, *where appropriate*.”) (emphasis added). By requiring plaintiffs to send notice to all defendants upon entering an attorney-client relationship for the purposes of pursuing a dramshop claim, and by requiring the dismissal of plaintiffs’ claim as to all defendants that did not receive *that* notice, the Legislature clearly contemplated one notice being sent to all defendants.

Further, the concurrence contends that because MCL 436.1801(4) requires notice to be given to “all” defendants, the statute contemplates the possibility that more than a single notice may be given. Obviously, copies of that single notice will have to be sent if there are multiple defendants. But that is not the same as saying the statute contemplates a notice being sent to all defendants after multiple attorney-client relationships are formed.

²² *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515 (2012) (“Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.”) (quotation marks and citation omitted); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 56 (“Of course, words are given meaning by their context . . .”).

²³ MCL 436.1801(4).

ultimately enter into thereafter.²⁴ Under the concurrence's interpretation, plaintiffs could decide for themselves when MCL 436.1801(4) applies and when it does not. That is, each time plaintiffs fail to give the requisite notice under MCL 436.1801(4), they could avoid dismissal simply by getting a new attorney to litigate their claim. This would eviscerate the 120-day notice requirement altogether and render the consequences of failing to comply with the statute meaningless.²⁵

Here, once plaintiffs and Meklir entered into an attorney-client relationship, Meklir was required to provide written notice to defendants under MCL 436.1801(4), which, at a minimum, needed to provide defendants with notice of plaintiffs' intent to pursue a dramshop action.²⁶ Meklir's letter wholly fails in this regard, as it does not apprise Tumbleweed of David's intent to pursue a dramshop action and was only addressed to Tumbleweed—not Chauncey's Pub. Accordingly, plaintiffs failed to comply with MCL 436.1801(4) after entering an attorney-client relationship with Meklir for the purpose of pursuing a dramshop claim, and as a result, their dramshop claim was properly dismissed.

²⁴ See *Langrill v Stingers Lounge*, 471 Mich 926, 926 (2004) ("Because plaintiff did not present any evidence to the contrary, there is a presumption that the attorney-client relationship she entered into with her first attorney, who filed the original complaint in this matter, included the purpose of pursuing a claim under MCL 436.1801.") (emphasis added).

²⁵ *Sweatt v Dep't of Corrections*, 468 Mich 172, 183 (2003) (opinion by MARKMAN, J.) ("It is our duty to read the statute as a whole and to avoid a construction which renders meaningless provisions that clearly were to have effect.") (quotation marks and citation omitted). The concurrence contends that "[t]he 120 day requirement still exists for each attorney-client relationship formed in pursuit of a dramshop claim," and that "[i]f a plaintiff does not comply with the notice requirement after entering an attorney-client relationship, then any dramshop claim that is pursued as a result of that attorney-client relationship is subject to dismissal . . ." The concurrence's interpretation is passing strange. This Court's "primary objective when interpreting a statute is to discern the Legislature's intent." *McCahan v Brennan*, 492 Mich 730, 736 (2012). I fail to see how interpreting MCL 436.1801(4) to allow plaintiffs unilateral authority to reset the statute's 120-day notice requirement effectuates any rational legislative purpose.

²⁶ *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 167 (2015) (noting that, while MCL 436.1801(4) does not specify what the notice must contain, when read in context, "it is patent that the written notice must, at a minimum, provide notice to the defendant of the plaintiff's intent to pursue an action under the dramshop act against the notified defendant") (quotation marks and brackets omitted).

IV. CONCLUSION

For these reasons, I agree with the circuit court and the Court of Appeals' dissenting opinion that there is no genuine dispute of material fact that Meklir and plaintiffs entered into an attorney-client relationship for the purpose of pursuing a dramshop claim some time prior to February 3, 2015. Accordingly, I would reverse the judgment of the Court of Appeals and remand to the Montmorency Circuit Court for reinstatement of summary disposition in favor of defendants.

MARKMAN, J., joins the statement of ZAHRA, J.

PEOPLE V VICTOR WILSON, No. 161222; Court of Appeals No. 351335. On order of the Court, the application for leave to appeal the February 19, 2020 order of the Court of Appeals is considered, and it is denied, because the defendant's motion for relief from judgment is prohibited by MCR 6.502(G). This denial is without prejudice to the defendant bringing a future motion for relief from judgment based on the witness recantation evidence that has not been presented to the trial court. The motions to stay and hold in abeyance, for remand, to appoint counsel and defense expert, and for bail are denied.

PEOPLE V COTTINGHAM, No. 161303; Court of Appeals No. 353329.

GREAT LAKES CAPITAL FUND FOR HOUSING LIMITED PARTNERSHIP XII V ERWIN COMPANIES, LLC, Nos. 161306 and 161307; Court of Appeals Nos. 349763 and 349931.

PEOPLE V JAMES REED, No. 161326; Court of Appeals No. 349566.

Summary Disposition May 26, 2020:

PEOPLE V SANCHEZ, No. 160032; Court of Appeals No. 343834. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Saginaw Circuit Court for the appointment of substitute appellate counsel, in light of *Halbert v Michigan*, 545 US 605 (2005). The defendant's previous appellate attorneys allowed the time limits for appellate review to expire without seeking direct review of the defendant's plea-based convictions or, alternatively, filing a motion to withdraw that met the requirements of *Anders v California*, 386 US 738, 744 (1967). On remand, substitute counsel, once appointed, may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate post-conviction motions in the circuit court, within six months of the date of the circuit court's order appointing counsel. 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. The motions to remand for evidentiary hearings are denied. We do not retain jurisdiction.

BRACY V NICHOLS, No. 160664; Court of Appeals No. 341837. On order of the Court, the application for leave to appeal the September 19, 2019

judgment of the Court of Appeals is considered. We do not disturb that part of the Court of Appeals judgment that reversed the Wayne Circuit Court's grant of summary disposition to Farmers Insurance Exchange. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment holding that summary disposition should be granted in favor of Geico Indemnity Company and we remand this case to the circuit court for further proceedings. The Court of Appeals acted prematurely in deciding issues that were not addressed by the circuit court. On remand, the circuit court may, in its discretion, allow further development of the factual record and legal arguments, including the application, if any, development of the factual record and legal arguments, including the application, if any, of *Dye v Esurance Prop & Cas Ins Co*, 504 Mich 167 (2019), before reconsidering whether to grant either party's motion for summary disposition. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should now be reviewed by this Court.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

Application for Leave to Appeal Dismissed May 26, 2020:

IW v MM, No. 161152; Court of Appeals No. 350711. On order of the Court, the motion to dismiss the application for leave to appeal the March 18, 2020 order of the Court of Appeals is considered, and it is granted. The remaining motions are denied as moot.

We conclude that the application for leave to appeal is frivolous and vexatious. MCR 7.316(C). The Respondent-Appellant is ordered to pay the Clerk of this Court \$500 within 28 days of the date of this order. We direct the Clerk of this Court not to accept any further filings from the Respondent-Appellant in any non-criminal matter until he has made the payment required by this order.

Leave to Appeal Denied May 26, 2020:

BARRIGER v BON-TON DEPARTMENT STORES, INC, No. 160028; Court of Appeals No. 339317.

PEOPLE v JOHN WILLIAMS, No. 160114; Court of Appeals No. 348131.

PEOPLE v UPSHAW, No. 160230; Court of Appeals No. 349127.

GUZALL v SEIFMAN, Nos. 160245 and 160246; Court of Appeals Nos. 344507 and 345190.

PEOPLE v WALLS, No. 160256; Court of Appeals No. 348335.

PEOPLE v KEVIN KING, No. 160262; Court of Appeals No. 348447.

In re APPLICATION OF INDIANA MICHIGAN POWER COMPANY TO INCREASE RATES, No. 160290; reported below: 329 Mich App 397.

JURCZAK V MOUNT CLEMENS INVESTMENT GROUP, LLC, No. 160301; Court of Appeals No. 348617.

PEOPLE V LYLE, No. 160416; Court of Appeals No. 349838.

NEWMAYER V BANK OF AMERICA, INC, No. 160452; Court of Appeals No. 343206.

PEOPLE V ADONIS FRYE, No. 160498; Court of Appeals No. 349310.

PEOPLE V MARKEST THOMPSON, No. 160537; Court of Appeals No. 348962.

PEOPLE V POST, No. 160545; Court of Appeals No. 350229.

PEOPLE V NELSON, No. 160554; Court of Appeals No. 350298.

WILLIAM P. FROLING REVOCABLE LIVING TRUST V PELICAN PROPERTY, LLC, No. 160561; Court of Appeals No. 342185.

PEOPLE V PATTON, No. 160571; Court of Appeals No. 341568.

PEOPLE V ROBERT HAWKINS, No. 160582; Court of Appeals No. 349202.

PEOPLE V ST ANDRE, No. 160588; Court of Appeals No. 350085.

PEOPLE V WHITFIELD, No. 160603; Court of Appeals No. 348128.

PEOPLE V KUROWICKI, No. 160656; Court of Appeals No. 343168.

DOA DOA, INC V PRIMEONE INSURANCE COMPANY, No. 160673; Court of Appeals No. 339215.

PEOPLE V FREDERICK ANDERSON, No. 160684; Court of Appeals No. 350751.

PEOPLE V GORDON DAVIS, No. 160685; Court of Appeals No. 344891.

DOERING V KOPPELBERGER, No. 160702; Court of Appeals No. 343196.

CAVANAGH, J., did not participate because of her prior involvement in this case.

HAMADY V AUTO OWNERS INSURANCE COMPANY, No. 160712; Court of Appeals No. 350216.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

GRAHAM V CAPITAL AREA TRANSPORTATION AUTHORITY, No. 160735; Court of Appeals No. 345460.

PEOPLE V SIFUENTES, No. 160765; Court of Appeals No. 350949.

IRWIN V FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 160773; Court of Appeals No. 350677.

PEOPLE V DALLAS WALKER, No. 160780; reported below: 330 Mich App 378.

- PEOPLE V JONATHON JONES, No. 160783; Court of Appeals No. 351001.
- PEOPLE V WAYNE, No. 160786; Court of Appeals No. 350150.
- PEOPLE V CORONADO, No. 160792; Court of Appeals No. 350777.
- PEOPLE V HORTON, No. 160800; Court of Appeals No. 349714.
- PEOPLE V FRED WILLIAMS, No. 160814; Court of Appeals No. 345324.
- PEOPLE V TALVEST ALLEN, No. 160816; Court of Appeals No. 344853.
- PEOPLE V BRIAN HAYWOOD, No. 160822; Court of Appeals No. 342729.
- PEOPLE V PURNELL, No. 160836; Court of Appeals No. 346649.
- PEOPLE V PLANK, Nos. 160838 and 160839; Court of Appeals Nos. 344298 and 348869.
- PEOPLE V ALBERT HAYWOOD, No. 160851; Court of Appeals No. 344797.
- PEOPLE V McCLINTON, No. 160852; Court of Appeals No. 352078.
- In re* GUARDIANSHIP OF BARBARA ANN DELBRIDGE, *In re* CONSERVATORSHIP OF BARBARA ANN DELBRIDGE, *In re* GUARDIANSHIP OF ROBERT LEE MITCHELL, and *In re* CONSERVATORSHIP OF ROBERT LEE MITCHELL, Nos. 160853, 160854, 160855, and 160856; Court of Appeals Nos. 346770, 346778, 346780, and 346781.
- MCCORMACK, C.J., did not participate because of her prior involvement in these cases.
- PEOPLE V MICHAEL BROOKS, No. 160857; Court of Appeals No. 351589.
- FLOEN V LEWIN, No. 160858; Court of Appeals No. 350477.
- PEOPLE V ARNDOLA LEWIS, No. 160875; Court of Appeals No. 342461.
- BAK V HENRY FORD MACOMB HOSPITAL CORPORATION, No. 160886; Court of Appeals No. 342483.
- BAK V HENRY FORD MACOMB HOSPITAL CORPORATION, No. 160890; Court of Appeals No. 342483.
- PEOPLE V ESQUIVEL, No. 160902; Court of Appeals No. 344832.
- PEOPLE V GOOD, No. 160910; Court of Appeals No. 351392.
- PEOPLE V DAVEAUNTA HALL, No. 160911; Court of Appeals No. 351448.
- PEOPLE V LEONARD HAYES, No. 160912; Court of Appeals No. 351363.
- PEOPLE V DAWSON, No. 160923; Court of Appeals No. 351266.
- PEOPLE V JOHN RICHARDSON, No. 160924; Court of Appeals No. 351491.
- PEOPLE V SPRINGS, No. 160925; Court of Appeals No. 344563.
- PEOPLE V GARLINGER, No. 160929; Court of Appeals No. 344679.

PEOPLE V GARZA, No. 160935; Court of Appeals No. 344870.

PEOPLE V MAGEE, No. 160951; Court of Appeals No. 344092.

PEOPLE V LESTER BELL, No. 160953; Court of Appeals No. 350195.

PEOPLE V ELMORE NICHOLS, No. 160976; Court of Appeals No. 351072.

PEOPLE V DAVID STEVENS, No. 160978; Court of Appeals No. 344795.

PEOPLE V NEAL, No. 160983; Court of Appeals No. 350673.

PEOPLE V MICHAEL GREEN, No. 160992; Court of Appeals No. 351749.

PEOPLE V KRZEMINSKI, No. 161099; Court of Appeals No. 344806.

WIMMER V MONTANO, No. 161121; Court of Appeals No. 351762.

PEOPLE V ADRIAN DAVIS, No. 161136; Court of Appeals No. 351413.

PEOPLE V JOHNATHAN BURKS, No. 161153; Court of Appeals No. 335955.

Reconsideration Denied May 26, 2020:

DKE, INC V SECURA INSURANCE COMPANY, Nos. 158988 and 158989; Court of Appeals Nos. 333497 and 337834. Leave to appeal denied at 505 Mich 969.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

MEGERIAN V UNITED SERVICES AUTOMOBILE ASSOCIATION, No. 159684; Court of Appeals No. 336483. Leave to appeal denied at 505 Mich 935.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE V JACK SMITH, No. 159733; Court of Appeals No. 347491. Leave to appeal denied at 505 Mich 974.

PEOPLE V OSWALD, No. 160017; Court of Appeals No. 349267. Leave to appeal denied at 504 Mich 1001.

PEOPLE V MICHAEL PETERSON, No. 160045; Court of Appeals No. 347080. Leave to appeal denied at 505 Mich 942.

PEOPLE V DORIAN WILLIS, No. 160063; Court of Appeals No. 347549. Leave to appeal denied at 505 Mich 975.

VIVIANO, J., did not participate because he presided over this case in the circuit court at an earlier stage of the proceedings.

PEOPLE V DEANDRE KING, No. 160069; Court of Appeals No. 349269. Leave to appeal denied at 505 Mich 871.

PEOPLE V DANNIE SMITH, No. 160089; Court of Appeals No. 348180. Leave to appeal denied at 505 Mich 975.

Summary Disposition May 27, 2020:

PEOPLE V RAMSEY, No. 160152; Court of Appeals No. 334614. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration in light of *People v Sammons*, 505 Mich 31 (2020).

PEOPLE V LEMONS, No. 160374; Court of Appeals No. 348277. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

WILSON V MEIJER GREAT LAKES LIMITED PARTNERSHIP, No. 160530; Court of Appeals No. 349078. Pursuant to MCR 7.305(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 Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 27, 2020:

MARQUARDT V UMASHANKAR, No. 160772; Court of Appeals No. 343248. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the decedent failed to give Dr. Umashankar notice as required by MCL 600.2912b, by way of notice mailed on July 20, 2009, on the ground that the notice was not addressed or directed to him. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., and Michigan Health and Hospital Association 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.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

Leave to Appeal Denied May 27, 2020:

PAGE V DOE, No. 160562; Court of Appeals No. 339777.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE V CARLSON, No. 160630; Court of Appeals No. 346234.

PEOPLE V JUSTIN SMITH, No. 160755; Court of Appeals No. 349782.

MCDADE V PROGRESSIVE INSURANCE COMPANY, No. 160864; Court of Appeals No. 345179.

Rehearing Denied May 27, 2020:

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017–2021, Nos. 158305, 158306, 158307, and 158308; reported below: 325 Mich App 207. Michigan Supreme Court opinion at 505 Mich 97.

Complaint for Superintending Control Dismissed May 28, 2020:

MONTANO V COURT OF APPEALS, No. 161233.

MONTANO V COURT OF APPEALS, No. 161281.

Motion to Waive Fees Denied May 28, 2020:

In re MONTANO, Nos. 161273 and 161274; Court of Appeals Nos. 353392 and 353410. On order of the Chief Justice, the motion for immediate consideration of the motion to waive fees, the motion to amend the application, and the motions to add issues are granted. On further order of the Chief Justice, the motion to waive fees is denied. The plaintiff-appellant shall pay the fees for the interlocutory application, the motion to amend the application filed on May 4, 2020, and the motions to add issues filed on May 6, 2020, and May 12, 2020, within 28 days of the date of this order or the application will be administratively dismissed. The motions to expedite, for stay, and for immediate consideration filed on May 4, 2020, are ordered withdrawn in accordance with the request of the plaintiff-appellant.

Summary Disposition May 29, 2020:

JEROME V CRUM, No. 159093; Court of Appeals No. 335328. On March 5, 2020, the Court heard oral argument on the application for leave to appeal the December 27, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals.

Plaintiff, Samuel Jerome, brought a tort action against defendants, Lieutenant Michael Crum and the city of Berkley. Relevant to this appeal, Mr. Jerome's action advanced a claim for gross negligence. Defendants sought summary disposition based upon both collateral estoppel and Mr. Jerome's having failed to advance evidence permitting a reasonable jury to conclude that Lieutenant Crum constituted the proximate cause of Mr. Jerome's arrest and imprisonment. The trial court granted summary disposition based upon Lieutenant Crum's

collateral-estoppel argument and Mr. Jerome appealed. In the Court of Appeals, defendants renewed both arguments in support of summary disposition. The Court of Appeals affirmed the trial court's grant of summary disposition. First, the Court of Appeals agreed with the trial court's collateral-estoppel analysis. *Jerome v Crum*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2018 (Docket No. 335328), pp 7-8. Second, as an alternative ground for affirming the grant of summary disposition, the Court of Appeals stated:

Moreover, assuming that collateral estoppel was not applicable . . . , summary disposition would be appropriate under MCR 2.116(C)(10) for lack of a genuine issue of material fact. For the reasons already outlined above, there is no evidence to show that Crum's failure to turn over the video recording of the August interview was a cause, let alone the proximate cause, of plaintiff's continued prosecution or imprisonment. Any suggestion that the prosecution would have dropped the case against plaintiff sooner if it had been aware of the tape earlier is to engage in impermissible speculation. Any reliance on the prosecution's ultimate decision to decline pursuing the case after the mistrial is misplaced because there is nothing in the record to show that the prosecution's decision was based on the existence of the videotape. Indeed, there are a host of possible reasons not related to the late production of the videotape why the prosecution could have decided to forgo a second trial, including that the witnesses perhaps testified in an unexpected way at the first trial or that the complainant perhaps simply decided that she was not going to testify or cooperate any more after having already been subjected to several interviews and having already testified in court twice. Hence, plaintiff cannot maintain his claim of gross negligence, and summary disposition is properly entered in favor of defendant. Thus, assuming the trial court erred when it granted summary disposition on plaintiff's gross negligence claim on the basis of collateral estoppel, we nonetheless affirm because summary disposition was warranted under MCR 2.116(C)(10). [Id. at 8 (emphasis added) (citation omitted).]

Thus, independent and alternative grounds supported the Court of Appeals' affirmance of the trial court's grant of summary disposition.

In his application for leave to appeal in this Court, Mr. Jerome challenges the Court of Appeals' conclusion that collateral estoppel barred his claim. Mr. Jerome, however, failed to present as an issue for review whether the Court of Appeals also erred in reaching its alternative holding that he failed to advance evidence to support the causation element of his gross-negligence claim. And neither Mr. Jerome's application for leave to appeal nor his supplemental brief following this Court's order scheduling oral argument on his application can fairly be read as challenging that aspect of the Court of Appeals' basis for affirming the grant of summary disposition. Accordingly, even if we were to conclude that collateral estoppel did not bar Mr. Jerome's claim, he has failed to place the Court of Appeals' alternative and independent

ground for affirming the trial court's grant of summary disposition before this Court. Therefore, we find it unnecessary to reach the merits of the collateral-estoppel issue and affirm the judgment of the Court of Appeals.

CAVANAGH, J. (*concurring*). I concur in the order affirming the judgment of the Court of Appeals but write separately because I believe that summary disposition of plaintiff's gross-negligence claim was proper on the ground that plaintiff failed to raise a genuine issue of material fact as to causation.

Plaintiff filed actions in both state and federal court against the city of Berkley and Lieutenant Michael Crum, the police officer who had criminally investigated plaintiff for the alleged sexual abuse of plaintiff's step-daughter, AK. The investigation resulted in criminal charges that were later dropped. Plaintiff's complaint in state court alleged unlawful arrest, false imprisonment, malicious prosecution, and gross negligence. The state district court determined that probable cause existed to bind plaintiff over on charges based on the testimony of the victim alone and did not consider any statements or testimony of Lieutenant Crum. Further, the federal district and appellate courts determined that any omissions or inconsistent statements by Lieutenant Crum, and his failure to disclose a videotape of an interview with AK, were not material to the existence of probable cause. *Jerome v Crum*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 25, 2016 (Case No. 15-12302); 2016 WL 4475010, p *4 ("Any inconsistencies between [AK's] accounts of the alleged abuse were known to the prosecutor and defense attorney as of the time of the preliminary exam, yet the judge found probable cause based upon [AK's] testimony. If the August 21 video had been available at the preliminary exam, Plaintiff cannot show that it would have changed the judge's finding of probable cause."); *Jerome v Crum*, 695 F Appx 935, 942 (CA 6, 2017) ("[Plaintiff] cannot show that Crum's omission of the details of the August 21 interview was material to or strengthened the case against him because A.K. stated the same version of events in the preliminary examination that she did in the August 21 interview."). Finally, the transcript of the criminal proceedings indicates that the mistrial was granted because the late disclosure of the videotape jeopardized plaintiff's right to a fair trial, not because the disclosure of the videotape obviated probable cause.

Given this factual record, there is no dispute that probable cause to continue the prosecution and incarceration of plaintiff existed up to and including the time that the mistrial was granted. While, conceivably, a claim for gross negligence could be sustained even where probable cause supports an arrest, prosecution, and continued incarceration, plaintiff failed to produce any evidence that his prosecution and incarceration would not have continued but for the actions of Crum. Under these facts, I agree with the Court of Appeals that plaintiff failed to raise a genuine issue of material fact as to causation and that summary disposition of plaintiff's gross-negligence claim was proper under MCR 2.116(C)(10).

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 29, 2020:

KROLCZYK V HYUNDAI MOTOR AMERICA, No. 160606; Court of Appeals No. 343996. The appellants shall file a supplemental brief within 42 days of the date of this order addressing the following issues: (1) whether the 46th District Court properly exercised jurisdiction over this case notwithstanding that the Oakland Circuit Court's November 18, 2015 transfer order lacked the appellees' stipulation "to an appropriate amendment of the complaint," Administrative Order No. 1998-1; (2) whether, assuming any error in the transfer was nonjurisdictional, the district court properly exercised jurisdiction over this case where, upon transfer, the complaint contained an *ad damnum* clause seeking more than the district court's jurisdictional limit, see MCL 600.8301; and (3) whether, assuming the district court properly exercised jurisdiction upon transfer notwithstanding the complaint's *ad damnum* clause, the district court nevertheless had the authority to permit amendment of the complaint. In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

MAPLES V STATE OF MICHIGAN, No. 160740; reported below: 328 Mich App 209. On order of the Court, the motion to docket application for leave to appeal is granted. The application for leave to appeal the May 14, 2019 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the proffered evidence is "new evidence" under MCL 691.1752(b). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The Court respectfully directs the Attorney General as appellee to file separate supplemental briefs arguing both sides of the question presented within 21 days of being served with the appellant's brief. The appellee shall also electronically file appendices, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's briefs. The parties should not submit mere restatements of their application papers. The time allowed for oral argument shall be 15 minutes for each side of the question presented. MCR 7.314(B)(2). The appellant may award part of his time to the Attorney General.

CLEMENT, J. (*concurring in part and dissenting in part*). I dissent from the Court's order granting plaintiff's motion to docket his application. The Court of Appeals ruled against plaintiff on May 14, 2019. See *Maples v Michigan*, 328 Mich App 209 (2019). Plaintiff then attempted to file an application for leave to appeal in this Court, but selected the wrong menu option in our TrueFiling software and filed the application in the Court of Appeals instead. Since this occurred on the deadline to file his application in this Court, his subsequent efforts to file an application in this Court were untimely, and on October 30, 2019, we denied his motion to accept his application. *Maples v Michigan*, 504 Mich 1003 (2019). However, on November 22—more than six months after the original opinion had issued, and almost one month after this Court had rejected his untimely application—the Court of Appeals ordered, *sua sponte*, certain amendments to its opinion in this matter. On the strength of these amendments, plaintiff filed a new application in this Court. Our clerk's office initially rejected that application, but plaintiff refiled it along with a motion to accept his application, and the matter was referred to the Justices.

I believe it is improper for this Court to docket this application. Plaintiff had 42 days to file an application for leave to appeal the Court of Appeals' decision. MCR 7.305(C)(2)(a). We have already held that he failed to file a timely application under that rule. That timeliness requirement is subverted when we reset it because the Court of Appeals ordered a *sua sponte* correction to its opinion. Admittedly, our court rules do not squarely resolve what should be done here, but in deciding whether to docket the application under these circumstances, I believe we should do our best to analogize to what the court rules do recognize. The closest analogy, in my view, is to those situations in which the Court of Appeals issues an unpublished opinion but then grants a subsequent publication request. Under such circumstances, the 42-day clock resets from the date of the reissued published opinion. See MCR 7.305(C)(2)(d). Of course, publication requests must be made within 21 days of the issuance of either the Court of Appeals' opinion or an order denying a timely motion for reconsideration, MCR 7.215(D)(1), so that window is not open indefinitely. Our decision to reset the 42-day clock when the Court of Appeals takes such action is motivated by the jurisprudential consequences of publication, which gives an opinion "precedential effect under the rule of stare decisis," MCR 7.215(C)(2), and binds future panels of the Court of Appeals, MCR 7.215(J)(1). Under these circumstances, it is understandable that a party who may have been content to accept an unsatisfactory unpublished opinion will prefer Supreme Court review once the opinion will control future cases as well.

The question in my mind, then, is whether the change the Court of Appeals ordered is a substantive change to the opinion, which changes its legal significance in an analogous way to ordering publication of what had been an unpublished opinion. In my view, that inquiry would examine whether the change that was made is, in and of itself, something that a party would have reason to appeal. I do not think the change here qualifies. The amendment the Court of Appeals ordered substituted one dictionary definition for another and made other con-

forming changes to the text; I do not believe these changes will substantively affect how any party litigates claims of this sort in the future. I agree with our clerk's office's initial conclusion that the change at issue was a clerical one which, therefore, did not reset the 42-day timeline plaintiff had to file in this Court, and I dissent from our order docketing his application.

All that said, the Court obviously has voted to docket plaintiff's application. That action having been taken, I concur with our order to direct argument on this application. The question presented is an interesting one that merits this Court's review. While I disagree with docketing the application, if it is to be docketed, I agree that we should order argument on it.

Leave to Appeal Denied May 29, 2020:

PEOPLE V MASALMANI, No. 154773; Court of Appeals No. 325662. 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 vacate our order of April 5, 2019. The application for leave to appeal the September 22, 2016 judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

MCCORMACK, C.J. (*dissenting*). I respectfully dissent from the Court's determination that leave to appeal was improvidently granted in this case. The trial court's sentencing decision reveals the critical flaw in this Court's opinion in *People v Skinner*, 502 Mich 89 (2018): by reading the Sixth Amendment out of MCL 769.25 we have permitted life-without-parole sentences that violate the Eighth Amendment. I would overrule *Skinner*. Short of that, I would vacate the decision below and remand to the trial court for resentencing, because the trial court abused its discretion when it treated the mitigating factors as aggravating factors to justify its sentence of life imprisonment without the possibility of parole.

The defendant, Ihab Masalmani, was 17 years old when he and 16-year-old Robert Taylor committed the offense for which Masalmani was sentenced to life without parole (LWOP). The two juveniles abducted a 21-year-old man in the parking lot of a fast-food restaurant and took the victim to a vacant home, where Masalmani shot and killed him.

Masalmani was charged with multiple felonies, including first-degree felony murder.¹ Masalmani was convicted, and the trial court imposed the then statutorily mandated sentence of LWOP for the murder conviction. At Masalmani's original sentencing proceeding the trial court did not consider (and, given the date of his conviction and sentencing, could not have considered) whether Masalmani was one of

¹ At the time of his crimes, Michigan law treated all 17-year-olds charged with crimes as adults, regardless of their offense. See MCL 712A.1(1)(i), amended effective October 1, 2021, by 2019 PA 109.

the “the rare juvenile offender[s] whose crime reflects irreparable corruption” such that his LWOP sentence was constitutional under the Eighth Amendment. *Miller v Alabama*, 567 US 460, 479-480 (2012) (quotation marks and citations omitted).

Miller was decided while Masalmani’s appeal of right was pending. The Court of Appeals affirmed Masalmani’s convictions but, in light of *Miller*’s prohibition on mandatory LWOP sentences for juvenile (homicide)² offenders, the panel vacated his murder sentence and remanded to the trial court for resentencing. *People v Masalmani*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2013 (Docket Nos. 301376 through 301378), p 7.

On remand, the trial court resentenced Masalmani pursuant to MCL 769.25,³ our state’s legislative response to *Miller*. The trial court heard expert and lay witness testimony. The former included testimony on adolescent brain development—the same science that the Supreme Court discussed in *Miller* to explain why juvenile offenders’ “transient rashness, proclivity for risk, and inability to assess consequences” reduces their culpability and “diminish[es] the penological justifications for imposing the harshest sentences . . . even when they commit terrible crimes.” *Miller*, 567 US at 472. The latter included testimony about Masalmani’s behavior while incarcerated and his family background and upbringing, including descriptions of the physical and sexual abuse he experienced as a child.

At the conclusion of the hearing, the trial court again sentenced Masalmani to LWOP. Addressing the “*Miller* factors” individually,⁴ the trial court concluded that all of the factors save one (Masalmani’s family

² See *Graham v Florida*, 560 US 48 (2010) (holding that the Eighth Amendment prohibits the imposition of a LWOP sentence on a juvenile offender for a nonhomicide offense).

³ Under MCL 769.25, a trial court must conduct a “*Miller* hearing” in any case in which the prosecutor timely moves for a sentence of LWOP for a defendant who, while less than 18 years of age, commits a crime the penalty for which is mandatory LWOP (but for the defendant’s youthfulness). At that hearing, the trial court must “consider the factors listed in [*Miller*] . . . and may consider any other criteria relevant to its decision, including the individual’s record while incarcerated.” MCL 769.25(6). The court must “specify on the record the aggravating and mitigating circumstances considered by the court and the court’s reasons supporting the sentence imposed.” MCL 769.25(7).

⁴ As *Miller* explained, a sentencing scheme that mandates LWOP for juvenile offenders violates the Eighth Amendment because such a scheme “mak[es] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence” and “poses too great a risk of disproportionate punishment.” *Miller*, 567 US at 479. In so holding, *Miller* outlined several mitigating factors unique to juvenile offenders that are given no weight in a mandatory sentencing regime. These

and home environment) weighed against a term-of-years sentence and favored life without the possibility of parole. The Court of Appeals affirmed the sentence, finding no error or abuse of discretion in the trial court's sentencing decision. *People v Masalmani*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket No. 325662).

We issued our decision in *Skinner* while Masalmani's application for leave to appeal was pending in this Court. *Skinner* raised a constitutional challenge to the sentencing process set forth in MCL 769.25; specifically, whether this process violates the Sixth Amendment right to have (almost) any fact that increases a defendant's punishment beyond the prescribed statutory maximum submitted to a jury and proven beyond a reasonable doubt. See *Apprendi v New Jersey*, 530 US 466 (2000). I thought the answer was yes. That is, the "most natural reading [of MCL 769.25] requires a trial court to make factual findings beyond those found by the jury before it can impose an LWOP sentence on a juvenile," because the statute requires a statement of aggravated and mitigating circumstances considered by the sentencing court, as well as reasons supporting the court's sentencing decision, before the court may impose life imprisonment without the possibility of parole. *Skinner*, 502 Mich at 152-153 (MCCORMACK, J., dissenting).

But my view did not prevail. This Court avoided the Sixth Amendment issue and held that MCL 769.25 does not require a trial court to make *any* additional findings (beyond the offender's guilt) before sentencing a juvenile offender to LWOP. *Skinner*, 502 Mich at 117-119 (opinion of the Court). That is, there is no judicial fact-finding problem, because there is no fact-finding requirement. The Court reasoned that such a result is consistent with *Miller* (and *Montgomery v Louisiana*, 577 US 190 (2016)),⁵ because those decisions do not impose a presumption against LWOP for juvenile offenders. *Skinner*, 502 Mich at 131. Instead, the statute "merely requires" the trial court to consider the *Miller* factors and explain its decision. *Id.* at 114-117; see MCL 769.25(6) and (7). If this is done, the trial court's sentencing decision will not be disturbed on appeal absent an abuse of discretion. *Skinner*, 502 Mich at 131-137.

"*Miller* factors" include: "chronological age and its hallmark features," including "immaturity, impetuosity, and failure to appreciate risks and consequences"; the juvenile's family and home environment; the circumstances of the offense, including susceptibility to familial and peer pressures; the "incompetencies associated with youth," including an inability to deal with police officers, prosecutors, or defense counsel; and reduced culpability due to age and capacity for change. *Miller*, 567 US at 477-478; see also *Skinner*, 502 Mich at 113 (stating that "[MCL 769.25] requires the court to conduct a hearing to consider the *Miller* factors").

⁵ *Montgomery* held that *Miller*'s prohibition on mandatory LWOP for juvenile offenders is a substantive rule that must be applied retroactively to cases in which direct appellate review ended before *Miller* was decided.

I remain unconvinced that this approach taken avoids constitutional infirmity.⁶ But my disagreement with the Court's constitutional holdings aside, a trial court's decision to sentence a juvenile offender to LWOP is subject to abuse-of-discretion review. See *Skinner*, 502 Mich at 131-137. In my view the trial court abused its discretion here.

"It is undisputed that all of [the *Miller*] factors are mitigating factors." *Skinner*, 502 Mich at 115, citing *Miller*, 567 US at 489. But the trial court's treatment of these factors shows that the court did not treat them as mitigating. That is, the court did not consider them for what they are—circumstances and features common to juvenile offenders generally, consideration of which would lead to reasons *not* to impose the maximum sentence allowed by our federal constitution. See note 4 of this statement. For example, in weighing Masalmani's "chronological age and its hallmark characteristics," *Miller*, 567 US at 477, the trial court concluded that "this factor *favours* imposing [a] sentence of life without the possibility of parole." (Emphasis added). This was not simply unartful phrasing; that is, the court was not finding the *absence* of a general feature of youth to conclude that Masalmani's crime was not mitigated. Rather, the court explained that had Masalmani been several months older at the time of his crime, he would not have benefited from *Miller*'s prohibition on mandatory LWOP sentencing. The court acknowledged that the scientific evidence presented at the *Miller* hearing "established that the prefrontal cortex continues to develop into one's mid-20s," but proceeded to disregard this evidence because "the Court is not free to take this developmental disconnect into consideration when a criminal defendant is over 18." This was a clear abuse of discretion. *Miller* did not suggest that 18-year-olds are, as a class, equipped with the decision-making faculties that 17-year-olds lack. Nor did *Miller* suggest that a sentencer should disregard the expanding body of scientific knowledge on adolescent brain development merely because an older offender who, although developmentally similar, may be subject to mandatory LWOP sentencing. To the extent *Miller* drew a bright line

⁶ As I explained, I think the majority's approach "renders meaningless the individualized sentencing required by *Miller* by allowing LWOP effectively to serve as the default sentence as long as the prosecutor files [a] motion [seeking a sentence of LWOP]." *Skinner*, 502 Mich at 148 (McCORMACK, J., dissenting). A sentencing scheme that does not begin with a presumption against LWOP for juvenile offenders violates the Eighth Amendment, at least under current United States Supreme Court jurisprudence. *Id.* at 150. And reading the statute to require no fact-finding requirement at all before a LWOP sentence may be imposed violates *Miller* and *Montgomery*. See *id.* at 145-148. The Supreme Court may resolve these questions next term. See *Jones v State*, 285 So 3d 626 (Miss Ct App, 2017), cert gtd 250 So 3d 1269 (Miss, 2018), cert dis by unpublished order of the Mississippi Supreme Court, entered November 27, 2018 (Docket No. 2015-CT-00899-SCT), cert gtd ___ US ___; 140 S Ct 1293 (2020).

at the legal age of majority, the Court was not suggesting that the adolescent development period ends at the age of 18. See *Roper v Simmons*, 543 US 551, 574 (2005) (“Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. *The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.*”) (emphasis added). The testimony in this case, which the trial court appeared to accept, suggested that 18-year-old offenders too should *not* be sentenced as adults, for the reasons explained in *Miller*. That is, while the law does not require that categorically, the facts might well in most cases. The court’s treatment of this factor invoked the scientific evidence for the precise opposite of what it showed. In doing so, the court upended *Miller*’s foundational principle—that the “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.” *Miller*, 567 US at 474.⁷

The trial court’s treatment of the other *Miller* factors (with the exception of Masalmani’s family and home environment, which the court acknowledged was mitigating) did not rehabilitate the court’s sentencing decision. The court’s evaluation of the “incompetencies associated with youth,” *Miller*, 567 US at 477, is short enough to quote in full: “[T]here was no evidence that the incapacities of youth caused defendant to be unable to participate in his defense. Nor is there any evidence that he implicated himself due to youthful incapacities. As such, this factor favors sentencing defendant to [LWOP].” Here again, I believe the trial court treated as aggravating circumstances factors that are exclusively mitigating (or, at most, neutral). *Miller* did not suggest that a juvenile offender is more deserving of LWOP if the offender is better able to participate in their defense; *Miller* discussed this factor in explaining how features of our criminal system may lead to disproportionate outcomes between juveniles and adults. See *Miller*, 567 US at 477-478 (explaining that a juvenile offender “might have been charged and convicted of a lesser offense if not for incompetencies associated

⁷ The trial court provided similar reasoning when it resentenced codefendant Taylor. Like Masalmani, Taylor was convicted of first-degree felony murder (in a separate trial), received resentencing relief under *Miller* in his appeal of right, and was resentenced to LWOP. Addressing this factor in Taylor’s case, the trial court stated:

Defendant [Taylor] was a mere 14 months shy of his 18th birthday at the time of his offense, suggesting that this developmental disconnect between his prefrontal cortex and his limbic system was not much more pronounced than that of an 18 year old. In short, while this factor does not weigh as heavily against [Taylor] as it did against [Masalmani], the Court is not convinced that this factor mitigates against a sentence of life without the possibility of parole.

with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys”).

Most troublesome is the trial court’s treatment of Masalmani’s potential for rehabilitation. See *Miller*, 567 US at 478 (stating that mandatory LWOP “disregards the possibility of rehabilitation even when the circumstances most suggest it”). After acknowledging that Masalmani’s troubled upbringing was a mitigating consideration, the court cited this same upbringing to conclude that Masalmani’s potential for rehabilitation was “minimal.” In so finding, the court did *not* assert that Masalmani was “irreparably corrupt,” but that his rehabilitation would require the type of professional treatment that “he is very unlikely to receive in prison.” In other words, the trial court cited the state’s inability to provide Masalmani with rehabilitative treatment—a fact completely out of Masalmani’s control—as a justification for his lifelong incarceration. The trial court did not evaluate Masalmani’s potential for rehabilitation but rather the state’s inability to facilitate such rehabilitation.⁸

The “circumstances of the homicide offense,” *Miller*, 567 US at 477, weighed heavily in the trial court’s decision to impose LWOP, and there is no doubt that Masalmani’s crime was vicious. But the individualized inquiry that *Miller* demands, and the sentencing decision that results from it, will always and only occur where a juvenile stands convicted of a homicide. See *Graham v Florida*, 560 US 48 (2010). Our review of the trial court’s work must, therefore, always go beyond the trial court’s evaluation of this factor. As the Supreme Court explained in *Miller*, “[t]hat Miller deserved severe punishment for killing [his victim] is beyond question. But once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.” *Id.* at 479.

Concluding there was no abuse of discretion in this case underscores my concern that our decision in *Skinner* allows for LWOP sentences that violate the Eighth Amendment. *Skinner*, 502 Mich at 148 (McCORMACK, J., dissenting) (“I cannot see how *Miller*’s dictates are satisfied by the hollow formality to which the majority’s holding would reduce the hearing mandated by MCL 769.25(6).”). Abuse of discretion is a deferential standard. But even so, the trial court’s sentencing decision must be a reasonable and principled outcome based on “case-specific detailed factual circumstances.” *Skinner*, 502 Mich at 134 (opinion of the Court) (quotation marks and citations omitted). That did not occur here.

For these reasons, I respectfully dissent.

⁸ Or rather, the court’s *perception* of the state’s inability. The trial court did not identify any evidence in the record to support its suspicion that Masalmani would be “very unlikely” to receive rehabilitative services while incarcerated. And evaluating the potential for rehabilitative services in our prison system in the decades to come—time that Masalmani would remain incarcerated had the court declined to impose LWOP—is, at most, an exercise in educated guesswork.

BERNSTEIN and CAVANAGH, JJ., join the statement of McCORMACK, C.J.

PEOPLE V SKELLETT, No. 161138; Court of Appeals No. 344600. On order of the Court, the motion for immediate consideration is granted and the motion for bond pending appeal is denied. The motion to file a pro per supplement is granted. The motion to seal Appendix F of the application for leave to appeal is granted. The Court finds that there is good cause to seal Appendix F because it contains confidential and privileged documents. There is no less restrictive means to adequately and effectively protect the specific interests asserted. See MCR 8.119(I). The application for leave to appeal the March 3, 2020 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.

PEOPLE V BISHOP PERRY, No. 161343; Court of Appeals No. 352870.

Summary Disposition June 5, 2020:

PEOPLE V HAYNIE, No. 159619; reported below: 327 Mich App 555. 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 reverse that part of the April 16, 2019 judgment of the Court of Appeals addressing jury instructions and we remand this case to the Macomb Circuit Court for a new trial before a properly instructed jury. See M Crim JI 17.2.

On the basis of the prosecutor's concession, we assume without deciding that assault and battery, MCL 750.81(1), is a lesser included offense of assault with intent to commit murder, MCL 750.83. The trial court erred by refusing to give the requested jury instruction because a rational view of the evidence supported a conviction for assault and battery. See *People v Cornell*, 466 Mich 335, 357 (2002). This error was not harmless as the evidence clearly supported an instruction on assault and battery. See *id.* at 363-366.

A requested instruction on a lesser included offense is proper if the greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. *Id.* at 357. There was evidence presented at trial that defendant had the intent necessary for assault and battery—that he either intended to commit a battery upon his mother, Patricia, or intended to make her reasonably fear an immediate battery. See *People v Johnson*, 407 Mich 196, 210 (1979). However, the prosecutor argued that no rational view of the evidence in this case supports a conviction for anything less than assault with intent to commit great bodily harm less than murder. Whether the instruction on the lesser included offense should have been given thus turns on whether a rational view of the evidence supported the conclusion that defendant lacked both the intent to kill and the intent to do great bodily harm. See *Cornell*, 466 Mich at 345. Patricia testified that she believed defendant lacked even the intent to commit great bodily harm against her—he had “gone out of his way

his whole life, even as a toddler, to keep [her] from any kind of pain.” Defendant’s sister testified that defendant and Patricia had a loving relationship, and there was no testimony that defendant and Patricia had any kind of falling out that might have motivated an intent to seriously harm or murder her. Defendant’s statements to Patricia during the assault suggested that his intended purpose was to help his mother by ridding her of the devil—“[M]om, I’ve got to save you, Lucifer has you” Because “believability is for the jury to decide, not appellate judges,” *People v Silver*, 466 Mich 386, 394 (2002), the jury could have chosen to believe this testimony. A rational view of these facts regarding defendant’s intent would allow a jury to conclude that defendant committed assault and battery.

The dissenting statement argues that defendant has offered insufficient evidence to obtain the instruction on the lesser offense, relying on the severity of Patricia’s injuries in contrast. But, as observed by the dissenting opinion in the Court of Appeals, “there is no quantum of injury necessarily associated with an assault and battery.” *People v Haynie*, 327 Mich App 555, 571 (2019) (GLEICHER, J., dissenting). While the severity of injury bears on intent, it is not necessarily dispositive, and the jury should be free to make its own determination after weighing the evidence.

We further conclude that this error was not harmless given that the evidence clearly supported an instruction on assault and battery. See *Cornell*, 466 Mich at 363-366.¹ As was the case in *Silver*, defendant’s alleged victim corroborated his theory of the case by testifying that she did not believe defendant intended to injure her. In addition, defendant’s sister’s testimony and the absence of testimony indicating a heightened intent supported defendant’s theory. Not giving the jury an instruction that allowed them to consider defendant’s comparative guilt as to assault and battery undermines the reliability of the verdict. See *Silver*, 466 Mich at 393. Accordingly, we reverse the judgment of the Court of Appeals and remand to the circuit court for a new trial. We do not retain jurisdiction.

CLEMENT, J. (*concurring*). I concur in full with the Court’s order. Because the People have conceded the issue of whether assault and battery is a necessarily included lesser offense of assault with intent to murder, we do not decide the issue today. I write separately to go over the questions that I believe will need answering if we take up this issue in the future.

¹ In his partial dissent, Justice ZAHRA challenges whether “this Court can simply make a determination as to whether instructional error of this kind undermines the reliability of the verdict without prior appellate review,” given that the Court of Appeals in *Silver* had considered the issue. However, the Court of Appeals did not consider whether the error in *Cornell* was harmless, yet that was the dispositive reason for this Court denying that defendant a new trial, so we believe that there is ample precedent for this Court resolving the question “without prior appellate review.”

As a general matter, when an offense consists of “different degrees, . . . the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment . . .” MCL 768.32(1). There has, over the years, been much debate about how to implement this statute, which, as we noted in *People v Cornell*, 466 Mich 335, 341 (2002), has been around in substantially identical form since 1846. The recurring issue is how to identify which lesser offenses a jury should be instructed upon, such that it could return a verdict as to an “offense inferior to that charged in the indictment.”

One rule is to instruct on “cognate” offenses based on the facts adduced at trial. Thus, in *People v Jones*, 395 Mich 379 (1975), overruled by *Cornell*, 466 Mich at 357, the defendant was charged with second-degree murder. The trial testimony was that the defendant shared an apartment with the victim; on a particular day, a friend of the victim’s came to visit, and while the victim and her friend were chatting in the kitchen, the defendant got a shotgun from a closet, aimed it at the victim, and fired it, killing her. *Id.* at 384-385. The defendant testified on his own behalf and conceded that he had obtained the shotgun from the closet, but claimed that he had only intended to brandish it for the purpose of scaring the visitor into leaving; he asserted that he did not know the weapon was loaded, that he did not intentionally aim it at anyone, and that the weapon only accidentally discharged when he was bumped by the visitor (who he had successfully induced into fleeing). *Id.* at 385. The jury was instructed as to second-degree murder and voluntary manslaughter, but the trial court rejected the defendant’s request to instruct the jury as to MCL 752.861, which criminalizes killing or injuring a person with the careless, reckless, or negligent discharge of a firearm. *Id.* at 385-386. We adopted a rule that “[i]f the lesser offense is of the same class or category, or closely related to the originally charged offense, so as to provide fair notice to the defendant that he will be required to defend against it, the lesser offense is or may be included within the greater.” *Id.* at 388. While MCL 752.861 is not a necessarily included lesser offense of second-degree murder—because MCL 752.861 requires the use of a firearm, while second-degree murder does not—we held under this test that the jury should have been instructed as to MCL 752.861 anyway. “Because the evidence adduced at trial would have supported a guilty verdict on the offense of careless, reckless or negligent discharge of firearms causing death, the trial court was required to . . . instruct the jury that such offense was a lesser included offense of the charge of second-degree murder.” *Id.* at 390.

In *Cornell*, we rejected this rule of “cognate” lesser offenses. Instead, we held that a jury could only be instructed under MCL 768.32(1) as to necessarily included lesser offenses. We repudiated the *Jones* rule and said a regime of necessarily included lesser offenses was more faithful to the text of the statute. *Cornell*, 466 Mich at 354. In doing so, we also concluded that requiring that a lesser included offense be necessarily included was more consistent with *Hanna v People*, 19 Mich 316 (1869), an early case that had construed what is now codified as MCL 768.32(1).

Cornell remains our controlling interpretation of the statute, so Michigan requires that a lesser offense be necessarily included in the charged offense for a jury to be instructed as to a lesser offense.

This contrast between *Cornell*'s "necessarily included" rule and the preceding caselaw played out in the Court of Appeals' disposition of this case. The majority, which held that assault and battery is not a lesser included offense of assault with intent to murder, did so on the basis of *People v Ross*, 73 Mich App 588 (1977). In *Ross*, the Court of Appeals was implementing our rule from *Jones*. In particular, *Ross* drew on some discussion in *Jones* of *People v McDonald*, 9 Mich 150 (1861). In *McDonald*, the defendant had been charged with assault with intent to murder, and we held that the defendant could also be convicted of assault and battery on such a charge. We observed in *Jones* that "under a strict 'necessarily included' test, an assault and battery offense would not be included, as battery is an element not required for the higher assault with intent to murder offense," and concluded that *McDonald* was evidence that we had not always consistently adhered to a line between "cognate" lesser included offenses and "necessarily" included lesser offenses. *Jones*, 395 Mich at 389. On the strength of the remark in *Jones*, *Ross* then remarked that "[a]ssault and battery is not an offense necessarily included within the crime of assault with intent to murder." *Ross*, 73 Mich App at 592. And, on the strength of *Ross*, the Court of Appeals here held that "assault and battery is not a lesser included offense of assault with intent to murder." *People v Haynie*, 327 Mich App 555, 561 (2019). Judge GLEICHER dissented. She observed that *Ross* had depended upon *Jones*, and *Jones* was overruled in *Cornell*. She preferred to look to *Hanna*, a case in which the defendant was charged with assault with intent to murder and, we held, was properly convicted of assault and battery. Since we had expressly looked to *Hanna* as the controlling law in *Cornell*, she argued that "*Hanna* answers the question presented in this case." *Id.* at 569 (GLEICHER, J., dissenting).

The problem is that *Jones* misconstrued *McDonald*, and *Cornell* misconstrued *Hanna*. If *Jones* stands for the proposition that a jury can be instructed on cognate lesser offenses based on the facts adduced at trial, and *Cornell* stands for the proposition that the jury can be instructed only on necessarily included lesser offenses, then *McDonald* and *Hanna* employed a third rule: that a jury can be instructed on lesser offenses that are included *within the narrative allegations of the charging document*. This rule "looks to the pleadings to determine whether the offense has been sufficiently alleged and allows any lesser included offenses if alleged in the information" and is described as "the cognate-pleadings theory." Koenig, *The Many-Headed Hydra of Lesser Included Offenses: A Herculean Task for the Michigan Courts*, 1975 Det C L Rev 41, 43, 49. Thus, in *McDonald*, the information alleged that the defendant "unlawfully ma[d]e an assault" on the victim and, in doing so, did "beat, wound and ill treat, with intent . . . unlawfully, feloniously and carnally to know and abuse." *McDonald*, 9 Mich at 150. In other words, the defendant was charged with assault with intent to rape, in violation of 1857 CL 5730. But, in the course of making such a charge, the information alleged that he "beat, wound[ed] and ill treat[ed]" the

victim, so the jury could find the defendant guilty of simple assault and battery, since physical contact was alleged. Similarly, in *Hanna*, 19 Mich at 317, it was alleged that the defendant “with a certain piece of iron, the same being a dangerous weapon, which he, . . . in his right hand then and there held, feloniously did beat, bruise and wound one John Shine, with intent . . . feloniously, wilfully, and of his malice aforethought, to kill and murder the said John Shine;” as well as that he “did make an assault, and did beat, choke, wound and strike him, the said John Shine, with intent . . . then and there feloniously, wilfully, and of his malice aforethought, to kill and murder” the victim. In other words, he was charged with assault with intent to murder while armed, and assault with intent to murder, in violation of 1857 CL 5724 and 5726. We held “that assaults are substantially and in effect divided by the statute into degrees; and that an indictment for any of the higher grades, or assaults with various degrees of aggravation, must include the inferior degree of simple assault; or, if the higher degree is charged including a battery, as in the present case, the simple assault and battery are included . . .” *Id.* at 322-323. The juries in *McDonald* and *Hanna* could convict on assault and battery, not because it was necessarily included in the charged offenses, but rather, because the factual allegations in each information supporting the charged offenses recited a battery.¹

To say that *Cornell* misunderstood *Hanna* is not to say that *Cornell* misinterpreted MCL 768.32(1), however. It seems apparent that criminal charges are made somewhat differently today than they were at the time of *Hanna*. What I do not know is what, exactly, has changed—is it simply a matter of convention? Have the legal standards changed? Perhaps a law or court rule has been amended? And when did that occur? The rule in *Hanna* does not seem to map all that well onto contemporary criminal procedure, meaning that it requires a degree of “translation” to apply it today—but to do so, I would certainly find it helpful to learn more about what changed and when it changed.

In addition, translating the rule under *Hanna* and its progeny to contemporary practice requires getting to the bottom of what the actual rule was. There are, unfortunately, many mysteries in the cases that follow. The actual assault and battery statute, MCL 750.81(1), provides that “a person who assaults or assaults and batters an individual . . . is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.” Per the terms of the statute, then, it is a matter of indifference whether a battery occurred;

¹ To the extent there is any doubt that this was the rule being employed in *McDonald and Hanna*, it is put to rest by *People v Ellsworth*, 90 Mich 442 (1892). There, we held that while the information was “not as clear and precise as it might have been,” it alleged that the defendant “bruise[d], wound[ed], and ill-treat[ed]” the victim, *id.* at 447, and thus a conviction for assault and battery was available under *Hanna* when the defendant was charged with assault with intent to do great bodily harm less than murder.

a simple assault, whether or not paired with a battery, is a 93-day misdemeanor. Much as with MCL 768.32(1), this has basically been the case since 1846; at that time, the maximum punishments were one year in jail or \$200, but the statute was equally indifferent to whether a battery occurred. See 1846 RS, ch 153, § 29. As we noted in *McDonald* and *Hanna*, where a complaint alleged some more serious assault, this statute put simple assault (or assault and battery) at the bottom of the stack of crimes for which the defendant could be convicted. At times, though, our cases have suggested that we are not as indifferent to the distinction between simple assault and assault and battery as the statute appears to be. In *Turner v Muskegon Circuit Judge*, 88 Mich 359 (1891), the defendant was charged with assault with intent to do great bodily harm less than murder, and she was found guilty of assault and battery. The defendant moved to have the verdict set aside, because the charging document did not specifically allege a battery. The prosecutor moved to amend the information to insert battery-specific language (“did beat, wound, and ill treat”), but the trial court released the defendant without ruling on the prosecutor’s motion. *Id.* at 360. The prosecutor sought a writ of mandamus in this Court against the circuit judge to compel the circuit court to vacate its order releasing the defendant and issue a judgment on the verdict,² but we held that the writ must be denied because “[i]t [was] plain that the information could not be amended so as to include the offense for which the jury convicted the [defendant].” *Id.* at 361. However, in *People v Andre*, 194 Mich 524 (1917), the defendant was charged with assault with intent to do great bodily harm less than murder, and he was ultimately convicted of assault and battery. Relying on *Turner*, we said that he could not be convicted of assault and battery if no battery was alleged in the charging document. However, we held that “[i]t does not follow . . . that the verdict must fail entirely,” because “[t]he jury could not have returned a verdict of assault and battery without finding that an assault had been committed,” meaning that “[t]he verdict should stand as a conviction for an assault.” *Id.* at 527.

I struggle to reconcile *Turner* and *Andre*. On first glance, it appears that in *Turner*, the defendant walked free on the technicality that the jury had returned a verdict of guilty on assault *and* battery, and the narrative in the information alleged no battery as such. Yet in *Andre*, I gather that the same technical defect was in the pleadings, but we held not that the defendant would go free, but rather that the verdict would be amended to a conviction for simple assault. *Andre* also confuses me because the defendant was sentenced to 60 days in jail, *id.* at 526, and we set aside that sentence because it “was greater than is allowed in case of an assault,” *id.* at 527. But 1915 CL 15220 provided that the maximum punishment for simple assault was one year in jail, which is

² Incidentally, it is also not clear to me why this argument came before this Court in the form of a complaint for mandamus against the trial court judge, rather than an appeal from the trial court’s order releasing the defendant.

much greater than 60 days. We cited *People v Harrington*, 75 Mich 112 (1889), in support, but I do not see how *Harrington* fits—it held that “for a conviction at the circuit of a crime within the jurisdiction of a justice [of the peace] no greater punishment can be given than could be imposed by a justice,” *id.* at 113-114, and because the sentence in *Harrington* was for four months in jail but a justice of the peace could impose no more than three months, the sentence was not “wholly void” but rather capped at three months, *id.* at 114. Given that the 60 days in *Andre* is less than the three months in *Harrington*, I do not see how *Andre* follows from *Harrington*.

A common theme of the cases that seem to insist upon a technical distinction between “assault” and “assault and battery” is that they pay little heed to the statutory text, which, as noted, imposes no different punishment for assaults and assaults paired with batteries. This appears to me to be the case in *Turner* and *Andre*, but it is not limited to them. In *People v Burk*, 238 Mich 485 (1927), the defendant was charged with assault with a dangerous weapon, and the trial judge charged the jury to determine whether, if they could not find him guilty of that, they could find him guilty of assault and battery; and, if they could not find him guilty of that, to determine whether he was guilty of simple assault. While this clearly seems to contemplate them as different crimes, it offers little insight into why the jury would need to be instructed in this fashion in light of the statutory text. I face similar confusion in *People v Kynerd*, 314 Mich 107 (1946), in which the defendant was charged with assault with a dangerous weapon, and the judge charged the jury to consider whether the defendant was either guilty as charged, guilty of assault and battery, or not guilty. He was convicted as charged, but he argued on appeal that the judge should have given the jury the option of convicting him of assault and battery. We rejected his argument, but again did little to analyze the actual statutory text.

Of course, perhaps there is a reason these cases did not engage with the statutory text. It could be that the outcome in those cases turned on our use of the “cognate-pleadings” rule. If so, the results in those cases may offer us little illumination about how things should work today—although to decide that with confidence, it would be helpful to learn how and when we moved away from our prior practices in charging defendants with crimes. Perhaps we would learn instead that the older cases are applicable to today, but some of them were simply wrong when they were decided—for example, perhaps *Turner* and *Andre* are not reconcilable. Or perhaps there are appropriate analogies to draw—for example, if in *Andre* the defendant’s conviction of assault and battery could be amended to a simple assault, perhaps we can conclude that where (as here) a defendant asks for an assault and battery instruction when a simple assault instruction may have been more precise, that should not be fatal to his appeal. Then again, maybe *all* of these cases are flawed—not just *Turner* and *Andre*, but also *Burk* and *Kynerd*—for not having been as attentive to the statutory text as we are now. Maybe there is a ghost in this particular law machine that I simply have not identified which connects these dots in some other fashion. I have no

particular view on what the “right” answer is—but I believe that for this Court to find that answer, we will benefit from assistance answering these questions.

ZAHRA, J. (*concurring in part and dissenting in part*). I concur with the majority’s decision to accept, without deciding, the prosecution’s concession that assault and battery¹ is a lesser included offense of assault with intent to commit murder.² I also concur with the majority’s determination that “a rational view of the evidence supported a conviction for assault and battery.” I write separately to express my opinion that the case should be remanded to the Court of Appeals for a determination as to whether the trial court’s instructional error was harmless.

In this case, the Court of Appeals, in a split decision, held that “[b]ecause of the brutality of the assault, no rational view of the evidence could support a finding of simple assault and battery.”³ Having made this determination, the majority concluded “that the trial court did not err by refusing to give an instruction on assault and battery.”⁴

Under this Court’s guidance in *People v Cornell*, if an instruction on a lesser included offense should have been given to the jury at trial, but was not, reversal is not warranted unless the instructional error was not harmless.⁵ This Court explained that even if a jury should have been given a requested instruction, a trial court’s error in failing to give the instruction is not grounds for reversal of criminal convictions unless the error was “‘outcome determinative’ because it undermined the reliability of the verdict,” stating:

[T]he reliability of the verdict is undermined when the evidence “clearly” supports the lesser included instruction, but the instruction is not given. In other words, it is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction. As we must consider the “entire cause” pursuant to MCL 769.26, in analyzing this question, we also invariably consider what evidence has been offered to support the greater offense.

Also, it is important to note that this “substantial evidence” standard for determining whether reversal is required on the basis of an instructional error differs from the standard for determining whether the error occurred. As discussed, an evidentiary dispute supported by a rational view of the evidence regarding the element that differentiates the lesser from the greater offense will generally require an instruction on the lesser

¹ MCL 750.81(1).

² MCL 750.83.

³ *People v Haynie*, 327 Mich App 555, 563 (2019).

⁴ *Id.*

⁵ *People v Cornell*, 466 Mich 335, 363-365 (2002).

offense. However, more than an evidentiary dispute regarding the element that differentiates the lesser from the greater offense is required to *reverse* a conviction; pursuant to MCL 769.26, the “entire cause” must be surveyed.^[6]

Because a majority of this Court has indicated its belief that a rational view of the evidence supported the requested instruction on assault and battery, it may be said that the Court of Appeals majority erred in its holding to the contrary. But neither the Court of Appeals majority nor the dissenting judge, for that matter, applied the second step of the *Cornell* analysis *at all*.⁷ Thus, at this juncture, a majority in this Court has decided the harmless-error question without any prior appellate review from the Court of Appeals. The decision to remand the case to the trial court is therefore, in my view, premature.

The majority cites this Court’s decision in *People v Silver*,⁸ seemingly as support for the notion that this Court can simply make a determination as to whether instructional error of this kind undermines the reliability of the verdict without prior appellate review. But even in that case, the Court of Appeals devoted *some* analysis to whether the instructional error involved constituted harmless error.⁹ This is not the case here. In the instant matter, absolutely no prior appellate review as to whether the instructional error at issue was harmless has taken place. And, given the nature of the facts under review, I am hard-pressed to conclude, as the majority has, that the trial court’s failure to provide a jury instruction on assault and battery undermined the reliability of the verdict, entitling defendant to a new trial.

Moreover, I am not satisfied by the majority’s response that *Cornell*, itself, supplies “ample precedent” for this Court’s undertaking of the harmless-error issue without prior appellate review. I acknowledge that

⁶ *Id.* at 365-366.

⁷ See *Haynie*, 327 Mich App at 563; *id.* at 571-572 (GLEICHER, J., dissenting).

⁸ *People v Silver*, 466 Mich 386 (2002).

⁹ *People v Silver*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2000 (Docket No. 212508), pp 2-3, rev’d 466 Mich 386 (2002). Admittedly, the Court of Appeals in *Silver* assessed the harmless-ness of the instructional error not via the *Cornell* “substantial evidence” test, but rather by the standard set forth by this Court in *People v Lukity*, 460 Mich 484, 496 (1999): “whether it is more probable than not that a different outcome would have resulted without the error.” *Silver*, unpub op at 2. This is likely because the Court of Appeals decided *Silver* more than two years before this Court’s decision in *Cornell*. Nevertheless, the point remains that when this Court addressed the issues presented in *Silver*, it did so *after* the Court of Appeals had already given some measure of discussion to whether the instructional error under review was harmless.

the Court of Appeals, in *Cornell*, did not consider whether any instructional error was harmless.¹⁰ But at the time, Michigan jurisprudence lacked uniformity as to the correct analysis applicable to claims of instructional errors involving lesser included offenses.¹¹ This Court was accordingly tasked with clarifying the proper analytical framework in the first instance.¹² It is not at all remarkable or surprising that the Court of Appeals failed to apply a harmless-error analysis when the rules governing the outcome of the case were as of yet unclear. Further, as the majority points out, this Court *denied the defendant a new trial in Cornell*.¹³ I question whether this Court would have addressed the harmless-error issue without prior appellate review if it had determined—as the majority has in the instant matter—that the defendant might have shown that he was entitled to a new trial.

I would reverse that part of the Court of Appeals' judgment addressing jury instructions and would remand the case to the Court of Appeals for consideration of whether the trial court's instructional error was harmless under this Court's guidance in *Cornell*.

MARKMAN, J. (*dissenting*). As with the majority, I accept the prosecutor's concession that assault and battery constitutes a necessary lesser included offense of assault with intent to commit murder (AWIM) and assault with intent to do great bodily harm (AWIGBH). However, I respectfully disagree that defendant here was entitled to an instruction on mere assault and battery and that both the trial court and the Court of Appeals erred by understanding differently. I further disagree with the Court's decision to reach the harmless-error issue rather than remanding to the Court of Appeals for initial consideration of this issue.

An instruction on a lesser included offense is proper "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357 (2002). For a rational view of the evidence to support the lesser offense, there must be conflicting evidence on the element that varies in degree between the charged offense and the lesser included offense. *Id.* at 361. The element in dispute between the three aforementioned offenses is the extent of apprehension or injury intended by the defendant. For an assault and battery, a defendant need only intend "either to commit a

¹⁰ See *People v Cornell*, unpublished per curiam opinion of the Court of Appeals, issued November 2, 1999 (Docket No. 211215), p 3, rev'd in part 466 Mich at 361.

¹¹ *Cornell*, 466 Mich at 353 ("[M]any of our more recent decisions concerning lesser included offenses have disregarded the statute and much of the older case law. Having done so, we now must decide how to reconcile these divergent approaches to lesser included offense instructions.").

¹² *Id.* at 353-361.

¹³ *Id.* at 367.

battery upon [the complainant] or to make [the complainant] reasonably fear an immediate battery.” M Crim JI 17.2(3). Meanwhile, the offenses of AWIM and AWIGBH require respectively, as their names suggest, a showing that defendant “intended to kill the person he assaulted” or “intended to cause great bodily harm.” M Crim JI 17.3(4), 17.7(4). “Great bodily harm means any physical injury that could seriously harm the health or function of the body.” M Crim JI 17.7(4).

The trial court concluded that a rational view of the evidence did not support defendant’s having possessed only an intent to commit a battery or place the victim in fear of a battery. And this Court reviews such a determination for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113 (2006) (“[A] trial court’s determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion.”) (quotation marks and citation omitted). “ ‘An abuse of discretion occurs when the trial court’s decision falls outside the range of principled outcomes.’ ” *People v Anderson*, 501 Mich 175, 182 (2018), quoting *People v Sewald*, 499 Mich 111, 116 (2016).

After review of the evidence, I cannot agree that the trial court abused its discretion. “Intent to cause serious harm can be inferred from the defendant’s actions, including the use of a dangerous weapon or the making of threats.” *People v Stevens*, 306 Mich App 620, 629 (2014). The injuries a victim sustains are also indicative of a defendant’s intent to injure. *Id.*; see also M Crim JI 17.7(4) (“Actual injury is not necessary, but if there was an injury, [the jury] may consider it as evidence in deciding whether the defendant intended to cause great bodily harm.”). Here, moments before commencing his attack on his 76-year-old mother, defendant stated that he “was going to have to twist [her] arms into knots and lift [her] up and shake [her] until he got Lucifer to let go.” Thereafter, defendant picked the victim up by the arms and shook her violently. While the victim was calling the police, defendant punched the victim with such force as to knock her unconscious with a single blow. And then, while the victim lay unconscious, defendant retrieved a “fairly heavy” wooden and metal bar with horseshoes welded onto it and struck the victim with sufficient force to crack and splinter the bar. As a result of the attack, the victim suffered two broken arms, a 4-centimeter cut near her eye, a fracture to her C6 vertebra, and a 10-centimeter laceration to her head. The police found the victim covered in blood, and the head laceration was of sufficient severity to necessitate paramedics inserting 17 staples into the victim’s head on the scene. Finally, as a result of these injuries, the victim was in intensive care for several days, in the hospital for two weeks, and in a nursing home/rehabilitation center for several months.

Under these circumstances, I cannot agree that the trial court reached a decision “outside the range of principled outcomes” when it determined that a rational view of the evidence did not support defendant intending a mere battery or placing the victim in fear of a mere battery. Most significantly, defendant’s use of the wooden and metal bar, after having rendered the victim unconscious, signifies a clear intention to “seriously harm the health or function of the [victim’s] body.” M Crim JI 17.7(4).

Defendant in opposition cites two pieces of evidence. First, he points to the victim's own testimony that she did not believe that defendant intended to cause her great bodily harm. Although this testimony certainly suggests a lesser intention, it is subjective and speculative (not to mention that the most severe of defendant's predations occurred after he had rendered the victim unconscious) and the trial court was not obliged to have found this testimony to be of determinative value.¹ Second, he points to the testimony of three experts who testified as to his mental health, with two of these opining that defendant was legally insane at the time of the offense. While this testimony certainly afforded the jury a basis—arguably a strong basis—for concluding that defendant could not form any criminal intent, these expert opinions were ultimately rejected by the jury. Moreover, they cannot serve as a legal basis for concluding that defendant possessed a *lesser* criminal intent. For this Court has concluded that the Legislature,

by enacting a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or mental retardation, . . . has signified its intent not to allow a defendant to introduce evidence of mental abnormalities *short of legal insanity* to avoid or reduce criminal responsibility by negating specific intent. [*People v Carpenter*, 464 Mich 223, 226 (2001) (emphasis added).]

In other words, “the Legislature has created an all or nothing insanity defense.” *Id.* at 237. And where this defense enables a jury to conclude that a defendant is *devoid* of criminal liability upon a finding of insanity, it does not allow a *lessening* or *diminishing* of the defendant's specific intent based upon his or her mental condition. Thus, the trial judge herself would clearly have erred had she relied upon defendant's mental health issues and claims of insanity to conclude that a rational view of the evidence supported the finding that defendant intended merely to batter the victim. Neither of the pieces of evidence relied upon by defendant gives rise to a reasonable conflict that would transform the trial court's exercise of judgment into an “abuse of discretion.”

For the above reasons, I respectfully disagree that the trial court here abused its discretion by concluding that a rational view of the evidence did not support instructing the jury on mere assault and battery. Accordingly, I would affirm defendant's conviction.

However, even if I were to agree with the majority that the trial court abused its discretion by concluding that a rational view of the evidence did not support instructing the jury on assault and battery, I would

¹ Similarly, because defendant's attack was apparently a “spur of the moment” action and his sister was not present to witness it, the trial court was not obliged to accept that her testimony as to the relationship between the defendant and the victim was particularly relevant to the court's assessment of what had taken place.

dissent nonetheless from this Court's decision to reach the issue of whether the trial court's failure to instruct the jury on assault and battery constituted harmless error. Not only do I concur with the observations in this regard in Justice ZAHRA's statement, but I also question whether this issue is even properly before this Court. Our grant order identified two questions for review: "(1) whether assault and battery is a necessarily included offense of assault with intent to commit murder; and if so (2) whether a rational view of the evidence in this case could support a conviction for assault and battery." *People v Haynie*, 504 Mich 974, 974 (2019). The order clearly did not identify the harmless-error issue as one for review, and thus the majority's reliance on the fact that we reached the same issue in *Silver* and *Cornell*, despite the same lack of review below, is misplaced because our orders in both of those cases expressly identified for review whether any error in failing to provide a lesser-included-offense instruction was harmless. *People v Silver*, 463 Mich 959 (2001); *People v Cornell*, 463 Mich 958 (2001).

For the stated reasons, I respectfully dissent from the Court's determination that the trial court abused its discretion by not instructing the jury on the offense of assault and battery. And I further dissent from its decision to reach the issue of whether any error in failing to instruct the jury on assault and battery was harmless rather than remanding to the Court of Appeals for initial consideration of this issue.

REAUME V TOWNSHIP OF SPRING LAKE, No. 159874; reported below: 328 Mich App 321. On May 6, 2020, the Court heard oral argument on the application for leave to appeal the May 21, 2019 judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment analyzing defendant's ordinance's definition of *single-family dwelling* and concluding that the definition excludes "temporary occupancy" because *family* is defined to exclude "transitory or seasonal" relationships. To the contrary, defendant's ordinance defines *dwelling* to include a "[b]uilding . . . occupied . . . as a home, residence, or sleeping place, either permanently or temporarily . . ." (Emphasis added.) The Court of Appeals erred by conflating the concept of a transient relationship between people with the concept of transient occupancy of the property.

Nonetheless, the Court of Appeals was correct insofar as it concluded, in the alternative, that the ordinance's definition of *dwelling* excludes plaintiff's property because the property is a *motel*, which the ordinance defines to include a "[b]uilding . . . containing sleeping . . . [u]nits which may or may not be independently accessible from the outside with garage or [p]arking [s]pace located on the [l]ot and . . . occupied by transient residents." The term "sleeping unit" is reasonably understood to include a bedroom, of which the property contains seven. Although *motel* commonly is understood as "an establishment which provides lodging and parking and in which the rooms are usu[ally] accessible from an outdoor parking area," *Merriam-Webster's Collegiate Dictionary* (11th ed), we must follow the definition provided in the ordinance. See *W S Butterfield Theatres, Inc v Dep't of Revenue*, 353 Mich 345, 350 (1958) ("We need not, indeed we must not, search afield

for meanings where the act supplies its own.”). So regardless of whether the property’s bedrooms are “accessible from an outdoor parking area,” we conclude that the property fits the ordinance’s definition of *motel* since that definition expressly allows that sleeping units “may not be independently accessible from the outside.”

We thus conclude that plaintiff’s use of her property was not a permitted use of a single-family dwelling under defendant’s ordinance. For this reason, we affirm the Court of Appeals judgment.

BERNSTEIN, J. (*concurring in part and dissenting in part*). I concur with the majority’s decision to vacate a portion of the Court of Appeals opinion, because I agree that the Court of Appeals erred in conflating transient personal relationships with a transient occupancy of property. However, I disagree with the majority’s decision to affirm that portion of the Court of Appeals opinion that concludes that plaintiff’s property is a motel, and would instead reverse the Court of Appeals judgment and remand to the trial court for further proceedings.

The majority affirms the Court of Appeals’ conclusion that plaintiff’s property is a motel by holding that a “‘sleeping unit’ is reasonably understood to include a bedroom, of which the property contains seven.” However, the term “sleeping unit” is not defined in defendant’s ordinance. The majority does not supply its own definition, and merely states that a sleeping unit might include a bedroom, which is different from explaining what a sleeping unit is. The dictionary defines “unit” as “a single quantity regarded as a whole in calculation.” *Merriam-Webster’s Collegiate Dictionary* (11th ed). “Bedroom” is defined as “a room furnished with a bed and intended primarily for sleeping.” *Id.* The definition of “unit” suggests that such a thing is used or rented separately from other units, as each unit is regarded as a whole. This understanding of a unit as comprising a complete entity makes sense in the context of a motel, where sleeping units can be rented separately, as individual units; although multiple units may be rented at once, they are rented independently from one another, unlike rooms in a single suite, which are rented together as a single unit.

As a result, it cannot be said that plaintiff’s property contained “sleeping units” because there is nothing in the record that suggests that her property had various independent units that were “whole” on their own.¹ Plaintiff’s property was originally designed as a house for a single family, and it was used and rented in its entirety, as a single unit altogether, and not as a collection of seven separate sleeping units.

¹ Plaintiff at one point advertised her property as two separate units, but changed the listing to one unit before either ordinance was passed. See MCL 125.3208(1) (“If the use of a dwelling, building, or structure . . . is lawful at the time of enactment of a zoning ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment.”)

Because I believe that plaintiff's property is not a "motel," I would remand to the trial court to determine if plaintiff otherwise met her burden for establishing prior nonconforming use. *Heath Twp v Sall*, 442 Mich 434, 444-446 (1993).

DEPARTMENT OF HEALTH AND HUMAN SERVICES V MANKE, No. 161394; Court of Appeals No. 353607. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and the May 29, 2020 order of the Shiawassee Circuit Court, and we remand this case to the Court of Appeals for plenary consideration. The motion for stay is denied as moot.

VIVIANO, J. (*concurring*). I agree with the Court's order remanding this case to the Court of Appeals for plenary consideration. I write separately to briefly highlight some of the issues that will need to be addressed on remand. First, it appears patently clear that two members of the Court of Appeals motion panel have no power to grant peremptory relief. See MCR 7.211(C)(4) ("The decision to grant a motion for peremptory reversal must be unanimous."). Doing so over Judge SWARTZLE's explicit objection (and without responding to it) is inexplicable.¹ In addition, the majority decided the important constitutional issues of first impression raised by defendant without plenary consideration, full briefing, oral argument, or an opportunity for amici curiae to file briefs. And it allowed the Department of Health and Human Services to argue these points as a basis for reversal even though the Department never responded to these arguments in the trial court. Finally, the Court of Appeals should address whether plaintiff's motion for a preliminary injunction is rendered moot now that the Governor has ordered that barbershops can open statewide on June 15, 2020.²

¹ The order at issue also may be invalid for another reason: The Department of Health and Human Services (DHHS) did not file a motion requesting peremptory reversal, and the Court does not have the power to grant such relief sua sponte under the applicable court rule. See MCR 7.211(C)(4) ("The appellant may file a motion for peremptory reversal on the ground that reversible error is so manifest that an immediate reversal of the judgment or order appealed from should be granted without formal argument or submission."). Cf. *Dawley v Hall*, 501 Mich 166 (2018) (holding that a rule allowing venue change based on a defendant's motion or the court's own initiative did not permit venue change based on a plaintiff's motion). In this case, although the "relief requested" section of its application did request an order summarily reversing the trial court, the DHHS never filed a motion for peremptory reversal under MCR 7.211(C)(4) (despite having previously filed a motion for immediate consideration under MCR 7.211(C)(6)).

² Today, the Governor signed an executive order allowing personal services businesses including barber shops to open statewide on June 15. See Executive Order No. 2020-115 (allowing the reopening of "hair salons . . . and similar establishments").

It is incumbent on the courts to ensure decisions are made according to the rule of law, not hysteria. Here, in addition to entering an order whose validity is highly suspect, the Court of Appeals majority took the extraordinary step of directing the trial court to take immediate action despite the fact that an application for leave had already been filed in our Court.³ Typically, the filing of an application in our Court automatically “stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.” MCR 7.305(C)(7)(a). Whether it did so wittingly or unwittingly, the Court of Appeals appears to have ordered this case to proceed despite the filing of an application in our Court when the Court of Appeals gave its May 29, 2020 order immediate effect.⁴

Courts decide legal questions that arise in the cases that come before us according to the rule of law. One hopes that this great principle—essential to any free society, including ours—will not itself become yet another casualty of COVID-19.⁵

³ Defendant’s application was filed in our Court on May 28, 2020. The next day, on May 29, the Court of Appeals ordered the trial court to immediately enter a very specific preliminary injunction order (“The trial court is ORDERED to immediately sign and enter a preliminary injunction order The body of the preliminary injunction order entered by the trial court shall include *verbatim* the language of the proposed preliminary injunction order submitted by plaintiff-appellant. . . . We continue to retain jurisdiction to verify immediate entry of the preliminary injunction by the trial court.”). *Dep’t of Health and Human Servs v Manke*, unpublished order of the Court of Appeals, entered May 29, 2020 (Docket No. 353607). The same day, the trial court complied with this highly suspect directive by entering a preliminary injunction and indicating that “this Order will be enforced through the Court’s general contempt powers. MCL 600.1711.” And now, according to published news reports, the Attorney General filed a motion this week seeking to have defendant held in contempt for his failure to comply with the trial court’s order. Acosta, MLive, *Owosso Barber Says he Won’t be Bullied as Michigan AG’s Office Files Motion to Find him in Contempt of Court* <<https://www.mlive.com/news/flint/2020/06/owosso-barber-says-he-wont-be-bullied-as-michigan-ags-office-files-motion-to-find-him-in-contempt-of-court.html>> (accessed June 4, 2020) [<https://perma.cc/H29K-WBSB>].

⁴ It is not clear to me whether MCR 7.305(C)(7) authorizes the Court of Appeals to lift the automatic stay once a case has reached our Court (or whether the Court of Appeals’ order was sufficient to do so, since it did not even reference this rule).

⁵ I am reminded of the famous exchange between Sir Thomas More and William Roper in *A Man for All Seasons*:

ROPER So now you’d give the Devil benefit of law!

Reconsideration Granted June 5, 2020:

PEOPLE V RAJPUT, No. 158866; Court of Appeals No. 339117. By order of March 23, 2020, the prosecuting attorney was directed to answer the motion for reconsideration of this Court's January 24, 2020 opinion. On order of the Court, the answer having been received, the motion is again considered, and it is granted. In light of the prosecutor's concession on reconsideration, the next to last paragraph of the Court's opinion is amended to read as follows:

We reverse the Court of Appeals' holdings that defendant was not entitled to his requested self-defense instruction and that Carr's testimony was irrelevant. We remand this case to the Court of Appeals to address whether the trial court's erroneous denial of defendant's requested self-defense instruction was harmless beyond a reasonable doubt. See *People v Anderson (After Remand)*, 446 Mich 392 (1994); *People v Carines*, 460 Mich 750 (1999). The Court of Appeals shall also address whether Carr's investigative-subpoena testimony was admissible under MRE 804(b)(1) and whether Clay's statement to the victim was admissible either as an excited utterance under MRE 803(2) or because it was not hearsay under MRE 801(c). If the panel concludes that the evidence was admissible, it shall consider whether exclusion of Carr's testimony was harmless or whether it is more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496 (1999).

Reconsideration Granted and Order Directing Oral Argument in a Case Pending on Application for Leave to Appeal Entered June 5, 2020:

PEOPLE V WAFER, No. 153828; Court of Appeals No. 324018. By order of April 26, 2019, the motion for reconsideration of this Court's March 9, 2018 order was held in abeyance for *People v Price* (Docket No. 156180). On the Court's own motion, the motion for reconsideration of this Court's March 9, 2018 order is again considered, and it is granted with

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- MORE Yes. What would you do? Cut a great road through the law to get after the Devil?
- ROPER I'd cut down every law in England to do that!
- MORE Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake. [Bolt, *A Man for All Seasons* (New York: Vintage Books, 1995), p 66 (stage directions omitted).]

respect to the defendant's double jeopardy issue. We amend this Court's March 9, 2018 order to read as follows:

On October 12, 2017, the Court heard oral argument on the application for leave to appeal the April 5, 2016 judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered, and it is denied, with respect to the defendant's jury instruction and prosecutorial misconduct issues, because we are not persuaded that those questions presented should be reviewed by this Court. That part of the application for leave to appeal raising a double jeopardy issue remains pending.

We further order that Justice MARKMAN's accompanying dissenting statement to the Court's March 9, 2018 order remains unchanged.

We direct the Clerk to schedule oral argument on that part of the defendant's application for leave to appeal addressing double jeopardy. MCR 7.305(H)(1). The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the defendant's convictions for second-degree murder, MCL 750.317, and statutory manslaughter, MCL 750.329(1), violate constitutional prohibitions against double jeopardy. See *People v Miller*, 498 Mich 13 (2015). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Davis* (Docket No. 160775).

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 issue 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 June 5, 2020:

PEOPLE V JOEL DAVIS, No. 160775; Court of Appeals No. 332081. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the defendant's convictions under MCL 750.81a(3) and MCL 750.84 violate constitutional prohibitions against double jeopardy, see *People v Miller*, 498 Mich 13 (2015); and (2) if so, whether the defendant is entitled to relief. See *People v Carines*, 460 Mich 750, 763 (1999). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the

brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Wafer* (Docket No. 153828).

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 June 5, 2020:

PEOPLE V CHRIS DAVIS, No. 161171; Court of Appeals No. 352819.

Leave to Appeal Denied June 12, 2020:

PEOPLE V MATHEWS, No. 158102; reported below: 324 Mich App 416. On October 3, 2019, the Court heard oral argument on the application for leave to appeal the May 22, 2018 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 question presented should be reviewed by this Court.

VIVIANO, J. (*dissenting*). I dissent from the majority's decision to deny leave in this case because I believe that the Court of Appeals erred in concluding that the warnings provided to defendant were insufficient under *Miranda v Arizona*, 384 US 436 (1966), and its progeny. I would reverse.

I

Defendant Laricca Mathews was charged with open murder, MCL 750.316, and related firearms charges arising out of the shooting death of her boyfriend, Gabriel Dumas. Defendant called 911 and told the dispatcher that she had shot Dumas. After the police arrived at the scene, she was taken into custody and transported to the Wixom Police Department. Defendant was interviewed twice while at the police station. Both interviews were videotaped, as required by MCL 763.8(2). During the first interview, Detective Brian Stowinsky provided defendant with an advice-of-rights form, which stated:

Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything you say may be used against you; (3) you have a right to a lawyer, and (4) if you cannot afford a lawyer, one will be provided free.

I understand what my rights are and am willing to talk.

Detective Stowinsky orally reviewed the advice-of-rights form with defendant, and the following exchange took place:

[*Detective Stowinsky*]: Ok, um, I'm going to review these, ok?

[*Defendant*]: Uh hmm.

[*Detective Stowinsky*]: I'm going to read these to you.

[*Defendant*]: Uh hmm.

[*Detective Stowinsky*]: Um, before I question, start asking you, you should know that you have a right to remain silent.

[*Defendant*]: Uh hmm.

[*Detective Stowinsky*]: Anything you say maybe [sic] used against you. You have a right to a lawyer, if you cannot afford a lawyer, one will be provided for free. Do you understand your rights?

[*Defendant*]: Yes.

[*Detective Stowinsky*]: Do you want to talk with me?

[*Defendant*]: Yeah, we can talk.

Defendant signed the form, and Detective Stowinsky proceeded to interview her. During the interview, defendant claimed that she and Dumas had been fighting and that she had shot Dumas in self-defense after Dumas attacked her.

Later that day, Sergeant Michael DesRosiers conducted a second interview with defendant. Before the interview, the following exchange took place:

[*Sergeant DesRosiers*]: . . . Alright, so um, Detective Stowinsky, remember he talked about your rights and everything?

[*Defendant*]: Uh hmm.

[*Sergeant DesRosiers*]: Same thing applies. Um, you don't, you don't have to even talk to me if you don't want to. You can get an attorney um, if you can't afford one, we'll make sure you get one.

[*Defendant*]: Ok.

[*Sergeant DesRosiers*]: So, um, we're just continuing the interview that you started with him. I just looked over the statement and have a couple questions about it. Um, so I'm looking at the statement and the problem I have, and you can stop me at any time you want, is, it's from the things in the statement don't necessarily match up with the evidence we found.

During the second interview, defendant claimed that she shot the victim when they were "face to face." When Sergeant DesRosiers told defendant that Dumas had been shot in the back of the head, defendant

speculated that the bullet may have ricocheted off the wall. She also suggested the shooting may have been an accident.

Defendant filed a motion to suppress the statements that she made to police arguing, in pertinent part, that the police failed to advise her that she had the right to have an attorney present both before and during questioning.¹ The trial court granted defendant's motion, concluding that the police had failed to inform defendant that she had the right to have an attorney present during the interrogation. The Court of Appeals initially denied the prosecution's interlocutory application for leave to appeal, but on remand from this Court, in a split decision, the Court of Appeals affirmed the trial court's ruling that suppressed defendant's statements. After recognizing the conflicting authority on the issue, the Court of Appeals agreed with the trial court, holding that "a general warning regarding a 'right to a lawyer' does not comply with the dictates of *Miranda*." *People v Mathews*, 324 Mich App 416, 429 (2018). Because there was no binding caselaw addressing this issue, the Court of Appeals undertook a lengthy and thorough review of its own cases, along with cases from the federal circuits and our sister state courts. Ultimately, the Court of Appeals majority decided to follow its own prior decisions, see, e.g., *People v Whisenant*, 11 Mich App 432, 434 (1968),² and those of the federal circuit courts, holding that a defendant must be specifically advised of the right to the presence of an attorney during questioning. See, e.g., *United States v Noti*, 731 F2d 610, 615 (CA 9, 1984). The Court of Appeals described the decisions of other federal circuits holding that general warnings were sufficient as "disingenuous in light of *Miranda*'s mandate for clear and unambiguous warnings[.]" *Mathews*, 324 Mich App at 438.

II

Miranda has been called a "pathmarking decision." *Florida v Powell*, 559 US 50, 53 (2010). It ruled that "an individual must be 'clearly informed,' prior to custodial questioning, that he has, among other rights, 'the right to consult with a lawyer and to have the lawyer with him during interrogation.'" *Id.*, quoting *Miranda*, 384 US at 471. It is beyond dispute, however, that *Miranda* was not intended, and has not been interpreted, as establishing a precise incantation that must be given prior to a custodial interrogation. *Miranda* itself said that either the warnings it laid down or "a fully effective equivalent" were required.

¹ Defendant also contended that the statements should be suppressed because the police failed to advise her that she could terminate the questioning at any point. Although the trial court did not address this argument, the Court of Appeals rejected it and defendant has not appealed that ruling.

² Other opinions from the Court of Appeals followed the cursory analysis in *Whisenant*. See *People v Jourdan*, 14 Mich App 743 (1968); *People v Hopper*, 21 Mich App 276 (1970).

Miranda, 384 US at 476; see also *Rhode Island v Innis*, 446 US 291, 297 (1980) (noting that the safeguards include the “*Miranda* warnings . . . or their equivalent”).

The Supreme Court’s post-*Miranda* pronouncements on the topic similarly make clear that the “Court has not dictated the words in which the essential information must be conveyed.” *Powell*, 559 US at 60; see also *California v Prysock*, 453 US 355 (1981) (“This Court has never indicated that the ‘rigidity’ of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. . . . Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures.”). The question is whether the warning that was given reasonably conveyed the rights specified in *Miranda*, and in making this determination the warning need not be interpreted as though it were a legal document. *Duckworth v Eagan*, 492 US 195, 203 (1989).

With regard to the specific warning at issue here—the notice of the right to an attorney—the Supreme Court has not established that the warning must expressly notify the suspect of the right to consult an attorney before questioning or have one present during it. Some comments in *Miranda* suggest such a requirement. See *Miranda*, 384 US at 471 (“Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . .”). But other statements mentioned the right to an attorney’s “presence” without specifying when and where the “presence” would occur.³ And when the Court gave an example of satisfactory warning language that complied with the standards it had set forth, it chose (and even lauded as “exemplary”) the standard warning that was given by the Federal Bureau of Investigation (FBI). *Miranda*, 384 US at 483. This is important because the FBI’s practice was to give only the general warning “that the person has . . . a right to counsel,” which included no information regarding when the right applied. *Id.* at 484.⁴

³ See *id.* at 444 (“Prior to any questioning, the person must be warned that . . . he has a right to the presence of an attorney . . .”); *id.* at 479 (An individual in custodial interrogation “must be warned prior to any questioning that . . . he has the right to the presence of an attorney.”); see generally *United States v Clayton*, 937 F3d 630, 639 (CA 6, 2019) (discussing the ambiguity surrounding *Miranda*’s use of “presence”); *Commonwealth v LaJoie*, 95 Mass App 10, 15 (2019) (“But when it came time to summarize what a suspect needed to be told, the *Miranda* opinion did not formulate the warning in terms of a right to counsel ‘during questioning’; rather, the Court in *Miranda* used the language, the ‘right to the presence of an attorney,’ without any temporal component.”).

⁴ The warning given more recently by the FBI is more specific. See FBI, *Legal Handbook for Special Agents* (2003), p 93 (quoting Form FD-395, which notes the person’s right to “talk to a lawyer for advice before” questioning, to “have a lawyer with [him or her] during ques-

As courts have recognized, *Miranda*'s various statements thus create some ambiguity.⁵ And, while it appears the discussion of the FBI warnings was not necessary to decide the case,⁶ the bottom line is that the Court specifically approved a warning that lacked any explicit reference to the time when the right to counsel attached, i.e., that it attached *before* or *during* the interrogation. The Sixth Circuit Court of Appeals explained it well:

To be sure, *Miranda* clarified that "presence" includes the right to consult with an attorney before and during questioning. But *Miranda* did not require a warning exactly to that effect. Case in point: *Miranda* acknowledged that the warnings employed by the FBI at the time of its decision were "consistent with the procedure which we delineate today." And those warnings, while advising of the right to counsel, conspicuously did not state expressly that counsel may be present during interrogation. [*United States v Clayton*, 937 F3d 630, 639 (CA 6, 2019) (citation omitted).]

See also *United States v Lamia*, 429 F2d 373, 376-377 (CA 2, 1970) (relying on *Miranda*'s approval of the FBI warnings); cf. *People of Territory of Guam v Snaer*, 758 F2d 1341, 1342 (CA 9, 1985) ("The Supreme Court in *Miranda* . . . , although making clear that one does have the right to consult with counsel before questioning, . . . is ambigu-

tioning," and to have a lawyer appointed before questioning if the suspect cannot afford one), available at <<https://vault.fbi.gov/Legal%20Handbook%20for%20FBI%20Special%20Agents/Legal%20Handbook%20for%20FBI%20Special%20Agents%20Part%201%20of%201/view>> (accessed May 29, 2020) [<https://perma.cc/NK9W-35PF>].

⁵ This point was not lost on the dissenters, who questioned how the FBI's warnings squared with the other statements in the majority's decision. See, e.g., *id.* at 500 n 3 (Clark, J., concurring in the result of a companion case and dissenting in *Miranda*) (noting that the FBI's warning regarding appointment of counsel was not as broad as the rule expressed by the majority); *id.* at 521 (Harlan, J., dissenting) (stating that while "[h]eaviest reliance is placed on the FBI practice, . . . the FBI falls sensibly short of the Court's formalistic rules.").

⁶ See *Miranda*, 384 US at 521 n 19 (Harlan, J., dissenting) (noting that this portion of the opinion was "*obiter dictum*"). To the extent this portion of *Miranda* was dicta, it had plentiful company in the opinion, much of which has been followed as binding nonetheless. See *Faheem-El v Klinecar*, 841 F2d 712, 730 (CA 7, 1988) (Easterbrook, J., concurring) ("The details of *Miranda* . . . could be disregarded [as dicta] on the ground that Ernesto Miranda had not been given any warning, so the Court could not pronounce on the consequences of giving three but not four of the warnings on its list."). As I explain below, however, even if dicta, the passages on the FBI warnings are particularly meaningful.

ous as to how explicitly the person must be *warned* of that right.”). And *Miranda* was not the only time the Supreme Court has endorsed a general advisement of the right to an attorney bereft of any temporal elements. In *Oregon v Elstad*, 470 US 298, 315 n 4 (1985), which addressed other issues, the Court stated that a warning that the suspect had the right to “consult an attorney at state expense” was “clear and comprehensive” and a part of a “careful administering of *Miranda* warnings.”

In other cases, the Supreme Court has approved warnings that offered less than was encompassed in *Miranda*’s more expansive passages. These cases instead focus on whether the warnings indicated limitations on the right to counsel. In *California v Prysock*, for example, the Court approved a warning that the defendant had a “right to talk to a lawyer before [being] questioned.” *Prysock*, 453 US at 356. *Miranda* was satisfied because “nothing in the warnings . . . suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general[.]” *Id.* at 360-361. Similarly, in *Duckworth v Eagan*, the defendant had been warned, “You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. . . . We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.” *Duckworth*, 492 US at 198 (emphasis and quotation marks omitted). The Court concluded that those warnings, when taken together, satisfied *Miranda* because they informed the defendant of his rights and did not specifically inform defendant that the right to counsel only attached during trial. *Id.* at 204-205. Most recently, in *Florida v Powell*, the Court upheld a warning that informed the defendant of his right to “talk to a lawyer before answering any of our questions” and that he could invoke his rights at any time but did not expressly state that the defendant could have the lawyer present during the interrogation. *Powell*, 559 US at 54 (quotation marks omitted). A commonsense interpretation of the warning, the Court concluded, conveyed the defendant’s rights. *Id.* at 62-64.

Among other courts, a split exists over whether the advisement must expressly mention that the right to a lawyer applies before or during the interrogation.⁷ Some courts have concluded that the right to have an attorney present at these times is independently critical and not adequately conveyed by a notice that mentions neither period or only one but not the other. See, e.g., *United States v Noti*, 731 F2d 610, 615

⁷ See generally McMahon, *Necessity That Miranda Warnings Include Express Reference to Right to Have Attorney Present During Interrogation*, 77 ALR Fed 123 (2020 update) (collecting and commenting on cases discussing presence of attorney during the interrogation); Comment, *Adding (Or Reaffirming) A Temporal Element to the Miranda Warning “You Have the Right to an Attorney,”* 90 Marq L Rev 1009, 1019-1024 (2007) (noting the circuit split as well as intracircuit conflict and tracing the source to *Miranda*’s disparate statements).

(CA 9, 1984) (“There are substantial practical reasons for requiring that defendants be advised of their right to counsel during as well as before questioning.”)⁸

Other cases, however, find that general warnings—i.e., those that do not expressly describe part or all of the temporal scope of the right to

⁸ See also *United States v Tillman*, 963 F2d 137, 141 (CA 6, 1992) holding that a general warning was inadequate because “the police failed to convey to defendant that he had the right to an attorney both before, during and after questioning”; *United States v Anthon*, 648 F2d 669, 672 (CA 10, 1981) (holding that a warning which failed to, among other things, “advise[] that [the defendant’s] right to counsel encompassed . . . the right to have counsel present during any questioning” violated *Miranda*); *Windsor v United States*, 389 F2d 530, 533 (CA 5, 1968) (“Merely telling [an individual being questioned] that he could speak with an attorney or anyone else before he said anything at all is not the same as informing him that he is entitled to the presence of an attorney during interrogation”); *State v Serna*, 2018-NMCA-074, ¶ 21 (NM App, 2018) (concluding “that *Miranda* requires that a person be warned, at least implicitly, that they have a right to counsel prior to questioning” and finding that no such warning was given in the case); cf. *United States v Wysinger*, 683 F3d 784, 798-800 (CA 7, 2012) (concluding that a warning appearing to give the defendant a choice of when he could have a lawyer—that he “had the ‘right to talk to a lawyer for advice before we ask any questions or have . . . an attorney with you during questioning’ ”—violated *Miranda*); *State v McNeely*, 162 Idaho 413, 414, 416-417 (2017) (concluding that an advisement of a “right to an attorney . . . [t]o help you with—stuff” did not satisfy *Miranda*).

Some of these cases warrant additional comment, as the state of the law in these circuits is not entirely clear. Recently, the Sixth Circuit has explained that other errors in *Tillman*—specifically, the failure to advise that the defendant’s statements could be used against him—were the thrust of the case, and thus its brief comment on the warning related to the attorney was “not persuasive.” *Mitchell v MacLaren*, 933 F3d 526, 535 (CA 6, 2019) (habeas proceedings). Additionally, the Ninth Circuit has subsequently held that a defendant “need not have been informed explicitly of his right to consult with counsel prior to questioning” when the warning adequately conveyed that right by stating he could have counsel appointed before the interrogation and present with him during it. *United States v Loucious*, 847 F3d 1146, 1151 (CA 9, 2017); see also *Sweeney v United States*, 408 F2d 121, 124 (CA 9, 1969) (finding sufficient a general warning that the defendant “was entitled to an attorney” because “following, as it did, immediately on the warning as to the right to remain silent and the risk in not doing so, would, we think, be taken by most persons to refer to the contemplated interrogation, not to some other time”).

counsel—suffice. These courts have offered compelling reasons that reflect the Supreme Court’s commonsense approach and that I find more persuasive. One threshold factor that courts have found significant is whether a suspect was given preinterrogation notice “that the warnings that followed were a prerequisite to any interrogation . . .” *Carter v People*, 398 P3d 124, 128 (Colo, 2017). At a more fundamental level, these courts embrace the unremarkable proposition that because “an unqualified statement lacks qualifications, all that police officers need do is convey the general rights enumerated in *Miranda*.” *United States v Frankson*, 83 F3d 79, 82 (CA 4, 1996). In other words, advising of the “right to counsel,” without qualifications, conveys that the right obtains before and during the interrogation.⁹ A related factor in these cases is that the warnings did not express “any temporal limitation that might

⁹ See *United States v Caldwell*, 954 F2d 496, 502 (CA 8, 1992) (“When the only claimed deficiency is that of generality, the teaching of *Duckworth* that we are not construing a will or defining the terms of an easement convinces us that we cannot hold the warning in this case amounts to plain error.”); *Lamia*, 429 F2d at 376-377 (“*Lamia* had been told *without qualification* that he had the right to an attorney and that one would be appointed if he could not afford one. Viewing this statement in context, *Lamia* having just been informed that he did not have to make any statement to the agents outside of the bar, *Lamia* was effectively warned that he need not make any statement until he had the advice of an attorney.”) (emphasis added); cf. *State v Figueroa*, 146 A3d 427, 432 (Me, 2016) (noting, where the advisement referenced that the defendant already had an attorney, a general warning of “a right to an attorney” was “communicated an unqualified right to counsel” that could be invoked at any time).

This conclusion—that unqualified statements do not expressly or impliedly convey qualifications—not only comports with common sense, but it also makes sense under a well-known linguistic theory of conversation developed by H. P. Grice. He posited that participants in conversations generally adhere to the maxim of “Quantity,” by which they expect that the information contained in statements will “be neither more nor less than is required.” Grice, *Logic and Conversation*, in *3 Syntax and Semantics: Speech Acts* (New York: Academic Press, 1975), p 47. This means that contributions to the conversation will not be “overinformative” because “overinformativeness may be confusing in that it is liable to raise side issues; and there may also be an indirect effect, in that the hearers may be misled as a result of thinking that there is some particular POINT in the provision of the excess of information.” *Id.* at 46. Thus, for example, the statement “Jane has two children” does not implicate that Jane has more than two children, even though the statement would remain true if she had a third child. Kaplan, *Linguistics and Law* (New York: Routledge, Taylor & Francis

even colorably be misunderstood to restrict the exercise of [the] right” to counsel in the interrogation. *Carter*, 398 F3d at 127.¹⁰ Even so, the mere possibility of misunderstanding does not disqualify the warning, as the advisement in *Powell* was upheld despite risking confusion as to whether the right pertained to the interrogation itself. *Id.*¹¹ And, critically, this group of cases also cites *Miranda*’s approval of the FBI warnings. See *Clayton*, 937 F3d at 639.¹² This approach thus trusts that *Miranda* meant what it said regarding the FBI warnings. As I explain below, this is the proper way to interpret *Miranda*. Under these rationales, numerous courts have upheld advisements like that in the present case, i.e., without any express reference to the temporal scope of the right to counsel.¹³

Group, 2020), p 7. In the same way, an unconditioned assertion that a suspect has the right to counsel does not implicate a temporal restriction on the right.

¹⁰ See also *United States v Warren*, 642 F3d 182, 186 (CA 3, 2011) (“[The defendant] offers no rationale for a reasonable person’s belief that the clear, unmodified statement ‘[y]ou have the right to an attorney’ would be regarded as time-limited.”); *State v King*, ___ So 3d ___, ___ (La, 2020) (Case No. 2019-KK-01332), slip op at 6-7 (“The unelaborated upon warning given in the present case, which lacked any temporal aspect at all, implied no limitation on the right to counsel.”).

¹¹ Justice Stevens’s dissent in *Powell* recognized this fact, stating that although he was “doubtful that warning a suspect of his ‘right to counsel,’ without more, reasonably conveys a suspect’s full rights under *Miranda*, . . . at least such a general warning does not include the same sort of misleading temporal limitation as in *Powell*’s warning.” *Powell*, 559 US at 73 n 8 (Stevens, J., dissenting).

¹² See also *Warren*, 642 F3d at 185 (noting that, in light of *Miranda*’s use of the FBI advisement, “it cannot be said that the *Miranda* court regarded an express reference to the temporal durability of this right as elemental to a valid warning”).

¹³ See *United States v Nash*, 739 F Appx 762, 765 (CA 4, 2018) (“[T]he phrase ‘you have a right to an attorney,’ under these circumstances, sufficiently advised Nash of his general right to consult with an attorney before and during the interrogation.”); *Frankson*, 83 F3d at 81-82 (upholding advisement of “the right to an attorney”); *United States v Adams*, 484 F2d 357, 361 (CA 7, 1973) (finding sufficient a warning that the suspect had the “right to counsel, and if they haven’t got funds to have counsel, . . . the court will see that they are properly defended”) (quotation marks omitted); *Lamia*, 429 F2d at 377-378 (upholding warning that defendant had the “right to an attorney”); *King*, ___ So 3d at ___, slip op at 6-7 (holding that similar warning, without temporal elements, sufficed); *State v Nave*, 284 Neb 477, 495 (2012) (citing with

My conclusion is also supported by the fact that temporal details are not required to impart the warning concerning the paramount right to remain silent. Even *Miranda*'s most detailed renditions of the warnings never suggested that the police had to specify *when* a suspect could exercise the unqualified "right to remain silent." See, e.g., *Miranda*, 384 US at 444, 467-468, 479. That an unqualified statement reasonably conveys the full breadth of the right to remain silent suggests that the same is enough for the right to an attorney: the former right is at the core of *Miranda*'s protection, whereas the latter is a means of protecting that core right.¹⁴ Thus, it would make little sense, linguistically or logically, to demand additional details about the auxiliary right but not the fundamental right it was designed to protect. Cf. *Carter*, 398 P3d

approval the court's past cases upholding warnings that made no mention of a "temporal element" or mentioned only the right to have counsel at the interrogation); *Eubanks v State*, 240 Ga 166, 168 (1977) ("It is implicit in this [general] instruction [of the "right to an attorney" along with the other basic rights] that if the suspect desired an attorney the interrogation would cease until an attorney was present."); *People v Walton*, 199 Ill App 3d 341, 344 (1990) (finding that specifically informing the suspect "that he 'had a right to consult with a lawyer'" reasonably conveyed the rights as mandated by *Miranda*); cf. *Figueroa*, 146 A3d at 432 (concluding that a general warning was sufficient under the circumstances and noting that the advisement also indicated that the defendant already had an attorney).

Other courts have upheld similar, but slightly more detailed warnings. See *Warren*, 642 F3d at 184, 186-187 (upholding warning that "You have the right to an attorney. If you cannot afford to hire an attorney, one will be appointed to represent you without charge before any questioning if you wish") (quotation marks omitted); *Rigterink v State*, 66 So 3d 866, 893 (Fla, 2011) ("Hence, by advising Rigterink that he may have counsel 'present prior to questioning,' the police reasonably conveyed to Rigterink . . . that counsel, if Rigterink so desired, would have been 'present' with Rigterink both before and during the custodial interrogation."); *LaJoie*, 95 Mass App at 11, 16-17 (upholding warning that the defendant had the right to counsel and if he could not afford one, an attorney would be appointed "prior to any questioning") (quotation marks omitted).

¹⁴ See *Miranda*, 384 US at 469 (explaining that the Court's "aim" in requiring a warning about the right to counsel "is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process"); *Adding (Or Reaffirming) A Temporal Element to the Miranda Warning*, 90 Marq L Rev at 1027 ("[T]he package of [*Miranda*] warnings is intended to convey to the suspect that he does not have to talk if he does not desire to. The attorney's presence is only a means to an end, not an end in itself" because it "safeguard[s] the suspect's right to remain silent.").

at 128 (“[I]t would be highly counterintuitive for a reasonable suspect in a custodial setting, who has just been informed that the police cannot talk to him until after they advise him of his rights to remain silent and to have an attorney, to understand that an interrogation may then proceed without permitting him to exercise either of those rights.”). Indeed, even the Court of Appeals in this case found that the police did not need to specifically inform defendant that she was able at any time to invoke her right to remain silent. See *Mathews*, 324 Mich App at 428, quoting *Miranda*, 384 US at 467-468 (“An individual who has been informed in ‘clear and unequivocal terms’ at the outset of the interrogation that ‘he has the right to remain silent’ will understand ‘that his interrogators are prepared to recognize his privilege should he choose to exercise it.’”). Consequently, I believe that an unqualified statement, unadorned with temporal components, is sufficient to advise a person of both rights.

III

In the present case, I conclude that the general warning defendant received satisfied *Miranda*. Defendant was given a form at the outset that notified her the warnings were necessary “[b]efore any questions are asked of you.” She then received, both on the form and verbally, advisement of an unqualified right to an attorney. Nothing was said that could have misled a reasonable person as to the scope of that right or suggested that it applied only at certain stages of the interrogation or judicial processes. Rather, a commonsense understanding of the warnings would lead one to believe that the right to an attorney could be invoked at any time.¹⁵

But even more important, to my mind, is that *Miranda* approved of FBI warnings no more detailed than the ones administered here and the Court has never required more since *Miranda*.¹⁶ Thus, the Court of

¹⁵ I concede that the warnings here could have been more explicit. However, it is up to the policy-making branches to adopt or require best practices; courts may only determine which practices pass constitutional muster. See *Walton*, 199 Ill App 3d at 344-345 (“While the better practice would be for the police to make explicit that defendant’s right to consult with a lawyer may be both before and during any police interrogation, we hold that the language used in this case [that the defendant had a right to consult with a lawyer] was sufficient to *imply* the right to counsel’s presence during questioning” because “no restrictions were stated by the police in the present case as to *how*, *when*, or *where* defendant might exercise his right ‘to consult with a lawyer.’”).

¹⁶ And it has passed on more than one opportunity to reverse courts that have upheld general warnings that contain partial or no express temporal components, including very recently. See *Carter v Colorado*, 583 US ___, 138 S Ct 980 (2018); *Warren v United States*, 564 US 1012 (2011).

Appeals' decision below stands for the proposition that warnings like those approved in *Miranda* actually violate *Miranda*. Instead of second-guessing *Miranda*, I would take the Supreme Court at its word on whether this way of phrasing the warning is permissible.¹⁷ Demanding anything more elaborate, as the Court of Appeals did here, exceeds what *Miranda* required and is therefore not an application but an extension of the case's holding.

In taking the narrower reading of *Miranda*, I am guided by first principles. I am not the first to notice that the rule crafted in *Miranda* lacks a discernable relationship to the actual text and original meaning of the Constitution.¹⁸ Of course, Supreme Court caselaw is binding and must be faithfully applied. *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004). But if a fair reading of the precedent does not resolve the issue we face, we have the power and the responsibility to decide the issue for ourselves. We are under no obligation to extend the scope of a precedent to cover the matter at hand, especially when, as here, the Supreme Court has already signaled its approval of the practice.

¹⁷ The Court of Appeals acknowledged the tension in *Miranda* produced by the discussion of the FBI warnings. *Mathews*, 324 Mich App at 437 n 7. Nonetheless, the Court of Appeals thought the statements concerning the FBI warnings mattered little because they were "immediately followed by a discussion of the then-current practices in" various other countries and military courts and came "in the larger context of responding to concerns" about the practical cost of the warnings. *Id.* The positioning of the discussion, however, does nothing to negate *Miranda*'s clear statements approving the FBI warnings, most notably that the FBI's "present pattern of warnings and respect for the rights of the individual . . . is consistent with the procedure which we delineate today." *Miranda*, 384 US at 483-484.

¹⁸ See *Dickerson v United States*, 530 US 428, 448 (Scalia, J., dissenting) ("[T]he decision in *Miranda*, if read as an explication of what the Constitution requires, is preposterous."); Markman, *Miranda v Arizona: A Historical Perspective*, 24 Am Crim L Rev 193, 241 (1987) ("Perhaps more than any Supreme Court decision preceding it, *Miranda* found the Court straying from the moorings of both the Constitution and the traditionally conceived judicial role to craft detailed, code-like prescriptions governing criminal justice. The *Miranda* decision had no basis in history or precedent but reflected, rather, a departure from the authoritative sources of law."); see generally Amar, *The Constitution and Criminal Procedure: First Principles* (New Haven: Yale University Press, 1997), pp 48-49 ("Modern understandings of the [Fifth Amendment self-incrimination] clause deviate far from its early American implementation, from plain meaning, and from common sense.").

I would not extend a decision like *Miranda* unless the extension can be independently justified under the proper interpretive approach, that is, unless the extension is required by the Constitution's original meaning.¹⁹ It is no easy task, however, to discern original meaning in an area where the caselaw has long since been uncoupled from that meaning. Here, for example, the interpretive endeavor required by *Miranda* revolves around a specific set of warnings promulgated by the Court. A judge's traditional tools of textual and historical inquiry mean little in this analytical framework. Does the text of the Fifth Amendment, as originally understood, require the conclusion that a person has been "compelled . . . to be a witness against himself" on the basis of statements he made without first being explicitly warned that he has a right to consult an attorney before and during custodial interrogation? Certainly, no one in this case has offered such an argument, and accordingly I will not assay an answer. Merely posing the question demonstrates the need for caution in this area.²⁰

For these reasons, I would not extend *Miranda* to provide that preinterrogation warnings must expressly advise of the right to counsel before and during the questioning. It is enough that a suspect, like defendant here, be notified of her unqualified right to counsel.

IV

In denying leave in this case, the Court declines to exercise the proper measure of circumspection that the issue requires and instead submits, without comment, to the Court of Appeals' extension of *Miranda* in a published opinion. I disagree that the warnings here were deficient under *Miranda*, and I would not extend that decision to

¹⁹ See Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 NYU J L & Liberty 44, 51 (2019) (arguing that originalist lower court judges "should only extend a Supreme Court precedent if the original meaning of the Constitution can support that extension"); cf. *Garza v Idaho*, 586 US ___, ___; 139 S Ct 738, 756 (2019) (Thomas, J., dissenting) (noting that the Court should "tread carefully before extending our precedents" when they do not reflect the Constitution's original meaning); *Free Enterprise Fund v Public Co Accounting Oversight Bd.*, 383 US App DC 119, 150 (2008) (Kavanaugh, J., dissenting) ("We should resolve questions about the scope of . . . precedent[] in light of and in the direction of the constitutional text and constitutional history."), *aff'd in part and rev'd in part* 561 US 477 (2010).

²⁰ Absent an analysis of original meaning—either in *Miranda* itself or with regard to its extension—this Court is forced to consult *Miranda*'s text rather than the Constitution's text. Thus, even though the Court's comments on the FBI warnings could be cast off as unnecessary to the decision, they take on more significance since they are all we have to work with in this situation.

prohibit these warnings. Accordingly, I believe the Court of Appeals' decision should be reversed, and I therefore respectfully dissent.

MARKMAN and ZAHRA, JJ., join the statement of VIVIANO, J.

STUMBO V ROE, No. 161433; reported below: 332 Mich App 479.

Leave to Appeal Denied June 16, 2020:

PEOPLE V LABELLE, No. 161465; Court of Appeals No. 353629.

MCCORMACK, C.J., did not participate due to her preexisting relationship with a party.

Petitions for Interim Suspension Granted June 17, 2020:

In re KAHLILIA Y. DAVIS, JUDGE 36TH DISTRICT COURT, No. 161134. On order of the Court, the petition for interim suspension is considered, and it is granted. The Honorable Kahlilia Y. Davis, Judge of the 36th District Court, is suspended with pay until further order of this Court.

In re ANONYMOUS JUDGE, No. 161331. On order of the Court, the petition for interim suspension is considered, and it is granted. The Honorable David Parrott, Judge of the 34th District Court, is suspended with pay until further order of this Court. In order to preserve the confidentiality required by MCR 9.225(A)(2) and MCR 9.261(A), with the exception of this order, the Supreme Court file is suppressed and shall remain confidential until further order of this Court.

Leave to Appeal Granted June 17, 2020:

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS/UNEMPLOYMENT INSURANCE AGENCY V LUCENTE and DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS/UNEMPLOYMENT INSURANCE AGENCY V HERZOG, Nos. 160843 and 160844; reported below: 330 Mich App 237. The parties shall address whether the Court of Appeals erred in its analysis of §§ 32, 32a, and 62 of the Michigan Employment Security Act of 1936 (MESA), MCL 421.1 *et seq.*, when it held that: (1) the Unemployment Insurance Agency is not required to comply with the time requirements set forth in § 32a when seeking to recoup payment of fraudulently obtained benefits under § 62 of the Act; and (2) the label that the agency used on its decisions was not determinative of its ability to seek to recoup improperly obtained benefits.

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 June 17, 2020:

PEOPLE V TIMOTHY HARE, No. 159841; Court of Appeals No. 346627.

PEOPLE V TRON ROBINSON, No. 160517; Court of Appeals No. 348966.

SWOFFORD V ALVAREZ, Nos. 160751 and 160752; Court of Appeals Nos. 344189 and 344465.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE V CHAPMAN, No. 160835; Court of Appeals No. 345090.

PEOPLE V FULLER, No. 161016; Court of Appeals No. 345500.

PEOPLE V HUBBARD, No. 161212; Court of Appeals No. 351605.

Summary Disposition June 19, 2020:

PEOPLE V BORTHWELL, No. 160000; Court of Appeals No. 346757. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the June 11, 2018 order of the Wayne Circuit Court, and we remand this case to that court for reconsideration of the defendant's motion for relief from judgment in light of *People v Johnson*, 502 Mich 541 (2018). We do not retain jurisdiction.

VIVIANO, J., would deny leave to appeal.

PEOPLE V SOLER-NORONA, No. 160241; Court of Appeals No. 348547. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. Because defendant's motion to waive fees met the requirements of MCL 600.321(4) and MCR 7.219(G), we direct the Court of Appeals to accept defendant's motion to waive fees; to treat defendant's delayed application for leave to appeal as having been filed with that motion; and to decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(E)(2). We do not retain jurisdiction.

PEOPLE V D'ANTE GORDON, No. 160730; Court of Appeals No. 350520. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), and reconsideration of the defendant's motion for relief from judgment. We further 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 at the evidentiary hearing. We do not retain jurisdiction.

PEOPLE V STOLTZ, No. 161311; Court of Appeals No. 346713.

FINLEY V GOVERNOR OF MICHIGAN, No. 161489; Court of Appeals No. 353761.

Superintending Control Denied June 19, 2020:

OAKES V COURT OF APPEALS, No. 161393.

Reconsideration Denied June 24, 2020:

WIMMER V MONTANO, No. 161121; Court of Appeals No. 351762. Leave to appeal denied at 505 Mich 1083.

IW V MM, No. 161152; Court of Appeals No. 350711. Motion to dismiss granted at 505 Mich 1080.

Leave to Appeal Denied June 26, 2020:

GAYDOS V BENDER, Nos. 159107 and 159124; reported below: 326 Mich App 667. On April 15, 2020, the Court heard oral argument on the applications for leave to appeal the January 3, 2019 judgment of the Court of Appeals. On order of the Court, the applications are again considered, and they are denied, there being no majority in favor of granting leave to appeal or taking other action.

MARKMAN, J. (*dissenting*). The Court of Appeals below recognized a new cause of action, a suit for professional malpractice against an expert witness retained by an unsuccessful party in prior litigation. This conclusion stands in tension with an extensive body of law of this state, broadly conferring immunity upon witnesses, not excluding expert witnesses, in prior proceedings. It also runs counter to a number of practical considerations that, in my judgment, continue generally to favor broad common-law immunity for such persons. Moreover, if this alteration of the law is to be undertaken (and it should be understood that I am not entirely unmoved by the argument that accountability constitutes a virtue of expert witnesses as it does of persons in other contexts), it should be undertaken by this Court, given that the question presented is of significance both in light of growing levels of expert involvement in contemporary litigation and as a question that has divided courts of other jurisdictions. Therefore, I respectfully dissent from the Court's order denying leave to appeal and instead would grant leave to appeal for further judicial consideration.

Although whether a retained expert is specifically entitled to witness immunity constitutes a question of first impression before this Court, the general principle of witness immunity is anything but this. Michigan first recognized a witness's right to immunity in 1881. See *Hart v Baxter*, 47 Mich 198, 200-201 (1881) (holding that statements offered by witnesses that are relevant to the proceeding are "absolutely privileged"). Consonant with this proposition, we have observed that the privilege "should be liberally construed so that participants in judicial proceedings may have relative freedom to express themselves without fear of retaliation." *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695 (1961), abrogated in part on other grounds by *Moore v Mich Nat'l Bank*, 368 Mich 71 (1962); see also *Maiden v Rozwood*, 461 Mich 109, 134 (1999). Courts of this state have consistently relied upon witness immunity to preclude independent legal claims. See, e.g., *Sanders*, 362 Mich at 695-696; *Meyer v Hubbell*, 117 Mich App 699, 704, 710 (1982). And witness immunity has been held applicable not only to statements made at trial by witnesses, but also to pretrial statements by

potential witnesses, including expert witnesses. *Sanders*, 362 Mich at 696; see also *Couch v Schultz*, 193 Mich App 292, 295 (1992) (concluding that witness immunity “extends to every step in the proceeding and covers anything that may be said in relation to the matter at issue, including pleadings and affidavits”). In summation, our past cases have regularly counseled that “[w]itnesses who are an integral part of the judicial process ‘are wholly immune from liability for the consequences of their testimony or related evaluations.’” *Maiden*, 461 Mich at 134, quoting 14 West Group’s Michigan Practice, Torts, § 9:393, at 9-131 to 9-132 (emphasis added).¹

In the face of this caselaw, one might have expected the Court of Appeals to look more skeptically upon plaintiff’s claim against a retained expert. This is particularly true where plaintiff has not cited a single Michigan decision recognizing any type of suit against any witness, expert or otherwise. And in additional respects, rejecting plaintiff’s claim for professional negligence against a retained expert would have been consistent with relevant common-law policy considerations. Cf. *Couch*, 193 Mich App at 294 (“Public policy is the principle underlying the [common-law] doctrine of absolute privilege.”).² First, allowing lawsuits against expert witnesses following unsuccessful litigation will obviously, and certainly, render it more difficult for a litigant to retain an expert, and thus as a result render it less likely that critical or complex issues will be fully and effectively engaged for the assessment of the fact-finder. In other words, the threat of legal recourse following trials in which expert testimony has either led in unpredictable or unexpected directions or the retaining party was simply disappointed and did not prevail is likely to discourage some individuals from providing expert testimony altogether while encouraging others who remain willing to testify to undertake precautions, such as the purchase of insurance, that will increase their fees. See, e.g., *Bruce v Byrne-Stevens & Assocs Engineers, Inc*, 113 Wash 2d 123, 130-131. Although these utterly-foreseeable consequences will affect all litigants, they are likely to have a disproportionately adverse impact upon those who already face financial obstacles to accessing the justice system.³

¹ The instant case involves experts retained by plaintiff in formulating pretrial strategies and does not involve experts who testified at trial. It also does not involve perjured testimony; the instant lawsuit is a civil lawsuit to redress an asserted personal injury.

² As the doctrine of witness immunity is a judicially created doctrine in which courts traditionally weigh and balance a range of relevant public-policy considerations, the matter is one historically falling within the domain of the common law.

³ I fear this will be especially true for indigent criminal defendants who in many cases require the appointment of an expert in order to mount an adequate defense. And the chilling effect of allowing lawsuits against expert witnesses may be even greater for indigent defendants

Second, and perhaps of even greater concern, for those individuals who remain willing to testify, the specter of future litigation may well cause the witness, bearing in mind his legal vulnerability, to overly-shade his opinions in favor of the party which retains him, thus subtly impugning both the integrity of his opinions and presumably the outcome of the proceeding. See *Briscoe v LaHue*, 469 US 325 333 (1983) (“A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.”); *Bruce*, 113 Wash 2d at 130 (“The threat of civil liability based on an inadequate final result in litigation would encourage experts to assert the most extreme position favorable to the party for whom they testify.”). Such an impact is completely at odds with fundamental interests identified by this Court in sustaining broad witness immunity. See *Maiden*, 461 Mich at 135, quoting *Daoud v De Leau*, 455 Mich 181, 202-203 (1997) (“Witness immunity is . . . grounded in the need of the judicial system for testimony from witnesses who, taking their oaths, are free of concern that they themselves will be targeted by the loser for further litigation.”).

Third, permitting a dissatisfied litigant to bring suit against an expert will also considerably extend the typical point of finality of litigation. The action against the expert will enable relitigation of the merits of the prior proceeding, essentially giving rise to a “retrial within a trial,” typically a lengthy and often convoluted form of legal proceeding, all within the guise of a suit for expert-witness malpractice. Such lawsuits thus will predictably and disproportionately burden the resources of the judiciary.

This Court now declines to address whether retained experts should remain subject to the protections of witness immunity. This declination is concerning given that the Court of Appeals itself recognized that the question presented was “[a]n important public question of first impression,” *Voutsaras Estate v Bender*, 326 Mich App 667, 682-683 (2019), and it is concerning because the Court of Appeals’ decision, absent further action by this Court, will immediately operate to encourage witness lawsuits. See generally *Marrogi v Howard*, 805 So 2d 1118, 1128 (La, 2002) (whether retained experts are entitled to witness immunity “has become one of increasing importance given the rapid growth in the number of professionals and others hired to provide litigants with assistance in the preparation and presentation of their cases”). Accordingly, I respectfully dissent and would grant leave to appeal for further judicial consideration.

MCCORMACK, C.J., and ZAHRA, J., join the statement of MARKMAN, J.

CAVANAGH, J., did not participate due to a preexisting relationship with a party.

seeking postconviction relief from judgment, who often must recruit an expert to work pro bono on their case.

PEOPLE V VALDEN WHITE, No. 161081; reported below: 331 Mich App 144.

PEOPLE V VALDEN WHITE, No. 161426; Court of Appeals No. 353638.

PEOPLE V HOGGARD, No. 161468; Court of Appeals No. 353437.

Summary Disposition June 30, 2020:

PEOPLE V CASTILLO, No. 161211; Court of Appeals No. 351841. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied June 30, 2020:

PEOPLE V MCARTHUR TAYLOR, No. 159763; Court of Appeals No. 347052.

DAMGHANI V CITY OF KENTWOOD, No. 159925; Court of Appeals No. 341213.

PEOPLE OF COMMERCE TOWNSHIP V SEKULOVSKI, No. 159956; Court of Appeals No. 347422.

ZELASKO V ZELASKO, No. 160120; Court of Appeals No. 342854.

PEOPLE V HOLLIS, No. 160132; Court of Appeals No. 348016.

TOWNSHIP OF GRAYLING V BERRY, No. 160171; reported below: 329 Mich App 133.

PEOPLE V TERI JOHNSON, No. 160178; Court of Appeals No. 349129.

PEOPLE V OZIER, No. 160271; Court of Appeals No. 348619.

WASHINGTON V OESTERLING, No. 160302; Court of Appeals No. 348074.

PEOPLE V ZAHRAIE, No. 160308; Court of Appeals No. 347720.

PEOPLE V MEGAELE CLEMONS, No. 160325; Court of Appeals No. 350200.

PEOPLE V KIRCHER, No. 160342; Court of Appeals No. 348393.

CITY OF EAST LANSING V WILSON, No. 160344; Court of Appeals No. 348391.

PEOPLE V KNAUSS, No. 160346; Court of Appeals No. 347453.

PEOPLE V EDWARD JOHNSON, No. 160347; Court of Appeals No. 348907.

RUDD V AVERILL, No. 160425; Court of Appeals No. 340135.

ROSS EDUCATION, LLC V CITY OF TAYLOR, No. 160461; Court of Appeals No. 344516.

PEOPLE V HOWARD HUGHES, No. 160485; Court of Appeals No. 349005.

PEOPLE V CROSS, No. 160501; Court of Appeals No. 349210.

DEFILIPPIS V REDFORD POLICE DEPARTMENT, No. 160515; Court of Appeals No. 348326.

PEOPLE V PICKETT, No. 160525; Court of Appeals No. 344436.

COLLINS V CITY OF FLINT, No. 160543; Court of Appeals No. 345203.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

PEOPLE V DEVON WILLIAMS, No. 160557; Court of Appeals No. 341838.

PEOPLE V VORIS, No. 160559; Court of Appeals No. 350663.

METRO HEALTHCARE SERVICES, INC V INNOVATIVE PAYROLL PROCESSING, INC, No. 160568; Court of Appeals No. 342802.

NOEL V SCHOLASTIC SOLUTIONS, LLC and NOEL V FISHER, Nos. 160574 and 160575; Court of Appeals Nos. 343580 and 347056.

PEOPLE V STIFF, No. 160584; Court of Appeals No. 340765.

PEOPLE V STEVEN JACKSON, No. 160586; Court of Appeals No. 348803.

PEOPLE OF THE CITY OF WESTLAND V PLATER, No. 160615; Court of Appeals No. 349599.

PEOPLE V SWANK, No. 160622; Court of Appeals No. 342905.

PEOPLE V SAMMY ALLEN, No. 160632; Court of Appeals No. 344207.

PEOPLE V CLIFF, No. 160648; Court of Appeals No. 342995.

PEOPLE V BEAN, No. 160649; Court of Appeals No. 343827.

PEOPLE V JOHN GREEN, No. 160688; Court of Appeals No. 350713.

PEOPLE V DONALD SCOTT, No. 160716; Court of Appeals No. 350402.

ANESTHESIA SERVICES AFFILIATES V CITY OF DETROIT, No. 160742; Court of Appeals No. 344317.

HARTLAND GLEN DEVELOPMENT, LLC V TOWNSHIP OF HARTLAND, No. 160743; Court of Appeals No. 344480.

RUTLEDGE V SUFFOLK COURT APARTMENTS, No. 160747; Court of Appeals No. 345752.

PEOPLE V REIHER, No. 160757; Court of Appeals No. 343234.

PEOPLE V JAMMAL JACKSON, No. 160766; Court of Appeals No. 345524.

ANAYA V BETTEN CHEVROLET, INC, No. 160768; reported below: 330 Mich App 210.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

- PEOPLE V TRUITTE, No. 160787; Court of Appeals No. 351322.
- PEOPLE V HOSKINS, No. 160799; Court of Appeals No. 345351.
- PEOPLE V DUPREE, No. 160823; Court of Appeals No. 339627.
- PEOPLE V GOREE, No. 160824; Court of Appeals No. 350642.
- PEOPLE V JERMAINE JOHNSON, No. 160834; Court of Appeals No. 343442.
- NORMAN V DEPARTMENT OF CORRECTIONS, No. 160847; Court of Appeals No. 349914.
- PEOPLE V DWAYNE MILLER, No. 160865; Court of Appeals No. 351204.
- MICHIGAN OPEN CARRY, INC V DEPARTMENT OF STATE POLICE, No. 160870; reported below: 330 Mich App 614.
- PEOPLE V JEFFREY WATTS, No. 160892; Court of Appeals No. 341729.
- PEOPLE V GRAY, No. 160895; Court of Appeals No. 342111.
- PEOPLE V MAURICE JOHNSON, No. 160897; Court of Appeals No. 344800.
- PEOPLE V JENSEN, No. 160898; Court of Appeals No. 350882.
- PEOPLE V BAGLEY, No. 160903; Court of Appeals No. 351403.
- RUDD V AVERILL, No. 160905; Court of Appeals No. 349319.
- PEOPLE V STAMPER, No. 160909; Court of Appeals No. 351065.
- PEOPLE V CRANDALL, No. 160961; Court of Appeals No. 351868.
- PEOPLE V RODNEY BROWN, No. 160984; Court of Appeals No. 346401.
- PEOPLE V RYAN SMITH, No. 161011; Court of Appeals No. 351563.
- In re* SMITH, No. 161058; Court of Appeals No. 352572.
- PEOPLE V COLEMAN, No. 161061; Court of Appeals No. 350641.
- PEOPLE V JAMISON-LAWS, No. 161065; Court of Appeals No. 345285.
- PEOPLE V ANTHONY HARRIS, No. 161071; Court of Appeals No. 346048.
- PEOPLE V EARVIN DAVIS, No. 161073; Court of Appeals No. 351010.
- PEOPLE V HANCOCK, Nos. 161074 and 161075; Court of Appeals Nos. 345034 and 345035.
- PEOPLE V SYMONE CALLOWAY, No. 161076; Court of Appeals No. 352433.
- MOORE V OCWEN LOAN SERVICING, LLC, No. 161079; Court of Appeals No. 347974.
- PEOPLE V FRANK TYSON, No. 161084; Court of Appeals No. 338299.
- PEOPLE V MUSTAFA, No. 161086; Court of Appeals No. 351857.

PEOPLE V RITCHEY, No. 161089; Court of Appeals No. 345735.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

STATE TREASURER V URAZ, No. 161163; Court of Appeals No. 349487.

PEOPLE V MITCHELL GLENN, No. 161199; Court of Appeals No. 351812.

Superintending Control Denied June 30, 2020:

MITCHELL V ATTORNEY GRIEVANCE COMMISSION, No. 161133.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied June 30, 2020:

PEOPLE V GERALD SHORT, No. 156653; Court of Appeals No. 337218. Leave to appeal denied at 505 Mich 974.

Summary Disposition July 1, 2020:

PEOPLE V MANWELL, No. 157563; Court of Appeals No. 333916. The motion to amend the defendant's reply brief is granted. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Parts III and IV of the judgment of the Court of Appeals regarding the testimony of the Children's Protective Services worker and Detective Newman, and we remand this case to the Court of Appeals for reconsideration in light of *People v Thorpe*, 504 Mich 230 (2019), and *People v Harbison*, 504 Mich 230 (2019). 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. The motions for documents, to challenge transcripts, for discovery, to compel testimony, and to remand are denied.

PEOPLE V SHELTON, No. 159883; Court of Appeals No. 337796. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals to consider whether the prosecutor's references to the defendant's prearrest silence were relevant and admissible under MRE 401 and MRE 403, see *People v Cetlinksi*, 435 Mich 742, 760-761 (1990), and if not, whether it is more probable than not that the error was outcome-determinative, *People v Musser*, 494 Mich 337 (2013).

The Court of Appeals shall forward its decision on remand to the Clerk of this Court within 56 days of the date of this order. We retain jurisdiction.

PEOPLE V JOHN LEWIS, No. 160650; Court of Appeals No. 350287. Pursuant to MCR 7.305(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 July 1, 2020:

TAXPAYERS FOR MICHIGAN CONSTITUTIONAL GOVERNMENT v STATE OF MICHIGAN, Nos. 160658 and 160660; reported below: 330 Mich App 295. The parties shall include among the issues to be briefed: (1) whether the defendants violated Const 1963, art 9, §§ 25 and 30, by classifying monies paid to school districts pursuant to Proposal A, Const 1963, art 9, § 11, as state spending in the form of aid paid to units of local government; (2) whether the defendants violated Const 1963, art 9, §§ 25 and 30, by classifying monies paid to public school academies (a.k.a. charter schools) as state spending in the form of aid paid to units of local government; (3) whether the Court of Appeals erred when it held that state funds directed to local governments to satisfy state obligations under Const 1963, art 9, § 29 may not be counted toward the proportion of state funds required by Const 1963, art 9, § 30; and (4) whether the Court of Appeals erred to the extent that it held that the Auditor General or the Office of the Auditor General is subject to mandamus relief.

The Michigan Municipal League, the Government Law Section of the State Bar of Michigan, the Michigan Townships Association, the Michigan Association of Counties, and Taxpayers United Michigan Foundation 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 July 1, 2020:

In re DIEHL, MINOR, No. 160457; reported below: 329 Mich App 671. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the Juvenile Code, MCL 712A.1 *et seq.*, allows a family court to revoke its previous authorization of a juvenile delinquency petition over the objection of the prosecution; (2) whether MCL 780.786b provides family courts with the independent authority to remove an already authorized delinquency matter from the adjudicative process without the prosecution's consent; (3) whether the family court's decision to "unauthorize" two delinquency petitions encroached on the prosecution's charging authority in violation of the Separation of Powers Clause, Const 1963, art 3, § 2; and (4) to the extent that the family court erred, whether that error was harmless, MCR 3.902(A); MCR 2.613.

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan, the Prosecuting Attorneys Association of Michigan, and the University of Michigan Law

School Juvenile Justice Clinic 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.

In re GUARDIANSHIP OF ORTA, MINORS, Nos. 161118 and 161119; Court of Appeals Nos. 346399 and 346400. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether *In re Ferranti*, 504 Mich 1 (2019), applies to guardianship proceedings; and (2) whether, to establish a guardianship under MCL 700.5204(2)(b), a parent must intend that his or her child permanently reside with another person. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Family Law Section and the Children's Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied July 1, 2020:

KELLY V GROHOWSKI, No. 159993; Court of Appeals No. 344237.

JAROS V VHS HARPER-HUTZEL HOSPITAL, INC, No. 160449; Court of Appeals No. 340566.

ESTATE OF MICHAEL WHYTE V DETROIT TRANSPORTATION CORPORATION, No. 160613; Court of Appeals No. 343161.

MENARD V IMIG, No. 161008; Court of Appeals No. 336220.

Summary Disposition July 2, 2020:

COMMITTEE TO BAN FRACKING IN MICHIGAN V BOARD OF STATE CANVASSERS, No. 161453. On order of the Court, the motion for immediate consideration is granted. The complaint for mandamus is considered, and relief is denied, because the Court is not persuaded that it should grant the requested relief. The motion to dismiss is denied as moot.

Order Modified July 2, 2020:

PEOPLE V JASON KEISTER, No. 159912; Court of Appeals No. 340931. Prior summary disposition order entered at 505 Mich 1014. On order of

the Court, the motion for reconsideration of this Court's March 27, 2020 order is considered. We modify the order, which now states:

On order of the Court, the application for leave to appeal the May 16, 2019 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the Court of Appeals judgment holding that the admission of testimony from Dr. Angela May that "there was a high likelihood of abuse" was not plain error. See *People v Keister*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2019 (Docket No. 340931) at 5-6. Her testimony was plainly contrary to *People v Smith*, 425 Mich 98 (1986), *People v Peterson*, 450 Mich 349 (1995), and *People v Thorpe*, 504 Mich 230 (2019). We REMAND this case to the Court of Appeals for consideration of whether the prejudice prong of the plain-error test was satisfied, and, if so, whether reversal of the defendant's convictions is warranted. See *People v Carines*, 460 Mich 750, 763-764 (1999). 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 all other respects, the motion for reconsideration is denied, because we are not persuaded that further reconsideration of our previous order is warranted. MCR 7.311(G).

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered July 2, 2020:

PEOPLE V MARTINEZ, No. 160060; Court of Appeals No. 341147. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the trial court erred by granting the prosecution's motion in limine to bar the defendant from presenting evidence of an alleged prior threat by the complainant to report an assault; and (2) if so, whether the error was prejudicial. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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.

BRONNER V CITY OF DETROIT, No. 160242; Court of Appeals No. 340930. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred in holding that the no-fault insurance act, MCL 500.3101 *et seq.*, precluded the City of Detroit from seeking contractual indemnification from GFL Environmental USA, Inc. for the City's payment of personal protection insurance (PIP) benefits. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied July 2, 2020:

In re MASON/LASOTA, MINORS, No. 161341; Court of Appeals Nos. 350001 and 350003.

WASENKO V AUTO CLUB GROUP, No. 161474; Court of Appeals No. 352890.

WASENKO V AUTO CLUB GROUP, No. 161493; Court of Appeals No. 352978.

Application for Leave to Appeal Dismissed July 8, 2020:

In re MONTANO, Nos. 161273 and 161274; Court of Appeals Nos. 353392 and 353410. On order of the Chief Justice, the plaintiff-appellant's interlocutory application, motion to amend the application filed on May 4, 2020, and motions to add issues filed on May 6, 2020, and May 12, 2020, are administratively dismissed for failure to pay the filing fees as directed by the Court's order of May 28, 2020.

Summary Disposition July 10, 2020:

PEOPLE V KRESTEL, No. 160048; Court of Appeals No. 341463. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment that affirmed the assessment of a financial sanction against the defendant's counsel, and vacate the \$500 assessment. We remand this case to the Berrien Circuit Court to reconsider the assessment, taking into consideration the wide latitude given to the judgment of criminal defense counsel when applying MCR 2.114(D)(2) (repealed) and a criminal defendant's right to present a defense. See *In re John R. Minock*, 441 Mich 881 (1992); *People v Hayes*, 421 Mich 271, 278 (1984). 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.

ZAHRA, J. (*dissenting*). I respectfully dissent from the majority's decision to vacate the portion of the Court of Appeals' judgment affirming the assessment of financial sanctions against defense counsel and to remand the case to the trial court for reconsideration of the assessment.

In this case, defendant filed a motion—with counsel's assistance—seeking dismissal of criminal charges against him on the basis of immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, and the affirmative defense established under § 8 of the act.¹ The trial court denied the motion, but also imposed a \$500 sanction against defense counsel for failing to make a reasonable inquiry into defendant's residency before making a good-faith argument relating to § 4 and § 8 of the MMMA, in violation of MCR 2.114(D).² The Court of Appeals affirmed the denial of defendant's motion and the imposition of the financial sanction.³

Now, however, providing little in the way of guidance to the trial court as to why it may have erred in its judgment, this Court remands the instant matter to that court so that the \$500 assessment can be reexamined, “taking into consideration the wide latitude given to the judgment of criminal defense counsel when applying MCR 2.114(D)(2) and a criminal defendant's right to present a defense.” In support of its decision, the majority cites two cases: (1) this Court's 1992 order in *In re Minock*,⁴ and (2) this Court's 1984 opinion in *People v Hayes*.⁵ But neither decision sheds a great deal of light on any potential error by the trial court. The cited order in *Minock* merely states that the motion to suppress at issue in that case “was not obviously frivolous.”⁶ No reasoning whatsoever was provided as to how the Court arrived at that conclusion, and were it not for an accompanying statement from Justice BOYLE and Justice RILEY, it would be unclear whether MCR 2.114(D)(2) was implicated in that case *at all*.⁷ And in *Hayes*, although the Court acknowledged the right to present a defense under the Michigan and

¹ See MCL 333.26424; MCL 333.26428.

² MCR 2.114 was repealed effective September 1, 2018, more than a year after the trial court denied defendant's motion and subsequently denied reconsideration. Nevertheless, the provisions of the former rule applicable to those who sign frivolous motions have been reincorporated into the Michigan Court Rules under MCR 1.109(E)(6).

³ *People v Krestel*, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2019 (Docket No. 341463), pp 11-13.

⁴ *In re Minock*, 441 Mich 881 (1992).

⁵ *People v Hayes*, 421 Mich 271 (1984).

⁶ *Minock*, 441 Mich 881.

⁷ *Id.* (BOYLE and RILEY, JJ., concurring in part and dissenting in part).

United States Constitutions, we were concerned there with the constitutionality of a statute barring the invocation of an insanity defense as a “sanction” for a criminal defendant’s failure to cooperate with psychiatric examinations, not the interplay between the constitutional right to present a defense and the financial sanction imposed under MCR 2.114(D)(2).⁸ Indeed, the citation of *Hayes* is particularly inapt as applied to this case because, in vacating the trial court’s \$500 assessment, the majority cites a case in which the Court ultimately held that the right to present a defense did *not* render the statutory “sanction” at issue unconstitutional.⁹

I am cognizant of attorneys’ responsibility to zealously advocate on behalf of their clients¹⁰ and that—as the trial court acknowledged in addressing defendant’s motion for reconsideration—“a party must receive some type of reasonable notice and an opportunity to be heard before the imposition of sanctions under MCR 2.114.”¹¹ And while I agree with the majority’s assertion that defense counsel should be given “wide latitude” when considering the propriety of sanctions under MCR 2.114(D)(2), I note that a trial court’s decision to impose sanctions is reviewed for an abuse of discretion.¹² This occurs only when a trial court’s decision results in an outcome that falls outside the range of principled outcomes.¹³ It is not always an easy hurdle to clear for criminal defendants, and because the lower courts have, in my view, adequately outlined the reasons favoring the imposition of the sanction, I am not persuaded that further action in the trial court is necessary. The majority’s nearly bare citations of *Minock* and *Hayes* do not convince me otherwise.

For these reasons, I would deny defendant’s application for leave to appeal.

Leave to Appeal Denied July 10, 2020:

PEOPLE V TOBY WOODS, No. 161539; Court of Appeals No. 353483.

Leave to Appeal Denied July 15, 2020:

PEOPLE V BRIAN WARREN, No. 161182; Court of Appeals No. 351202.

BURTON-HARRIS V WAYNE COUNTY CLERK, No. 161564; Court of Appeals No. 353999.

⁸ See *Hayes*, 421 Mich at 278-279.

⁹ *Id.* at 278-283.

¹⁰ See *People v Mitchell*, 454 Mich 145, 170 (1997).

¹¹ *Vittiglio v Vittiglio*, 297 Mich App 391, 405 (2012).

¹² See *Casey v Auto Owners Ins Co*, 273 Mich App 388, 404 (2006).

¹³ *Id.*, citing *Woodard v Custer*, 476 Mich 545, 557 (2006).

Leave to Appeal Before Decision by the Court of Appeals Denied July 15, 2020:

WAYNE COUNTY JAIL INMATES V LUCAS, No. 161566; Court of Appeals No. 354075.

Rehearing Denied July 15, 2020:

PEOPLE V ALVIN JENKINS, No. 158298; opinion at 505 Mich 16.

Reconsideration Denied July 15, 2020:

PEOPLE V IHAB MASALMANI, No. 154773; Court of Appeals No. 325662. Leave to appeal denied at 505 Mich 1090.

SANDERS V TUMBLEWEED SALOON, INC, No. 158789; Court of Appeals No. 338937. Leave to appeal denied at 505 Mich 1069.

Leave to Appeal Before Decision by the Court of Appeals Denied June 4, 2020:

HOUSE OF REPRESENTATIVES V GOVERNOR, No. 161377; Court of Appeals No. 353655.

BERNSTEIN, J. (*concurring*). I agree with my fellow Justices that this case presents extremely significant legal issues that affect the lives of everyone living in Michigan today. And that is exactly why I join the majority of this Court in denying the parties' bypass applications—*because* I believe that a case this important deserves full and thorough appellate consideration.

Additionally, with the issuance of Executive Order No. 2020-110, “shelter in place” is no longer mandated in the state of Michigan. While recognizing that not all restrictions have been lessened (and acknowledging the possibility of future restrictions being reimplemented), I believe the parties and this Court would benefit most from having the vital constitutional issues of this case fully argued in the Court of Appeals before receiving a final determination from our Court. See *League of Women Voters v Secretary of State*, 505 Mich 931 (2019) (denying the plaintiffs' bypass application). Cases of the ultimate magnitude, such as this one, necessitate the complete and comprehensive consideration that our judicial process avails.

The significance of this case is undeniable. And with many of the restrictions on daily life having now been lifted, our eventual consideration of these issues must receive full appellate consideration before our Court can most effectively render a decision on the merits of this case.

CLEMENT, J. (*concurring*). In this case, the Legislature advances several arguments asking us to hold that a law it enacted 75 years ago, 1945 PA 302, codified at MCL 10.31 *et seq.*, is unconstitutional or the Governor's actions are beyond the statutory authority contained in that statute, and that the Governor's executive orders issued under that

statute in response to the COVID-19 pandemic are consequently invalid. Contrary to what is suggested by the dissents from the Court's order today, the Legislature is not litigating the civil liberties of all Michiganders. Moreover, to read the dissents, one might be left with the impression that this Court has declined altogether to decide this case. It has not—it has only declined to decide the case before the Court of Appeals does. I believe this is both compelled by our court rules and advisable as a matter of prudence. Because I believe the Court neither can nor should review this case before the Court of Appeals does, I concur with the Court's order denying these bypass applications.

I believe, first, that the rules governing bypass applications are not satisfied here. Given that “the supreme court shall have . . . appellate jurisdiction as provided by rules of the supreme court,” Const 1963, art 6, § 4, whether the rules have been satisfied is seemingly of its own jurisdictional and constitutional significance. Our rules provide that, to grant a bypass application, “[t]he application must show” either that “delay in final adjudication is likely to cause substantial harm” or that “the appeal is from a ruling that . . . any . . . action of the . . . executive branch[] of state government is invalid[.]” MCR 7.305(B)(4)(a) and (b). I do not believe the Legislature satisfies either requirement. In its bypass application, the Legislature argues that the “substantial harm” prong is satisfied because “Michiganders . . . are living under a cloud of ambiguity” given the debate over whether the Governor's executive orders responding to the COVID-19 pandemic are actually legal. But this case is not a class action filed on behalf of all Michiganders to litigate their civil liberties—it is a suit filed by the Legislature asserting that certain of its institutional prerogatives have been infringed by the Governor's actions. The Legislature shows no substantial harm *to the Legislature* caused by going through the ordinary appellate process. As an institution, it is exactly as free to enact legislation—whether responsive to this pandemic or otherwise—as it was before any of the Governor's executive orders were entered.¹ As to the “invalidity of executive action” prong, the Legislature argues that “this appeal involves a ruling that has already declared” Executive

¹ Justice VIVIANO argues that the Legislature's separation-of-powers argument, if vindicated, would be a “substantial harm,” and that “[a]t the bypass stage, we need not decide the merits of the Legislature's separation-of-powers argument.” I agree that we need not decide those merits, and we are not by denying this bypass application. Given the novelty of the Legislature's standing argument, however, I do not believe it can show that it has suffered a substantial harm at this point with the certainty required to justify the extraordinary act of granting a bypass appeal. After Court of Appeals review, the Legislature would need to show only that either “the issue involves a substantial question about the validity of a legislative act,” “the issue has significant public interest and the case is one . . . against . . . an officer of the state . . . in the officer's official capacity,” or that “the issue involves a legal principle

Order No. 2020-68 invalid. However, the Legislature does not appeal *that* ruling—rather, it appeals the ruling that Executive Order No. 2020-67 and its successors *are* valid. In my view, the Legislature’s inability to satisfy MCR 7.305(B)(4) is fatal to its bypass application.² Since the Michigan Constitution commits to us the ability to prescribe our own appellate jurisdiction, we are obliged to scrupulously adhere to the restrictions we have imposed on ourselves if we are to sit in judgment of the constitutionality of 1945 PA 302 and the Governor’s actions under it.³

of major significance to the state’s jurisprudence.” MCR 7.305(B)(1) through (3). I predict these showings will be much easier to make.

² Justice ZAHRA argues that “even assuming there is a shortcoming in the Legislature’s application, that defect is cured by the Governor’s” bypass cross-appeal, but I disagree. The court rules list what an application for leave to appeal “must show,” MCR 7.305(B), and the Legislature’s application does not make the required showing. There is no indication under the rule that a party who fails to make a required showing can have its application rehabilitated by the other side. I am also unpersuaded by Justice VIVIANO’s citation of the rules of the Supreme Court of the United States. Justice VIVIANO does not deny that the language used there is different from our rules and requires a showing only “that the case is of such imperative public importance as to justify deviation from normal appellate practice” Sup Ct Rule 11. Our general rules governing leave to appeal require a similar showing, see MCR 7.305(B)(1) through (3), but for a bypass application our rules require the *additional* showing, beyond the importance of the issues, of either substantial harm or that the case is an appeal from a ruling that certain legislative or executive actions are invalid, MCR 7.305(B)(4). I do not believe such a showing is made here. Nor do I believe that the decisions of other state supreme courts, with different court rules, should control our application of our court rules.

³ Justice VIVIANO asserts that “[i]t is indisputable that our Court has jurisdiction over this case,” but with a plurality of this Court concluding otherwise, it is plainly disputable. An application “must show” the items included in the list. MCR 7.305(B). Echoing that language, commentary on our rules also characterizes it as mandatory. See Gerville-Réache, *Expediting Review*, § 7.23, p 199 in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed, January 2018 update) (remark- ing that a bypass application “must show” the grounds listed in MCR 7.305(B)(4)). Moreover, the original form of the rule provided only that bypass applications show that “delay in final adjudication is likely to result in substantial harm”; the additional option in MCR 7.305(B)(4)(b) that a bypass application can also show that it is an appeal from a ruling that various forms of law or government action are invalid was added in 2002. See 466 Mich lxxxvi, lxxxix (2002). Since such a judicial declara-

I also concur with denying the Governor's bypass cross-appeal. "It is a general rule in this state . . . that only a party aggrieved by a decision has a right to appeal from that decision," meaning that "[a] party who could not benefit from a change in the judgment has no appealable interest." *Ford Motor Co v Jackson (On Rehearing)*, 399 Mich 213, 225-226 (1976) (citation omitted). It is, at minimum, uncertain to me whether the Governor is aggrieved by the decision of the Court of Claims such that she would have appellate standing at this juncture. On the one hand, the Court of Claims ruled that EO 2020-68 was an invalid evasion of the requirement under MCL 30.403(3) and (4) of the Emergency Management Act (EMA), MCL 30.401 *et seq.*, that the Legislature approve disaster and emergency declarations after 28 days; invalidating EO 2020-68 falls within the terms of MCR 7.305(B)(4)(b) and is arguably the sort of appealable interest an appealing party must possess. However, the Court of Claims also ruled that MCL 10.31(1) was an adequate basis for all of the Governor's substantive orders that have purported to regulate much of life in Michigan after April 30, 2020.⁴ Because no substantive regulation issued by the Governor has been held invalid, I question whether the Court of Claims' ruling that EO 2020-68 invalidly evaded the EMA is anything more than an advisory opinion.⁵ And,

tion would already have fallen within the grounds listed in MCR 7.305(B)(1) through (3), the fact that MCR 7.305(B)(4)(b) was added to MCR 7.305(B)(4) indicates that we understood it to be mandatory for bypass applications; otherwise, it would be redundant of what is already stated in MCR 7.305(B)(1) through (3). Our past practice also indicates it is mandatory, as we have denied bypass applications on the basis that the grounds in the rule were not satisfied. See *White v Detroit Election Comm*, 495 Mich 884 (2013); *Barrow v Detroit Election Comm*, 495 Mich 884 (2013). (Note that at the time *White* and *Barrow* were decided, this requirement was found at MCR 7.302(B)(4). It was moved to MCR 7.305(B)(4) as part of a general rewrite of the rules governing practice in this Court. See 497 Mich xcxi, cxcv (2015).)

⁴ The Legislature approved an extension of the Governor's initial emergency declaration under the EMA until April 30, see 2020 SCR 24, but did not adopt further extensions.

⁵ On the other hand, the Governor may have a viable *contingent* cross-appeal, in which she challenges the decision of the Court of Claims to the extent that the appellate courts reverse the Court of Claims' decision upholding her executive orders under MCL 10.31(1). If "the cross-appellant, like any appellant, must be an aggrieved party in some respect, meaning it must be able to identify a concrete and particularized injury that can be redressed in the context of the cross-appeal," Rose, *Appeals of Right in the Court of Appeals*, § 4.46, p 100, in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed, January 2018 update), it may be that the Governor's interest in maintaining any cross-appeal would be contingent on the outcome of the Legisla-

because “it is only opinions issued by the Supreme Court and published opinions of the Court of Appeals that have precedential effect under the rule of stare decisis,” *Detroit v Qualls*, 434 Mich 340, 360 n 35 (1990), the Court of Claims’ remarks about EO 2020-68 will not control future litigation over the propriety of the Governor’s actions under the EMA—even future COVID-19 litigation.⁶ The Governor appears aware of this reality, because when she announced a subsequent extension of the COVID-19 state of emergency in Executive Order No. 2020-99, she continued to declare emergencies under both MCL 10.31(1) and— “[s]ubject to the ongoing litigation”—the EMA. Given my qualms, I am not convinced that Justice ZAHRA is correct to allege that the Governor’s bypass cross-appeal “cure[s]” any defects in the Legislature’s application. I am also unmoved by the fact that both parties ask us to grant these bypass applications. This Court writes the court rules; I do not believe the parties can rewrite the rules for us by their mutual agreement so as to bootstrap their way to jurisdiction.

I also do not believe it would be prudent to hear this case at this juncture. The statutes at issue have seen very little litigation arise under them, meaning there is little on-point authority. Moreover, the theory by which the Legislature asserts standing to bring this suit in the first place is entirely novel in Michigan. Further appellate review and development of the arguments will only assist this Court in reaching the best possible answers.⁷ Until a vaccine for COVID-19 is invented, our

ture’s appeal. Given these uncertainties, however, at minimum I do not believe it would be wise to exercise any discretion we may have to hear this case without allowing it full appellate review. For all these reasons, I do not think the Governor’s bypass cross-appeal rehabilitates the Legislature’s defective initial bypass application.

⁶ Justice VIVIANO questions whether my reasoning renders the bypass appeal provision nugatory given that, in bypassing the Court of Appeals, a party will necessarily “be appealing a nonbinding decision.” But this is clearly incorrect. Had the Governor been told that her substantive executive orders were invalid, she would have been ordered by a court to stop doing something she was doing, and exposed to contempt sanctions if she did not, without regard to whether the reasoning was binding on future disputes. I question whether the Court of Claims’ ruling here aggrieved the Governor because it essentially answered the hypothetical question of whether her executive orders *would* be valid *if* MCL 10.31(1) were not an adequate basis for them. Such a ruling does not appear to control her current orders, nor is its reasoning binding on future disputes. It is, at minimum, a sufficiently uncertain question that I do not believe this Court can properly predicate its review of this case on this foundation.

⁷ As Justice VIVIANO points out in his dissent, there are numerous cases relating to COVID-19 making their way through our state and federal courts. While many of these cases raise issues distinct from

society will be living with the risk of the spread of this disease and the argued necessity of emergency measures to mitigate that spread. There is little prospect of these disputes being rendered moot, and I have little doubt that the Court will take them up in the future.

I also disagree that this Court should heavy-handedly direct the Court of Appeals in its management of this litigation. First of all, if there is a need for expedited consideration, the parties are free to request it from the Court of Appeals, which is better positioned to know how best to balance the need for expeditious review with the resources it has available to scrutinize the arguments being made. I disagree with Justice VIVIANO that the Court of Appeals will simply put this case on any “conveyor belt,” and I believe they will recognize “this is no ordinary case.” Second, the cases in which we most often direct expedited review are election cases in which the parties have externally imposed deadlines they must satisfy to submit paperwork or print ballots. See, e.g., *League of Women Voters v Secretary of State*, 505 Mich 931 (2019). Third, I believe many of the observations that justify denying this bypass application also justify declining to order an extraordinary schedule in the Court of Appeals. Justice ZAHRA argues that “the people of this state have a great interest in the final disposition of these issues,” but the people of this state are not a party to the case—the Legislature is, suing in its institutional capacity and arguing that its prerogatives are being violated. Until a final judicial resolution of these issues is reached, the Legislature is free in the interim to avail itself of the ordinary legislative process under the Constitution. That this Court has resolved this bypass application in less than two weeks is, I believe, evidence enough that we are treating these issues with appropriate urgency.

As noted, the issue before us is not whether we will *ever* decide these issues, but rather whether we will decide them before the Court of Appeals has considered them. Because I conclude that we neither can nor should grant these bypass applications, I concur with our order denying them.

MCCORMACK, C.J., and CAVANAGH, J., join the statement of CLEMENT, J.

MARKMAN, J. (*dissenting*). I dissent from the majority’s decision to deny the parties’ applications to bypass the Court of Appeals in order to expedite the final resolution of the present dispute. Indeed, in all likelihood, the consequence of our decision today will be to ensure that this Court never issues a meaningful decision concerning the nature and required procedures of the emergency authority of this state. For the following reasons, I would grant these applications.

those raised by the Legislature in this case, in at least one, the Court of Appeals has granted leave to appeal on a very similar issue—“whether the trial court abused its discretion in ruling that plaintiff’s claim regarding the unconstitutionality of the [emergency powers of the governor act], MCL 10.31 *et seq.*, was unlikely to succeed.” *Mich United for Liberty v Governor*, order of the Court of Appeals, entered May 29, 2020 (Docket No. 353643).

First, I would grant the applications because they pertain to an issue of the greatest practical importance to the more than 10 million people of this state: the validity of executive orders declaring a state of emergency and thereby enabling a single public official to restrict and regulate travel, assembly, business operations, educational opportunities, freedoms and civil liberties, and other ordinary aspects of the daily lives of these people, including matters of crime and punishment and public safety. To put it even more specifically, the present applications place into question the entirety of the processes and procedures by which the executive orders that have defined nearly every minute, and nearly every aspect, of the lives of “we the people” of Michigan for more than the past two months were fashioned into law.

Second, I would grant the applications because, notwithstanding their vast differences in apprehending the legal and constitutional preconditions required of an emergency order, the parties *commonly* argue that this Court should grant their bypass applications in light of the profound significance and practical impact of the present emergency orders.

Third, I would grant the applications because they implicate a “case or controversy” of the greatest historical consequence between the two representative and accountable branches of our state government: each in concurrence seeking the counsel of the third branch as to what is demanded by the constitutional charter that has guided the people’s government for the past 185 years. The Governor contends that her office possesses the authority to issue the executive orders in response to the present emergency, while the Legislature in response contends that her office lacks such authority absent its own participation. Put simply, what is at issue is how the extraordinary emergency powers of government are to be invoked and how the decision-makers of our two most fundamental constitutional institutions are respectively to be engaged.

Fourth, I would grant the applications because time is an altogether relevant consideration to what is required of this judiciary. Our state continues in the midst of an emergency in which both the lives and the liberties of its people are being lost each day. By today’s action, it is unlikely that this Court will ever decisively resolve the present dispute and thus that whatever errors or excesses may have been made in the course of the present emergency will never be pronounced or remedied but left only to be repeated on the occasion of what inevitably will arise some day as our next emergency.

Fifth, I would grant the applications because this case cries out for the most expedited and final review of the highest court of this state. If there is a matter, if there is an obligation, that compels the most urgent action of this Court, it is the present matter, our present obligation. This case defines the very purpose and the fundamental responsibility of a supreme court of this union of states. By our decision to deny the applications for bypass, we bypass an exercise of authority to decide what is perhaps the most substantial dispute ever presented to this

Court, not only diminishing our standing among the judicial institutions of our federal system but diminishing our relevance within the judicial institutions of this state itself.

ZAHRA, J., joins the statement of MARKMAN, J.

ZAHRA, J. (*dissenting*). I dissent from this Court's order denying both litigants' applications for leave to appeal from the Court of Claims, thereby leaving intact without immediate review the Governor's various emergency orders issued in response to the COVID-19 pandemic and the Court of Claims order ruling in part that the Governor acted erroneously under MCL 30.401 *et seq.* I would grant the applications and decide the matters forthwith. I also dissent from this Court's inexplicable failure to direct the Court of Appeals to hear this case on an expedited basis. This case presents palpable constitutional questions that are of compelling interest to every resident, business, and employer in Michigan. The instant matter is arguably the most significant constitutional question presented to this Court in the last 50 years. By granting both applications, this Court could put to rest with finality whether and to what extent the legislation on which the Governor relied to issue the serial emergency COVID-19 orders remains a valid source of legal authority for those orders. Admittedly, deciding these difficult questions is no easy task. But the people of this state rightly demand that this Court resolve such difficult questions. Because each resident's personal liberty is at stake, it is emphatically our duty to decide this case. I dissent from the Court's failure to immediately undertake this duty.

Life for people throughout Michigan was turned on its head when on March 10, 2020, in response to the COVID-19 pandemic that threatened widespread contagion, serious and sometimes fatal illness, and a critical overload to our health system, the Governor issued Executive Order No. 2020-4, declaring a state of emergency under the authority of two separate statutory delegations of emergency authority: 1945 PA 302, known as the "emergency powers of the governor act" (EPGA), MCL 10.31 *et seq.*; and the Emergency Management Act (EMA), MCL 30.401 *et seq.* The EMA carries a 28-day limit on the amount of time in which the Governor can issue orders under a state of emergency before the act requires the Governor to declare an end to the emergency, unless both houses of the Legislature extend the period through a resolution.¹

Over the next several weeks, the Governor issued numerous additional statewide orders generally requiring people to stay at home unless their departure from home was essential, closing all nonessential² businesses, closing all schools before the end of the school year, and

¹ MCL 30.403(3). The Governor, however, argues that the Court of Claims erred by concluding that she cannot issue new orders reinstating the effect of her prior orders at the end of each order issued under the EMA.

² Many of the Governor's orders distinguished essential from nonessential activity. Still, in other areas, the people were left to wonder

seriously restricting travel, assembly, and other aspects of daily life. Law and nonemergency medical offices throughout Michigan were closed indefinitely. Both houses of the Michigan Legislature granted the Governor an extension of authority to April 30, 2020, but neither the House of Representatives nor the Senate passed a resolution to grant any further extension. On the day the EMA expressly required the declaration of emergency to be rescinded, the Governor rescinded the declaration and, within minutes, declared another statewide emergency on the basis of COVID-19, ordering that all the previous orders should now be considered effective under the new order. The Governor separately declared a state of emergency under the EPGA and ordered that all previous orders should be considered effective under that declaration as well.

People throughout Michigan were understandably frustrated over their inability to leave home to, among other things, work, engage in commerce, obtain preventative health care, visit friends and family, and maintain their personal appearance with salon and grooming services. Sporadic peaceful protests broke out throughout the state in which some residents practiced civil disobedience. The political branches of government divided over the issue. The Legislature believed it should be permitted a seat at the table in crafting emergency orders, and the Governor proclaimed unilateral authority to act.

The Michigan House of Representatives and the Michigan Senate sued the Governor in the Court of Claims, seeking a declaratory ruling that the Governor's authority under the EMA had expired and that the EPGA pertained only to local matters and did not authorize a statewide declaration of emergency. The Governor responded that each source of statutory authority continued to provide her with the power to issue orders for the protection of the public health. The Court of Claims agreed with the Legislature that the Governor's authority under the EMA had expired, but held that the EPGA granted the Governor independent authority to issue orders that would protect lives and control the emergency situation created by COVID-19. That same day, the Legislature filed an application for leave to appeal in the Court of Appeals and filed in this Court an application for leave to appeal under MCR 7.305(B)(4), which permits "an appeal before a decision of the Court of Appeals."

The Governor filed a brief in response to the Legislature's application in this Court as well as an application for leave to appeal challenging two holdings of the Court of Claims: (1) the conclusion that the Legislature has standing to bring a declaratory action, and (2) the holding that Executive Order No. 2020-68 was invalid because the Governor's authority to act under the EMA had expired.

Significantly, both of our coequal branches of government (the parties to this litigation) recognize the gravity of this matter and have asked this Court to resolve the constitutional questions before the Court without the benefit of intermediary (and prolonged) review from our

whether certain activities in which they wished to engage were permitted under the various orders. See note 3 of this statement.

Court of Appeals. Because MCR 7.305(B)(4) is perfectly satisfied,³ this Court should forthwith decide the following three questions:

³ Not only would I accept the parties' olive branch and address this matter to maintain comity within our state government, our court rules, namely MCR 7.305(B)(4), emphasize this Court's defined role to determine matters in which:

(a) delay in final adjudication is likely to cause substantial harm, or

(b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid[.]

My concurring colleagues, by contrast, believe a bypass of the Court of Appeals is not warranted because the Legislature has failed to satisfy the requirements of MCR 7.305(B)(4). In arguing its case to bypass the Court of Appeals, the Legislature asserts:

Delaying final adjudication would do "substantial harm," as citizens and lawmakers would be left in a state of uncertainty at a time when confident decision-making is a requirement for survival. Michiganders are living under and attempting to interpret orders that never should have been implemented over their Legislature's objection; at the very least, they are living under a cloud of ambiguity that can be rectified by this Court. MCR 7.305(B)(4)(a). The *ultra vires* nature of the Governor's actions puts at risk people who are relying on governmental direction to guide their conduct. Lastly, this appeal involves a ruling that has already declared one related "action of the . . . executive branch[] of state government invalid." MCR 7.305(B)(4)(b). [Alterations in original.]

I am persuaded that the requirements of MCR 7.305(B)(4) are satisfied. As representatives of the people, the Legislature clearly has an interest in providing certainty "at a time when confident decision-making is a requirement for survival." It is no secret that many residents and businesses have struggled to understand the Governor's emergency executive orders related to the COVID-19 virus. See DesOrmeau, *After 102 Executive Orders, Confusion is Commonplace on What's Allowed in Michigan and What Isn't* <<https://www.mlive.com/public-interest/2020/05/after-101-executive-orders-confusion-is-commonplace-on-whats-allowed-in-michigan-and-what-isnt.html>> (accessed June 2, 2020) [<https://perma.cc/K5WK-4RCY>]. Further, the Governor makes no attempt to rebut the Legislature's assertion that it has been particularly harmed by the Governor's usurpation of Legislative power through her emergency executive orders.

(1) whether the Michigan Senate and the Michigan House of Representatives have standing in this case to seek declaratory relief in the Court of Claims,

(2) whether the Governor has continuing authority under the Emergency Management Act (EMA), MCL 30.401 *et seq.*, to issue emergency executive orders related to the COVID-19 virus, and

(3) whether the Governor has continuing authority under the emergency powers of the governor act (EPGA), MCL 10.31 *et seq.*, to issue emergency executive orders related to the COVID-19 virus.

The members of this Supreme Court, Michigan's court of last resort, have been elected to serve as the final arbiters of law and constitutional questions that are of significant public interest and importance to our state. No issue is of greater public interest or importance than the resolution of whether the Governor was within her constitutional authority to deprive the 10-million-plus residents and the thousands of business owners of Michigan of their personal freedom and economic liberty. Unlike the legislative and executive branches of government, which make and enforce laws through a political process, the judiciary is the nonpolitical branch of government charged with the extremely limited but all-important role of interpreting only those laws and constitutional questions presented in cases and controversies brought to the Court by adversaries in litigation. It is exactly because this Court is the pinnacle of the apolitical branch of government and limited in the scope of its duties that the people trust and accept our resolution of disputes, even when we are sharply divided when rendering our opinions. This is all the more true where, as here, the case presents a constitutional question of significant magnitude that divides our political branches of government. The people of Michigan expect this Court to resolve this dispute. We should do so.

And yet, beyond declining to grant the Legislature's application, the Court's majority also fails to order the Court of Appeals to hear and resolve these issues on an expedited basis. I make no attempt to explicate this failure. Again, both of our coequal branches of government have asked for these significant constitutional questions to be answered as soon as possible. And the people of this state have a great interest in the final disposition of these issues as soon as possible. To the extent a majority of this Court has concluded that the wisdom of our intermediate appellate court is essential to our resolution of these weighty issues, there is no reason why this Court should not order the Court of Appeals to hear and decide these questions forthwith. The Court's failure to, at a minimum, require the Court of Appeals to decide these cases on an expeditious basis fails to accord the respect due to our coequal branches

Moreover, even assuming there is a shortcoming in the Legislature's application, that defect is cured by the Governor's application, which expressly invites a challenge to the Court of Claims' holding that the Governor's actions were invalid under the EMA. See MCR 7.305(B)(4)(b). Again, both of our coequal branches of government want these questions answered. We should honor their requests.

of government and displays insensitivity to the people of this state who are entitled to know with certainty whether the constraints of liberty imposed by the emergency orders under which they labor are constitutionally permissible.

MARKMAN, J., joins the statement of ZAHRA, J.

VIVIANO, J. (*dissenting*). The Court today turns down an extraordinary request by the leaders of our coequal branches of government to immediately hear and decide a case that impacts the constitutional liberties of every one of Michigan's nearly 10 million citizens.¹ See *Walsh v River Rouge*, 385 Mich 623, 639 (1971) ("The invocation of a curfew or restriction on the right to assemble or prohibiting the right to carry on businesses licensed by the State of Michigan involves the suspension of constitutional liberties of the people."). Because I believe we are duty-bound to give our immediate attention to this case, I cannot join an order that nonchalantly pushes it off for another day.

The Governor and the Legislature do not seem to agree on many things these days, but they both agree that this case merits our immediate attention. In addition, since they individually and collectively represent every single resident of our state, one can surmise that the views of the Governor and Legislature represent the diverse views of large numbers of our citizens. They are crying out to this Court for help because there is a significant amount of confusion in our state over what the Governor's executive orders mean and whether they are enforceable.² And the instant case is not the only one involving questions regarding the validity of the Governor's actions to combat COVID-19.³ A substantive ruling on the merits of this case by our Court would not only

¹ Justice CLEMENT is of course correct that this case does not involve a direct claim of a constitutional rights violation. But, since the validity of the Governor's executive orders are at stake, and it is indisputable that those orders impinge on the constitutional liberties of our citizens, it is rudimentary logic—not hyperbole—to say that the case impacts the civil liberties of our citizens.

² See, e.g., DesOrmeau, *After 102 Executive Orders, Confusion is Commonplace on What's Allowed in Michigan and What Isn't* <<https://www.mlive.com/public-interest/2020/05/after-101-executive-orders-confusion-is-commonplace-on-whats-allowed-in-michigan-and-what-isnt.html>> (accessed June 2, 2020) [<https://perma.cc/K5WK-4RCY>].

³ There are at least five other cases involving challenges to COVID restrictions in the lower courts: *Martinko v Governor* (Docket No. 353604); *Slis v Michigan* (Docket No. 351211); *Dep't of Health & Human Servs v Manke* (Docket No. 353607); *Mich United for Liberty v Governor* (Docket No. 353643); and *Associated Builders & Contractors of Mich v Governor* (Docket No. 20-000092-MZ). Cases concerning the restrictions are also proliferating in the federal courts. See *Mitchell v Whitmer* (Case No. 1:20-cv-00384) (WD Mich); *League of Indep Fitness Facilities & Trainers, Inc v Whitmer* (Case No. 1:20-cv-00458) (WD Mich); *Allen v*

provide clarity to the Governor, the Legislature, and the public, but it would also assist the lower courts as they continue to address these issues in other matters.

I agree with Justice ZAHRA that both applications easily satisfy the requirements of our bypass rule, MCR 7.305(B)(4). As an initial matter, it is clear that our Court has jurisdiction here under MCR 7.303, which governs the jurisdiction of the Supreme Court. Under MCR 7.303(B)(1), we have discretion to “review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.305).” Contrary to Justice CLEMENT’s suggestion, we have never held that the grounds for discretionary appeal are jurisdictional—I see no reason to do so now. It is indisputable that our Court has jurisdiction over this case, if we choose to assert it.

The Legislature’s bypass application clearly shows that a “delay in final adjudication is likely to cause substantial harm[.]” MCR 7.305(B)(4)(a). The second question presented in the application is “whether the Emergency Powers of the Governor Act [MCL 10.31 *et seq.*] is consistent with the separation-of-powers doctrine in the Michigan Constitution, where the act . . . results in the usurpation of the Legislature’s role in formulating public policy[.]” The Legislature further asserts that “COVID-19 presents real problems that call for a comprehensive and deliberative governmental response. The Court should restore the proper constitutional order and allow the branches to get to work—together.”⁴ In short, the Legislature is arguing that because the Governor has claimed the authority to exercise core legislative powers for an indefinite period, the Legislature has been displaced from its normal constitutional role as the branch with “the authority to make, alter, amend, and repeal laws.” *Harsha v Detroit*, 261 Mich 586, 590 (1933). See Const 1963, art 4, § 1 (stating that with certain exceptions not relevant here, “the legislative power of the State of Michigan is vested in a senate and house of representatives”); Const 1963, art 4, § 51

Whitmer (Case No. 2:20-cv-11020) (ED Mich); *Mich United Conservation Clubs v Whitmer* (Case No. 1:20-cv-00335) (WD Mich); *Mich Nursery & Landscape Ass’n v Whitmer* (Case No. 1:20-cv-331) (WD Mich); *Beemer v Whitmer* (Case No. 1:20-cv-323) (WD Mich); *VanderZwaag v Whitmer* (Case No. 1:20-cv-325) (WD Mich); *Martinko v Whitmer* (Case No. 2:20-cv-10931) (ED Mich); *Thompson v Whitmer* (Case No. 1:20-cv-00428) (WD Mich); *Midwest Institute of Health, PLLC v Whitmer* (Case No. 1:20-cv-00414) (WD Mich); *Otworth v Whitmer* (Case No. 1:20-cv-00405-PLM-RSK) (WD Mich); *Signature Sotheby’s Int’l Realty, Inc v Whitmer* (Case No. 1:20-cv-00360) (WD Mich). More are sure to follow.

⁴ See also Michigan Legislature’s Emergency Bypass Application for Leave to Appeal, p 27 (“In effectively exercising standardless lawmaking authority to formulate public policy rather than the democratic process, the Governor has usurped the Legislature’s power.”); *id.* at 33 (“Nor can the Governor usurp the lawmaking power merely because she disagrees with the Legislature’s response to the COVID-19 crisis.”).

(“The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.”). At the bypass stage, we need not decide the merits of the Legislature’s separation-of-powers argument. It is enough to recognize the obvious, substantial, and ongoing institutional harm that is being caused if the Legislature’s claim has merit.

Justice CLEMENT asserts, not incorrectly, that the Legislature still has the power to enact laws. But that misses the point of the Legislature’s claim. Absent the Governor’s extraordinary exercise of core legislative powers during the pandemic, the normal constitutional order would prevail and the Governor and the Legislature would be compelled to work together to shape the public policy of our state. Instead of needing a supermajority vote to override the Governor’s veto and restore the *status quo ante*, the Legislature could enact laws and present them to the Governor by a simple majority vote of each house. And the Governor would have an incentive—the one our founders built into our system of government—to work with Legislature to develop bills that she found acceptable and would be willing to sign into law. The Legislature’s position, in short, is that by her ongoing and broad exercise of the legislative power, the Governor has usurped its power and diminished its institutional role. Being sidelined from its role in shaping public policy during this pandemic is undoubtedly a substantial harm to the institutional prerogatives of the Legislature.

The concurring justices give even shorter shrift to the Governor’s bypass application. For one thing, Justice CLEMENT’s concurrence never mentions or purports to apply our bypass rule with regard to the Governor’s application. Instead it offers a series of suppositions on topics other than whether the Governor is appealing the invalidation of executive action, which is all that MCR 7.305(B)(4)(b) requires and which is precisely what the Governor seeks to appeal here. The Court of Claims invalidated an executive order, No. 2020-68, which the Governor issued under the Emergency Management Act (EMA), MCL 30.401 *et seq.*

Justice CLEMENT seems to agree that the Governor has met the requirements of MCR 7.305(B)(4)(b). The thrust of Justice CLEMENT’s argument is that the Governor *might* not be an aggrieved party because, even though the court struck down her order under the EMA, she was able to retain all her substantive regulations in an identical order under the emergency powers of the governor act (EPGA). But the Governor has good reason for feeling that she is aggrieved even if her regulations remain standing at this point in the proceedings. “[T]o have standing on appeal [i.e., to be an aggrieved party], a litigant must have suffered a concrete and particularized injury” arising from the judgment below. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291 (2006).⁵

⁵ See also *Attorney General v Bd of State Canvassers*, 500 Mich 907, 908 n 6 (2016) (ZAHRA and VIVIANO, JJ., concurring) (“‘Aggrieved’ is a term of art defined as ‘having legal rights that are adversely affected; having been harmed by an infringement of legal rights.’ An ‘aggrieved

The Governor argues that the “EMA provides for a more extensive structure of governmental action in response to an emergency, and a more detailed set of powers for the Governor to implement in that response.” A comparison of the two statutes at issue displays the EMA’s more elaborate provisions. Compare MCL 10.31 (setting forth the Governor’s general authority to promulgate orders after proclaiming a state of emergency) with, e.g., MCL 30.408 and MCL 30.409 (establishing emergency manager coordinators across various institutions and entities) and MCL 30.411 (providing limited immunity). And, importantly, the Governor contends that the EMA not only empowers her to act but affirmatively *requires* her to declare an emergency or disaster. Whether these provisions and others differentiate the EMA from the EPGA, so that the statutes do not conflict, goes to the merits of the statutory issue in this case, and thus I would not now suggest an answer. It is enough here that the Governor has raised a colorable argument that the decision below struck down her executive order, effectively cabined her statutory tools, and required her to disregard statutory obligations. This constitutes a concrete and particular injury.

Moreover, consider the implications of Justice CLEMENT’s hunch about the Governor’s aggrieved-party status. If the Legislature successfully appealed its claims—either here or in the Court of Appeals—and the EPGA no longer authorized Executive Order No. 2020-68, then the Governor would need to fall back on the EMA. But by that point it would doubtless be too late for her to appeal.⁶ In other words, the Governor would become aggrieved only when it would be too late for her to do anything about it.⁷

In sum, because the Governor is appealing the invalidation of her executive actions, her bypass application satisfies MCR 7.305(B)(4)(b). And she also has claimed sufficient injury from the judgment below. If the majority wishes to deny the application on other grounds, so be it. But it should not pretend the Court’s hands are tied by our procedural rules.⁸

party’ is ‘a party whose personal, pecuniary, or property rights have been adversely affected by another person’s actions or by a court’s decree or judgment.’ Thus, to be ‘aggrieved,’ a party must demonstrate that it has been harmed in some fashion.”) (citations omitted).

⁶ Under Justice CLEMENT’s logic, it would not be enough for the Governor that the Legislature could satisfy the bypass rule in order for her to bring her appeal.

⁷ In addition, Justice CLEMENT’s reminder that the Court of Claims’ decision is not binding is irrelevant: it would seemingly always be the case that a party seeking to bypass the Court of Appeals will be appealing a nonbinding decision. If this is a meaningful consideration in rejecting a bypass, then one wonders why we have the rule at all.

⁸ By denying the bypass, the majority has not only written the bypass court rule out of the rulebook, it has also put us at odds with the highest

* * *

This case involves some of the most important legal principles that can arise in a free society. The parties' briefs reverberate with weighty

courts of many other states who have not faltered in their responsibility to timely address the significant legal issues arising from their states' responses to the COVID-19 pandemic. The Pennsylvania Supreme Court, exercising immediate jurisdiction in a challenge to executive orders, said it well: "[T]his case presents issues of immediate and immense public importance impacting virtually all Pennsylvanians and thousands of Pennsylvania businesses, and that continued challenges to the Executive Order will cause further uncertainty." *Friends of Danny DeVito v Wolf*, ___ Pa ___, ___ (2020) (Docket No. 68 MM 2020), slip op at 17. In a similar case, the Kansas Supreme Court exercised expedited original jurisdiction, explaining that such jurisdiction lay when the court "determine[s] the issue is of sufficient public concern. Under the circumstances our state faces, we easily do." *Kelly v Legislative Coordinating Council*, 311 Kan 339, ___ (2020) (Docket No. 122765), slip op at 9 (citation omitted). See also *In re State of Texas*, 602 SW3d 549 (2020) (Docket No. 20-0394) (addressing whether COVID-19 justified voting by mail); *Seawright v New York City Bd of Elections*, ___ NY2d ___ (2020) (Slip Op No. 02993) (addressing election requirements in light of COVID-19); *Wisconsin Legislature v Palm*, 391 Wis 2d 497, ___; 2020 WI 42, ¶ 10 (Wis, May 13, 2020) (exercising original jurisdiction—which covered cases " 'that should trigger the institutional responsibilities of the Supreme Court' "—over the legislature's challenge of executive orders because the "order . . . impacts every person in Wisconsin, as well as persons who come into Wisconsin, and every 'non-essential business' ") (citation omitted); *Cal Attorneys for Criminal Justice v Newsom*, order of the California Supreme Court, entered May 13, 2020 (Case No. S261829), p 1 ("This mandate proceeding, like others that have recently come before this court, raises urgent questions concerning the responsibility of state authorities during the current pandemic to protect the health and safety of inmates . . . in light of the spread of the novel coronavirus . . ."); *id.* at 4 (Liu, J., dissenting) ("As a prudential matter, we exercise [original mandamus] jurisdiction 'only in cases in which "the issues presented are of great public importance and must be resolved promptly." ' If there is any case where exercising our mandamus jurisdiction is appropriate, this is it.") (citations omitted); *Comm for Pub Counsel Servs v Chief Justice of the Trial Court*, 484 Mass 1029, 1029 (2020) (denying reconsideration of earlier holding that the court had superintending authority "to stay a final sentence that is being served, absent a pending appeal or a motion for new trial"); *Goldstein v Secretary of the Commonwealth*, 484 Mass 516 (2020) (addressing an election-signature requirement in light of COVID); *In re Abbott*,

assertions about our constitutional structure, as well as the need for and the scope of the Governor's emergency powers. These issues, and how we decide them, will have a direct impact on the constitutional liberties of

601 SW3d 802, 63 Tex Sup Ct J 909 (2020) (holding that trial judges lacked standing to challenge an executive order applying to bail decisions); *Comm for Pub Counsel Servs v Chief Justice of the Trial Court*, 484 Mass 431, 446 (2020) (exercising general superintendence, under which the court could “remedy matters of public interest ‘that may cause further uncertainty within the courts’ ”) (citation omitted); *Christie v Commonwealth*, 484 Mass 397 (2020) (hearing petition for immediate release from custody due to COVID-19 concerns under the court's general superintendence power); *In re Interrogatory on House Joint Resolution 20-1006*, ___ P3d ___, ___; 2020 CO 23, ¶ 28 (Colo, 2020) (“We conclude that the interrogatory [by the General Assembly asking for guidance in light of conditions posed by COVID-19 on a constitutional requirement] now before us presents an important question upon a solemn occasion. Accordingly, we exercise original jurisdiction. The General Assembly and the public at large urgently need an answer to the interrogatory to avoid uncertainty surrounding the length of the remaining regular session and its impact on pending bills and bills yet to be introduced.”); cf. *Strizich v Mont Dep't of Corrections*, order of the Montana Supreme Court, entered May 5, 2020 (Case No. OP 20-0225) (declining to consider petition for injunctive relief because the case, involving COVID-19 and state correctional facilities, was fact-intensive); *Disability Rights Mont v Mont Judicial Districts 1-22*, order of the Montana Supreme Court, entered April 14, 2020 (Case No. OP 20-0189) (denying petition to exercise mandamus power because the request involved factual issues and the legal contention failed on the merits).

It is noteworthy, too, that in the United States Supreme Court, the significance of the issues would alone justify bypassing the court of appeals. See also Sup Ct Rule 11 (“A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such *imperative public importance* as to justify deviation from normal appellate practice and to require immediate determination in this Court.”) (emphasis added). Indeed, “[t]he writ . . . has been granted in some of the most important cases in [the last] century.” Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup Ct Rev 259, 259 (1986); see *Dames & Moore v Regan*, 453 US 654, 667-668 (1981) (“Arguing that this is a case of ‘imperative public importance,’ petitioner then sought a writ of certiorari before judgment. Because the issues presented here are of great significance and demand prompt resolution, we granted the petition for the writ, adopted an expedited briefing schedule, and set the case for oral argument on June 24, 1981.”) (citations omitted).

every person who lives or owns property in, or simply visits, our state while the restrictions are in place. On a fundamental and practical level, they impact how our friends and neighbors live their lives on a daily basis, where they can go, with whom, how and when they can practice their religion, whether they can go out to eat or to the hardware store or to the beach—in short, nearly every decision they make about nearly everything that they do. Our Court exists to vindicate the constitutional rights of our citizens and to be the final expositor of state law; thus, we are uniquely situated to provide a prompt and final resolution of the issues presented in this case.

The leaders of our state government believe we should hear this case now. I agree. But instead of rising to the occasion, the majority order dodges these issues for now and defers them to the lower courts so they can weigh in first. Ordinarily, I would agree with this approach. But this is no ordinary case. It should not simply go on the conveyor belt with all of the others. Because my colleagues have decided to put it there at least for the time being, I respectfully dissent.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 30, 2020:

In re CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, No. 161492. On order of the Court, the questions certified by the United States District Court for the Western District of Michigan are considered. We direct the Clerk to schedule oral argument on the questions on Wednesday, September 2, 2020, at 9:30 a.m. The parties to the underlying proceeding shall submit briefs in conformity with MCR 7.312 and in accordance with the following briefing schedule: the brief and appendixes of the plaintiffs are due within 21 days after the date of this order; the brief and appendixes of the defendants are due within 14 days after service of the plaintiffs' brief; and a reply is due within 14 days after service of the last timely filed defendants' brief. The motion to bifurcate briefing is denied, but nothing in this order precludes briefing and argument on whether the Court should exercise its discretion to answer the certified questions.

The Michigan House of Representatives and the Michigan Senate are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the certified questions may move the Court for permission to file briefs amicus curiae.

ZAHRA, J. (*concurring*). The United States District Court for the Western District of Michigan has asked this Court to answer two certified questions concerning the Governor's "authority . . . to issue or renew any executive orders related to the COVID-19 pandemic" and whether the emergency powers of the governor act, MCL 10.31 *et seq.*, or the Emergency Management Act, MCL 30.401 *et seq.*, or both, violate "the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution." In light of the action taken by the federal court, the Michigan Legislature filed a motion for reconsideration of this Court's denial of the application to bypass the Court of Appeals in *House*

of *Representatives v Governor*, ____ Mich ____; 943 NW2d 365 (2020).¹ The order denying the application to bypass was decided by the narrowest of margins by this seven-member Court, with vigorous dissents filed by Justice MARKMAN, Justice VIVIANO, and myself. It suffices to say that the dissenting justices concluded that in this unprecedented time amid a global pandemic, it is the duty of this Court to expeditiously decide the extent to which the Governor can exercise certain statutory powers, as well as integral constitutional questions relating to whether the Governor's thus-far largely unreviewed assertion of these powers violates our Constitution's core commitment to the separation of powers.

I concur in the order establishing an expedited briefing schedule and setting oral arguments for September 2, 2020, in response to the federal district court's request that this Court answer its certified questions.² I also concur in the Court's denial of the motion for reconsideration of this Court's denial of the application to bypass the Court of Appeals, while directing that court to issue its decision by August 21st. But my concurrence in the Court's actions of today should in no way be taken as a retreat from my dissenting statement to the order denying the application for bypass. I believed then and continue to believe today that "[b]ecause each resident's personal liberty is at stake, it is emphatically our duty to decide [these weighty constitutional issues]." *Id.* at ____; 943 NW2d at 371 (ZAHRA, J., dissenting). I also continue to share the concerns expressed by Justice MARKMAN and Justice VIVIANO in their dissenting statements to the order denying the application for bypass. As Justice VIVIANO expressed, the issues at stake "and how we decide them[] will have a direct impact on the constitutional liberties of every person who lives or owns property in, or simply visits, our state while the [Governor's] restrictions are in place." *Id.* at ____; 943 NW2d at 378 (VIVIANO, J., dissenting).

Yet, I decline to join Justice MARKMAN's dissent to the instant order. I do not take issue with the way Justice MARKMAN has framed the urgency or importance of the matters before us. If writing on a blank slate, I most assuredly would hear and decide both *In re Certified Questions* and *House of Representatives* more expeditiously than provided in the instant order and would do so without review by the Court of Appeals. But this matter is not presented to us on a blank slate.

Notwithstanding the vigorous dissents of three justices from the denial of the application for bypass, a majority of this Court concluded

¹ The issues presented in *House of Representatives* are for all intents and purposes identical to the issues presented in *In re Certified Questions*.

² MCR 7.308(A)(3) provides that should the Court decide to answer certified questions, briefs are to be filed following the briefing schedule for calendar cases (which would take 112 days). The instant order has reduced that period by more than half, allowing just 49 days for the filing of all briefs. The notice setting oral arguments is also expedited, with arguments being conducted just days after the briefs are submitted.

that further review by this Court should not occur without the benefit of review and an opinion from the Court of Appeals. I also took specific exception to this Court's failure to order the Court of Appeals to hear and decide the issues presented in *House of Representatives* on an expedited basis and by a date certain.³ Notwithstanding the lack of direction from this Court, the Court of Appeals decided to expedite these proceedings. And now with the certified questions presented to us by the federal court, the order issued by this Court today requires the Court of Appeals to release its opinion no later than August 21, 2020, leaving time for the Governor, the Legislature or both to file applications for leave to appeal in this Court before we hear arguments in the certified-questions case on September 2, 2020. I believe the instant briefing and argument schedule is as expeditious as possible under the circumstances presented. Without doubt, the people of this state are far better served by the majority's instant order than by the Court's previous order denying the application for bypass.

Finally, while I do not join Justice MARKMAN's dissenting statement, I share his concern that there is "no certainty that this Court will ever actually *answer* the certified questions, and, if we do choose to do so, such a decision will likely be issued sometime in October, November, or December, perhaps." Admittedly, it remains entirely possible that after briefing and argument a majority of the Court will decline to answer the certified questions or will resolve them in an opinion of the Court delivered many months later. But I am only one of seven justices on the Court and can only endeavor to impress upon my colleagues my views on the law and how it should be applied to the matters that come before this Court. I accept my responsibility as an elected member of the Supreme Court and pledge to the people of Michigan that I have and will continue to endeavor to resolve these important questions as expeditiously as the Court and present circumstances allow.

VIVIANO, J., joins the statement of ZAHRA, J.

CAVANAGH, J. (*concurring*). I agree with Justice MARKMAN that "the underlying issues in these cases pertain to an 'emergency' of the most compelling and undisputed character" and that "ensuring a *timely* judicial response to the issues posed" is critically important. It is equally as critical in my opinion, however, that the judicial response to this emergency be thoughtfully and thoroughly considered. I also agree with Justice MARKMAN that "responding to this inquiry through a considered and thoughtful assessment of the requirements of our law and Constitution" is a high priority. It is such a high priority in my opinion that this Court should and has taken great pains to ensure that we have the benefit of full briefing from the parties in *In re Certified Questions* and the Court of Appeals' considered decision in *House of Representatives v*

³ *House of Representatives*, ___ Mich at ___; 943 NW2d at 373 (ZAHRA, J., dissenting) ("And yet, beyond declining to grant the Legislature's application, the Court's majority also fails to order the Court of Appeals to hear and resolve these issues on an expedited basis. I make no attempt to explicate this failure.").

Governor. Those benefits are particularly valuable here because these cases will require resolution of important constitutional questions of first impression—perhaps the most imposing exercise we must undertake as the state’s highest court.

I disagree with Justice MARKMAN that we have not sufficiently expedited the process in these cases. Any casual observer of the appellate process in Michigan would recognize that these cases are, in fact, receiving significantly expedited review. For example, it typically takes on average between 13 and 14 *months* for the Court of Appeals to dispose of a case by opinion.¹ In contrast, the timeline from the date that the *House of Representatives* claim of appeal was filed in the Court of Appeals (May 28, 2020) until the day that a decision will be issued by the panel (August 21, 2020) is just over 12 *weeks*. Unlike Justice MARKMAN, who seemingly views the Court of Appeals as a roadblock to this Court’s consideration of cases, I find immense value in the meaningful analysis and perspective offered by our intermediate appellate court. To expedite the *House of Representatives* appeal any further would be to risk sacrificing the substantive contribution of the Court of Appeals. Moreover, a typical briefing schedule applied to certified questions, see MCR 7.308(A)(3), takes 84 days with oral argument, if granted, ordered sometime after. In regard to the instant *Certified Questions* case, today’s order cuts the briefing schedule almost in half to 49 days and schedules oral argument only two weeks after that. Put simply, these cases are receiving substantially expedited consideration while still allowing the parties to fully present argument on the complex issues presented.

I also disagree with Justice MARKMAN’s statement that this Court resolved the constitutional rights of “one Michigan barber” but is refusing to resolve the constitutional rights of other Michigan citizens through its orders in these cases. This is simply not true. In *Dep’t of Health & Human Servs v Manke*, 505 Mich 1110; 943 NW2d 397 (2020), this Court unanimously remanded “the barber’s” claims to the Court of Appeals for full consideration by that court. For the reasons already stated, our orders today ensure that every citizen will be given the very same consideration.

Finally, although Justice MARKMAN forecasts that, as a consequence of this Court’s orders ensuring that these cases receive complete and adequate consideration, this Court may never “issue[] a meaningful decision” and is unlikely to “ever decisively resolve the present dispute,” I, again, must disagree. As Justice CLEMENT aptly noted in her earlier concurring statement attached to this Court’s order denying bypass in *House of Representatives v Governor*, ___ Mich ___, ___; 943 NW2d 365, 369 (2020), “[u]ntil a vaccine for COVID-19 is invented, our society will be living with the risk of the spread of this disease and the argued necessity of emergency measures to mitigate that spread.” Since the

¹ Michigan Court of Appeals, *2018 Annual Report*, p 6, available at <<https://courts.michigan.gov/Courts/COA/aboutthecourt/Documents/AnnualReport2018.pdf>> (accessed June 30, 2020) [<https://perma.cc/44RA-6642>].

time Justice CLEMENT made this observation, there have unfortunately been no advances in science or public health to eradicate this virus and, therefore, I continue to join her in believing that there is “little prospect of these disputes being rendered moot . . .” *Id.*

In sum, I believe that the orders issued today in these related cases best balance the need for a timely judicial response with the equally important need for a thoughtful and thorough resolution. The judicial response of this Court should and will be guided by the deliberate consideration of our intermediate appellate court in *House of Representatives* and informed by full briefing by the parties in *In re Certified Questions*. I am confident that each and every one of my colleagues accepts their responsibility as elected members of this Court to honestly endeavor to resolve these important questions as expeditiously, thoroughly, and thoughtfully as possible.

MARKMAN, J. (*dissenting*). On June 18th, the United States District Court for the Western District of Michigan certified two questions to this Court, requesting our opinion concerning (a) whether the Governor possesses “the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic,” and (b) whether the emergency powers of the governor act, MCL 10.31 *et seq.*, or the Emergency Management Act, MCL 30.401 *et seq.*, or both, violate “the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.” In that case, the Court now schedules oral argument for September 2nd. And in a separate but related case, the Court denies the Legislature’s motion for reconsideration of our earlier decision to deny its application to bypass the Court of Appeals, while directing that court to issue its decision by August 21st.

This Court possesses the authority to expedite its own deliberations or not; to expedite the deliberations of the Court of Appeals or not; and to bypass entirely the deliberations of the Court of Appeals or not. Therefore, where, as here, matters of expedition come before the Court, the determinative question is less one of legal authority than of judgment and purpose. In other words, what would be the *purpose* in a given case for expediting its resolution or not, for bypassing the Court of Appeals or not? What would or would not be accomplished by such expedition? Here, the Court has chosen nominally to expedite the deliberations of the Court of Appeals in the Legislature’s case and the deliberations of this Court in the “certified questions” case, while reaffirming its recent decision not to bypass the Court of Appeals and thereby to expedite the work of this Court in the Legislature’s case. All to what purpose?

One obvious “purpose” that might inform our consideration of matters of expedition would be this: what extent of reasonable expedition will most likely ensure that our ultimate decision will be rendered in a sufficiently timely manner to enable that decision to govern the *present* dispute, the dispute arising from the *present* emergency, the dispute prompting the *present* lawsuit? That, of course, is the entire point of both the lawsuit and the certified questions before this Court; these cases do not pose academic exercises and they are not addressed to the next pandemic, but their common purpose is to more clearly

define the legal and constitutional relationship between the Legislature and the Governor in the context of the *present* emergency. And in this regard, the Court's "expedition" of these two cases today seems to me entirely unfocused. While it is indeed an "expedition" of sorts, it is an "expedition" unsuited to what must be its principal purpose, to facilitate the adoption of rules that are faithful to the law and the Constitution and that will govern the interactions between the Legislature and the Governor during the COVID-19 emergency of the year 2020.

It has now been 39 days since expedited treatment was first sought by the Legislature in its lawsuit. And as a result of today's orders, there will be 52 additional days before even an intermediate decision from the Court of Appeals will be required and, of course, there is no certainty that this Court will ever hear an appeal from that decision. And in the "certified questions" case, the Court provides for a 49-day briefing schedule, with oral arguments to be held 65 days from now, again, of course, with no certainty that this Court will ever actually *answer* the certified questions, and, if we do choose to do so, such a decision will likely be issued sometime in October, November, or December, perhaps.

I have no greater insight than do my colleagues, or than does the public generally, as to the future course and duration of the present emergency. But I do know this: the underlying issues in these cases pertain to an "emergency" of the most compelling and undisputed character, and ensuring a *timely* judicial response to the issues posed is what should determine the extent of this Court's expedition. While there may be little we can do concerning the public health consequences of the present crisis, there is a great deal we can do in assessing the legal and constitutional propriety of our state's response to the emergency. Through which *institutions* and by which *procedures* and by an understanding of which *laws* should Michigan's response be formulated under a Constitution in which even emergencies are subject to the rule of law?

Both houses of our Legislature in their representation of the "we the people" believe that the Governor has exceeded her lawful authority in certain curtailments of the rights of the people, and the Governor in her representation of "we the people" believes that she has exercised her executive powers in a manner faithful to the law and Constitution. And although I have not counted heads, just as the two great institutions of our system of self-government have divergent positions as to the state's emergency response, so too do millions of citizens, a good number of whom believe they have suffered specific personal harm and injury as a result of this response. This Court, as the third great institution of our constitutional system, has now been requested by the Legislature in a case aptly named *House of Representatives & Senate v Governor* to resolve the present dispute—a resolution presumably to be grounded upon "neither Force nor Will, but merely judgment," Federalist No. 78, as this is derived from the "judicial power" of this state. Both the Legislature and the Governor previously sought from this Court, but did not receive, expedited treatment through a bypass of the Court of Appeals.

But these cases not only pose a separation-of-powers dispute of immense consequence, but the certified questions posed by the federal court implicate a significant issue of federalism as well. The certified

questions in this case pertain to medical procedures in Michigan delayed by emergency executive order; in another recent federal court case, the issues pertained to gyms and fitness facilities closed by emergency executive order; and similar lawsuits have been filed in still other federal cases. It is a highly concerning matter that lawsuits of this nature, each implicating the respective authorities of the legislative and executive branches of this state, would increasingly be filed in federal court. And yet, when the federal district court in the present case demonstrates genuine federal-state comity in seeking out the perspectives of this Court on the requirements of Michigan law—while interrupting its own litigation in the process—the unhurried nature of our response is disconcerting.

Rather than engaging in further “expediting,” I would *resolve* the present cases and I would do so in a manner affording *timely* guidance concerning our state’s legal and constitutional response to the COVID-19 emergency. To put it differently, rather than addressing the rights of one Michigan barber in one well-publicized case over the course of the past four months, I would address more encompassingly, and more consistently, the rights of *all* Michigan citizens by answering the common inquiry in the present cases: where do the respective authorities of the Legislature and the Governor begin and end during a time of emergency? In my view, there is nothing that constitutes a higher priority on this Court’s agenda than clearly responding to this inquiry through a considered and thoughtful assessment of the requirements of our law and Constitution.

I remarked in my dissenting statement a month ago, when this Court initially rejected bypass of the Court of Appeals, that “the consequence of our decision today will be to ensure that this Court never issues a meaningful decision concerning the nature and required procedures of the emergency authority of this state. . . . By today’s action, it is unlikely that this Court will ever decisively resolve the present dispute and thus that whatever errors or excesses may have been made in the course of the present emergency will never be pronounced or remedied but left only to be repeated on the occasion of what inevitably will arise some day as our next emergency.” I see nothing in today’s orders to cause me to alter this perspective. The responsibility of this Court is not to “expedite,” but it is to *sufficiently* expedite, to treat the present disputes with the requisite sense of urgency, so that the issues raised are resolved in a manner that has a practical impact on the rule of law in our state during the pendency of the ongoing crisis. Regrettably, that is not what is being achieved by today’s orders.

Accordingly, I dissent from each order because each, in my judgment, fails to expedite this Court’s consideration to a sufficient extent. In *In re Certified Questions*, I would answer both questions and do so on a considerably more expedited basis. And in *House of Representatives & Senate v Governor*, I would grant the Legislature’s motion for reconsideration and order the case to be heard in conjunction with *In re Certified Questions*, thereby also deciding this case on a considerably more expedited basis.

RESPONSE TO CONCURRENCE OF JUSTICE CAVANAGH

Justice CAVANAGH writes in her concurring statement that “[u]nlike Justice MARKMAN, who seemingly views the Court of Appeals as a roadblock to this Court’s consideration of cases, I find immense value in the meaningful analysis and perspective offered by our intermediate appellate court.” Having sat on the Court of Appeals for four years, I too have enormous regard for the institution and for its individual judges. More to the point, however, having *not* sought to bypass the Court of Appeals in approximately 99.99% of the cases within our state’s appellate system, I believe my support of a bypass in *this* case is less indicative of the view that the Court of Appeals constitutes a “roadblock” than it is of the view that this case pertains to an *emergency* and is *singular* in terms of its potential impact in resolving competing legal and constitutional claims of our Legislature and Governor, as well as in its implications for the public health and economic welfare of our state and its people. For these reasons, this case warrants exceptional treatment and meaningful expedition.

Reconsideration Denied June 30, 2020:

HOUSE OF REPRESENTATIVES V GOVERNOR, No. 161377; Court of Appeals No. 353655. On order of the Court, the motion for immediate consideration is granted. The motion for reconsideration of this Court’s June 4, 2020 order is considered, and it is denied, because we are not persuaded that reconsideration of our previous order is warranted. MCR 7.311(G). However, we DIRECT the Court of Appeals to issue a decision in *House of Representatives and Senate v Governor* (Court of Appeals Docket No. 353655) no later than Friday, August 21, 2020. Any appeal from that decision must be filed in this Court by 5:00 p.m. on Friday, August 28, 2020.

ZAHRA, J. (*concurring*). The United States District Court for the Western District of Michigan has asked this Court to answer two certified questions concerning the Governor’s “authority . . . to issue or renew any executive orders related to the COVID-19 pandemic” and whether the emergency powers of the governor act, MCL 10.31 *et seq.*, or the Emergency Management Act, MCL 30.401 *et seq.*, or both, violate “the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.” In light of the action taken by the federal court, the Michigan Legislature filed a motion for reconsideration of this Court’s denial of the application to bypass the Court of Appeals in *House of Representatives v Governor*, ___ Mich ___; 943 NW2d 365 (2020).¹ The order denying the application to bypass was decided by the narrowest of margins by this seven-member Court, with vigorous

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dissents filed by Justice MARKMAN, Justice VIVIANO, and myself. It suffices to say that the dissenting justices concluded that in this unprecedented time amid a global pandemic, it is the duty of this Court to expeditiously decide the extent to which the Governor can exercise certain statutory powers, as well as integral constitutional questions relating to whether the Governor's thus-far largely unreviewed assertion of these powers violates our Constitution's core commitment to the separation of powers.

I concur in the order establishing an expedited briefing schedule and setting oral arguments for September 2, 2020, in response to the federal district court's request that this Court answer its certified questions.² I also concur in the Court's denial of the motion for reconsideration of this Court's denial of the application to bypass the Court of Appeals, while directing that court to issue its decision by August 21st. But my concurrence in the Court's actions of today should in no way be taken as a retreat from my dissenting statement to the order denying the application for bypass. I believed then and continue to believe today that "[b]ecause each resident's personal liberty is at stake, it is emphatically our duty to decide [these weighty constitutional issues]." *Id.* at ____; 943 NW2d at 371 (ZAHRA, J., dissenting). I also continue to share the concerns expressed by Justice MARKMAN and Justice VIVIANO in their dissenting statements to the order denying the application for bypass. As Justice VIVIANO expressed, the issues at stake "and how we decide them[] will have a direct impact on the constitutional liberties of every person who lives or owns property in, or simply visits, our state while the [Governor's] restrictions are in place." *Id.* at ____; 943 NW2d at 378 (VIVIANO, J., dissenting).

Yet, I decline to join Justice MARKMAN's dissent to the instant order. I do not take issue with the way Justice MARKMAN has framed the urgency or importance of the matters before us. If writing on a blank slate, I most assuredly would hear and decide both *In re Certified Questions* and *House of Representatives* more expeditiously than provided in the instant order and would do so without review by the Court of Appeals. But this matter is not presented to us on a blank slate.

Notwithstanding the vigorous dissents of three justices from the denial of the application for bypass, a majority of this Court concluded that further review by this Court should not occur without the benefit of review and an opinion from the Court of Appeals. I also took specific exception to this Court's failure to order the Court of Appeals to hear and decide the issues presented in *House of Representatives* on an

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expedited basis and by a date certain.³ Notwithstanding the lack of direction from this Court, the Court of Appeals decided to expedite these proceedings. And now with the certified questions presented to us by the federal court, the order issued by this Court today requires the Court of Appeals to release its opinion no later than August 21, 2020, leaving time for the Governor, the Legislature or both to file applications for leave to appeal in this Court before we hear arguments in the certified-questions case on September 2, 2020. I believe the instant briefing and argument schedule is as expeditious as possible under the circumstances presented. Without doubt, the people of this state are far better served by the majority's instant order than by the Court's previous order denying the application for bypass.

Finally, while I do not join Justice MARKMAN's dissenting statement, I share his concern that there is "no certainty that this Court will ever actually *answer* the certified questions, and, if we do choose to do so, such a decision will likely be issued sometime in October, November, or December, perhaps." Admittedly, it remains entirely possible that after briefing and argument a majority of the Court will decline to answer the certified questions or will resolve them in an opinion of the Court delivered many months later. But I am only one of seven justices on the Court and can only endeavor to impress upon my colleagues my views on the law and how it should be applied to the matters that come before this Court. I accept my responsibility as an elected member of the Supreme Court and pledge to the people of Michigan that I have and will continue to endeavor to resolve these important questions as expeditiously as the Court and present circumstances allow.

VIVIANO, J., joins the statement of ZAHRA, J.

CAVANAGH, J. (*concurring*). I agree with Justice MARKMAN that "the underlying issues in these cases pertain to an 'emergency' of the most compelling and undisputed character" and that "ensuring a *timely* judicial response to the issues posed" is critically important. It is equally as critical in my opinion, however, that the judicial response to this emergency be thoughtfully and thoroughly considered. I also agree with Justice MARKMAN that "responding to this inquiry through a considered and thoughtful assessment of the requirements of our law and Constitution" is a high priority. It is such a high priority in my opinion that this Court should and has taken great pains to ensure that we have the benefit of full briefing from the parties in *In re Certified Questions* and the Court of Appeals' considered decision in *House of Representatives v Governor*. Those benefits are particularly valuable here because these cases will require resolution of important constitutional questions of first impression—perhaps the most imposing exercise we must undertake as the state's highest court.

³ *House of Representatives*, ___ Mich at ___; 943 NW2d at 373 (ZAHRA, J., dissenting) ("And yet, beyond declining to grant the Legislature's application, the Court's majority also fails to order the Court of Appeals to hear and resolve these issues on an expedited basis. I make no attempt to explicate this failure.").

I disagree with Justice MARKMAN that we have not sufficiently expedited the process in these cases. Any casual observer of the appellate process in Michigan would recognize that these cases are, in fact, receiving significantly expedited review. For example, it typically takes on average between 13 and 14 *months* for the Court of Appeals to dispose of a case by opinion.¹ In contrast, the timeline from the date that the *House of Representatives* claim of appeal was filed in the Court of Appeals (May 28, 2020) until the day that a decision will be issued by the panel (August 21, 2020) is just over 12 *weeks*. Unlike Justice MARKMAN, who seemingly views the Court of Appeals as a roadblock to this Court's consideration of cases, I find immense value in the meaningful analysis and perspective offered by our intermediate appellate court. To expedite the *House of Representatives* appeal any further would be to risk sacrificing the substantive contribution of the Court of Appeals. Moreover, a typical briefing schedule applied to certified questions, see MCR 7.308(A)(3), takes 84 days with oral argument, if granted, ordered sometime after. In regard to the instant *Certified Questions* case, today's order cuts the briefing schedule almost in half to 49 days and schedules oral argument only two weeks after that. Put simply, these cases are receiving substantially expedited consideration while still allowing the parties to fully present argument on the complex issues presented.

I also disagree with Justice MARKMAN's statement that this Court resolved the constitutional rights of "one Michigan barber" but is refusing to resolve the constitutional rights of other Michigan citizens through its orders in these cases. This is simply not true. In *Dep't of Health & Human Servs v Manke*, 505 Mich 1110; 943 NW2d 397 (2020), this Court unanimously remanded "the barber's" claims to the Court of Appeals for full consideration by that court. For the reasons already stated, our orders today ensure that every citizen will be given the very same consideration.

Finally, although Justice MARKMAN forecasts that, as a consequence of this Court's orders ensuring that these cases receive complete and adequate consideration, this Court may never "issue[] a meaningful decision" and is unlikely to "ever decisively resolve the present dispute," I, again, must disagree. As Justice CLEMENT aptly noted in her earlier concurring statement attached to this Court's order denying bypass in *House of Representatives v Governor*, ____ Mich ____, ____; 943 NW2d 365, 369 (2020), "[u]ntil a vaccine for COVID-19 is invented, our society will be living with the risk of the spread of this disease and the argued necessity of emergency measures to mitigate that spread." Since the time Justice CLEMENT made this observation, there have unfortunately been no advances in science or public health to eradicate this virus and, therefore, I continue to join her in believing that there is "little prospect of these disputes being rendered moot . . ." *Id.*

¹ Michigan Court of Appeals, *2018 Annual Report*, p 6, available at <<https://courts.michigan.gov/Courts/COA/aboutthecourt/Documents/Annual-Report2018.pdf>> (accessed June 30, 2020) [<https://perma.cc/44RA-6642>].

In sum, I believe that the orders issued today in these related cases best balance the need for a timely judicial response with the equally important need for a thoughtful and thorough resolution. The judicial response of this Court should and will be guided by the deliberate consideration of our intermediate appellate court in *House of Representatives* and informed by full briefing by the parties in *In re Certified Questions*. I am confident that each and every one of my colleagues accepts their responsibility as elected members of this Court to honestly endeavor to resolve these important questions as expeditiously, thoroughly, and thoughtfully as possible.

MARKMAN, J. (*dissenting*). On June 18th, the United States District Court for the Western District of Michigan certified two questions to this Court, requesting our opinion concerning (a) whether the Governor possesses “the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic,” and (b) whether the emergency powers of the governor act, MCL 10.31 *et seq.*, or the Emergency Management Act, MCL 30.401 *et seq.*, or both, violate “the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.” In that case, the Court now schedules oral argument for September 2nd. And in a separate but related case, the Court denies the Legislature’s motion for reconsideration of our earlier decision to deny its application to bypass the Court of Appeals, while directing that court to issue its decision by August 21st.

This Court possesses the authority to expedite its own deliberations or not; to expedite the deliberations of the Court of Appeals or not; and to bypass entirely the deliberations of the Court of Appeals or not. Therefore, where, as here, matters of expedition come before the Court, the determinative question is less one of legal authority than of judgment and purpose. In other words, what would be the *purpose* in a given case for expediting its resolution or not, for bypassing the Court of Appeals or not? What would or would not be accomplished by such expedition? Here, the Court has chosen nominally to expedite the deliberations of the Court of Appeals in the Legislature’s case and the deliberations of this Court in the “certified questions” case, while reaffirming its recent decision not to bypass the Court of Appeals and thereby to expedite the work of this Court in the Legislature’s case. All to what purpose?

One obvious “purpose” that might inform our consideration of matters of expedition would be this: what extent of reasonable expedition will most likely ensure that our ultimate decision will be rendered in a sufficiently timely manner to enable that decision to govern the *present* dispute, the dispute arising from the *present* emergency, the dispute prompting the *present* lawsuit? That, of course, is the entire point of both the lawsuit and the certified questions before this Court; these cases do not pose academic exercises and they are not addressed to the next pandemic, but their common purpose is to more clearly define the legal and constitutional relationship between the Legislature and the Governor in the context of the *present* emergency. And in this regard, the Court’s “expedition” of these two cases today seems to me entirely unfocused. While it is indeed an “expedition” of sorts, it is an

“expedition” unsuited to what must be its principal purpose, to facilitate the adoption of rules that are faithful to the law and the Constitution and that will govern the interactions between the Legislature and the Governor during the COVID-19 emergency of the year 2020.

It has now been 39 days since expedited treatment was first sought by the Legislature in its lawsuit. And as a result of today’s orders, there will be 52 additional days before even an intermediate decision from the Court of Appeals will be required and, of course, there is no certainty that this Court will ever hear an appeal from that decision. And in the “certified questions” case, the Court provides for a 49-day briefing schedule, with oral arguments to be held 65 days from now, again, of course, with no certainty that this Court will ever actually *answer* the certified questions, and, if we do choose to do so, such a decision will likely be issued sometime in October, November, or December, perhaps.

I have no greater insight than do my colleagues, or than does the public generally, as to the future course and duration of the present emergency. But I do know this: the underlying issues in these cases pertain to an “emergency” of the most compelling and undisputed character, and ensuring a *timely* judicial response to the issues posed is what should determine the extent of this Court’s expedition. While there may be little we can do concerning the public health consequences of the present crisis, there is a great deal we can do in assessing the legal and constitutional propriety of our state’s response to the emergency. Through which *institutions* and by which *procedures* and by an understanding of which *laws* should Michigan’s response be formulated under a Constitution in which even emergencies are subject to the rule of law?

Both houses of our Legislature in their representation of the “we the people” believe that the Governor has exceeded her lawful authority in certain curtailments of the rights of the people, and the Governor in her representation of “we the people” believes that she has exercised her executive powers in a manner faithful to the law and Constitution. And although I have not counted heads, just as the two great institutions of our system of self-government have divergent positions as to the state’s emergency response, so too do millions of citizens, a good number of whom believe they have suffered specific personal harm and injury as a result of this response. This Court, as the third great institution of our constitutional system, has now been requested by the Legislature in a case aptly named *House of Representatives & Senate v Governor* to resolve the present dispute—a resolution presumably to be grounded upon “neither Force nor Will, but merely judgment,” Federalist No. 78, as this is derived from the “judicial power” of this state. Both the Legislature and the Governor previously sought from this Court, but did not receive, expedited treatment through a bypass of the Court of Appeals.

But these cases not only pose a separation-of-powers dispute of immense consequence, but the certified questions posed by the federal court implicate a significant issue of federalism as well. The certified questions in this case pertain to medical procedures in Michigan delayed by emergency executive order; in another recent federal court case, the issues pertained to gyms and fitness facilities closed by emergency executive order; and similar lawsuits have been filed in still other

federal cases. It is a highly concerning matter that lawsuits of this nature, each implicating the respective authorities of the legislative and executive branches of this state, would increasingly be filed in federal court. And yet, when the federal district court in the present case demonstrates genuine federal-state comity in seeking out the perspectives of this Court on the requirements of Michigan law—while interrupting its own litigation in the process—the unhurried nature of our response is disconcerting.

Rather than engaging in further “expediting,” I would *resolve* the present cases and I would do so in a manner affording *timely* guidance concerning our state’s legal and constitutional response to the COVID-19 emergency. To put it differently, rather than addressing the rights of one Michigan barber in one well-publicized case over the course of the past four months, I would address more encompassingly, and more consistently, the rights of *all* Michigan citizens by answering the common inquiry in the present cases: where do the respective authorities of the Legislature and the Governor begin and end during a time of emergency? In my view, there is nothing that constitutes a higher priority on this Court’s agenda than clearly responding to this inquiry through a considered and thoughtful assessment of the requirements of our law and Constitution.

I remarked in my dissenting statement a month ago, when this Court initially rejected bypass of the Court of Appeals, that “the consequence of our decision today will be to ensure that this Court never issues a meaningful decision concerning the nature and required procedures of the emergency authority of this state. . . . By today’s action, it is unlikely that this Court will ever decisively resolve the present dispute and thus that whatever errors or excesses may have been made in the course of the present emergency will never be pronounced or remedied but left only to be repeated on the occasion of what inevitably will arise some day as our next emergency.” I see nothing in today’s orders to cause me to alter this perspective. The responsibility of this Court is not to “expedite,” but it is to *sufficiently* expedite, to treat the present disputes with the requisite sense of urgency, so that the issues raised are resolved in a manner that has a practical impact on the rule of law in our state during the pendency of the ongoing crisis. Regrettably, that is not what is being achieved by today’s orders.

Accordingly, I dissent from each order because each, in my judgment, fails to expedite this Court’s consideration to a sufficient extent. In *In re Certified Questions*, I would answer both questions and do so on a considerably more expedited basis. And in *House of Representatives & Senate v Governor*, I would grant the Legislature’s motion for reconsideration and order the case to be heard in conjunction with *In re Certified Questions*, thereby also deciding this case on a considerably more expedited basis.

RESPONSE TO CONCURRENCE OF JUSTICE CAVANAGH

Justice CAVANAGH writes in her concurring statement that “[u]nlike Justice MARKMAN, who seemingly views the Court of Appeals as a

roadblock to this Court's consideration of cases, I find immense value in the meaningful analysis and perspective offered by our intermediate appellate court." Having sat on the Court of Appeals for four years, I too have enormous regard for the institution and for its individual judges. More to the point, however, having *not* sought to bypass the Court of Appeals in approximately 99.99% of the cases within our state's appellate system, I believe my support of a bypass in *this* case is less indicative of the view that the Court of Appeals constitutes a "roadblock" than it is of the view that this case pertains to an *emergency* and is *singular* in terms of its potential impact in resolving competing legal and constitutional claims of our Legislature and Governor, as well as in its implications for the public health and economic welfare of our state and its people. For these reasons, this case warrants exceptional treatment and meaningful expedition.

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 December 18, 2019:

PROPOSED AMENDMENTS OF MCR 1.109, 2.002, 2.302, 2.306, 2.315, 2.603, 3.101, 3.222, 3.618, 4.201, and 8.119.

On order of the Court, this is to advise that the Court is considering amendments of Rules 1.109, 2.002, 2.302, 2.306, 2.315, 2.603, 3.101, 3.222, 3.618, 4.201, and 8.119 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigan/supremecourt/rules/pages/default.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 the proposal in its present form.

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

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1) Form and Captions of Documents.

(a) All documents prepared for filing in the courts of this state and all documents ~~prepared~~issued by the courts for placement in a case file must be legible and in the English language, comply with standards established by the State Court Administrative Office, and be on good quality 8½ by 11 inch paper or transmitted through an approved electronic means and maintained as a digital image. The font size must be 12 or 13 point for body text and no less than 10 point for footnotes, except with regard to forms approved by the State Court Administrative Office. Transcripts filed with the court must contain only a single transcript page per document page, not multiple pages combined on a single document page.

(b)-(g) [Unchanged.]

(2)-(8) [Unchanged.]

(E) Signatures.

(1)-(3) [Unchanged.]

(4) An electronic signature is acceptable in accordance with this subrule.

(a) [Unchanged.]

(b) If a law or court rule requires a signature to be notarized or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law or court rule, is attached to or logically associated with the signature pursuant to MCL 55.286b.

(bc) [Relettered but otherwise unchanged.]

(5)-(7) [Unchanged.]

(F) [Unchanged.]

(G) Electronic Filing and Service.

(1) [Unchanged.]

(2) Electronic-Filing and Electronic-Service Standards. Courts shall implement electronic filing and electronic service capabilities in accordance with this rule and shall comply with the standards established by the State Court Administrative Office. Confidential and nonpublic information or documents and sealed documents ~~must be that are~~ electronically filed or electronically served ~~must be filed or served~~ in compliance with these standards to ensure secure transmission of the information.

(3) Scope and Applicability.

(a)-(d) [Unchanged.]

(e) If a party or attorney in a case is registered as an authorized user in the electronic-filing system, a court may ~~must~~ electronically ~~serve~~ send to that authorized user any notices, orders, opinions, ~~and~~ other documents issued by the court in that case by means of either the

(i) electronic-filing system, or

(ii) the court's on-premise electronic document management system, without the need for the e-mail agreement required under MCR 2.107(C)(4).

(f) For the required case types, attorneys must electronically file documents in courts where electronic filing has been implemented, unless an attorney filing on behalf of a party is exempted from electronic filing under subrule (j) because of a disability. All other filers are required to electronically file documents only in courts that have been granted approval to mandate electronic filing by the State Court Administrative Office under AO 2019-~~XX~~2.

(g) [Unchanged.]

(h) Upon request, the following persons are exempt from electronic filing without the need to demonstrate good cause:

(i) a person who has a disability as defined under the Americans with Disabilities Act that prevents or limits the person's ability to use the electronic filing system;

(ii)-(iii) [Unchanged.]

~~(i) A request for an exemption under subrule (h)(i) must be requested as a reasonable accommodation in accordance with subrule (j). A request for an exemption under subrules (h)(ii) or (iii) must be filed with the court in paper where the individual's case will be or has been filed as follows: If the individual filed paper documents at the same time as the request for exemption, the clerk shall process the documents for filing. If the documents meet the filing requirements of subrule (D), they will be considered filed on the day they were submitted.~~

~~(i) The request for an exemption must be on a form approved by the State Court Administrative Office, must specify the reasons that prevent the individual from filing electronically, and be verified under MCR 1.109(D)(3). The individual may file supporting documents along with the request for the court's consideration. There is no fee for the request.~~

~~(ii) The request must specify the reasons that prevent the individual from filing electronically. The individual may file supporting documents along with the request for the court's consideration.~~

~~(ii) A request made under subrule (h)(ii) or (iii) shall be approved by the clerk of the court on a form approved by the State Court Administrative Office. For all other requests,~~

~~(iii) A judge must review the request and any supporting documentation and issue an order granting or denying the request within two business days of the date the request was filed.~~

~~(j) A person with a disability as defined under the Americans with Disabilities Act that prevents or substantially limits the person's ability to use the electronic-filing system may request and shall be granted an exemption from electronic filing as a reasonable accommodation as follows:~~

~~(i) A request for exemption under this subrule shall be filed as a request for reasonable accommodation in the court in which the individual's case has or will be filed. When submitted in writing, the request shall be made on the SCAO-approved form "Request for Reasonable Accommodations and Response."~~

~~(ii) Whether or not the court determines any other reasonable accommodations are appropriate, the court shall prepare an order exempting the person from electronic filing.~~

~~(k) If the individual filed paper documents at the same time as the request for exemption under either subrule (i) or (j), the clerk shall process the documents for filing. If the documents meet the filing requirements of subrule (D), they will be considered filed on the day they were submitted.~~

~~(l)(iv) The clerk of the court must hand deliver or promptly mail the clerk approval granted or order entered under subrule (i) or (j) to the individual. The clerk must place the request, any supporting documentation, and the clerk approval or order in the case file. If there is no case file, the documents must be maintained in a group file.~~

~~(m)(v) An exemption granted under this rule is valid only for the court in which it was filed and for the life of the case unless the individual exempted from filing electronically registers with the electronic-filing system. In that event, the individual waives the exemption and becomes subject to the rules of electronic filing and the~~

requirements of the electronic-filing system. An individual who waives an exemption under this rule may file another request for exemption.

(4)-(5) [Unchanged.]

(6) Electronic-Service Process.

(a) General Provisions.

(i) [Unchanged.]

(ii) Service of process of all other documents electronically filed shall be accomplished electronically among authorized users through the electronic-filing system, ~~unless one or more parties have~~ If a party has been exempted from electronic filing; or a party has not filed a response or answer or has not registered with the electronic-filing system and that party's e-mail address is unknown. In those circumstances, service shall be made on that party by any other method required by Michigan Court Rules.

(iii)-(v) [Unchanged.]

(b)-(c) [Unchanged.]

(7) Transmission Failures.

(a)-(c) [Unchanged.]

(d) In the event the electronic-filing system fails to transmit a document selected for service, if deemed necessary to ensure due process rights are protected, the State Court Administrator shall provide notice to the affected persons in either of the following ways:

(i) file, as a nonparty, a notice of defective service in each affected case and, as deemed appropriate, serve the notice, or

(ii) send notice of a system-wide transmission failure to each affected system user.

(e) If notice is provided under subrule (d), the clerk of the court where the affected case is filed must enter the event in the case history in accordance with MCR 8.119(D)(1)(a).

(f) A fee shall not be assessed on a motion filed claiming that rights in the case were adversely affected by transmission failure of a document selected for service.

RULE 2.002. WAIVER OF FEES FOR INDIGENT PERSONS.

(A) Applicability and Scope.

(1)-(3) [Unchanged.]

(4) If fees are waived under this rule before judgment, the waiver continues through the date of judgment unless ordered otherwise under subrule (J). If fees are waived under this rule postjudgment, the waiver continues through the date of adjudication of the postjudgment proceedings. In probate proceedings, "postjudgment" means any proceeding in the case after the original petition is adjudicated. If jurisdiction of the case is transferred to another court, the waiver continues in the receiving court according to this rule unless ordered otherwise by the receiving court under subrule (J). If an interlocutory appeal is filed in another court, the waiver continues in the appellate court.

(5) [Unchanged.]

(B)-(K) [Unchanged.]

RULE 2.302. DUTY TO DISCLOSE; GENERAL RULES GOVERNING DISCOVERY.

(A)-(G) [Unchanged.]

(H) Filing and Service of Disclosure and Discovery Materials.

(1) Unless required by a particular rule, disclosures, requests, responses, depositions, and other discovery materials may not be filed with the court except as follows:

(a) If the materials are to be used in connection with a motion, they must ~~either be filed separately or~~ be attached to the motion, response, or an accompanying affidavit;

(b) If the materials are to be used at trial, they shall not be filed with the court, but must be submitted to the judge and made an exhibit under MCR 2.518 or MCR 3.930;

(c) [Unchanged.]

(2)-(4) [Unchanged.]

RULE 2.306. DEPOSITIONS ON ORAL EXAMINATION OF A PARTY.

(A)-(E) [Unchanged.]

(F) Certification and Transcription; Filing; Copies.

(1)-(2) [Unchanged.]

(3) Except as provided in subrule (C)(3) or in MCR 2.315(E), a deposition may not be filed with the court unless it has first been transcribed. If a party requests that the transcript be filed, the person conducting the examination or the stenographer shall promptly file the certified transcript with the court in which the action is pending in accordance with MCR 2.105(A); after transcription and certification; and shall give prompt notice of its filing to all other parties, unless the parties agree otherwise by stipulation in writing or on the record.

~~(a) If the transcript is personally delivered to the court, securely seal the transcript; it must be securely sealed~~ in an envelope endorsed with the title and file number of the action and marked "Deposition of [*name of witness*];" ~~and promptly file it with the court in which the action is pending as prescribed in accordance with MCR 2.105(A) or send it by registered or certified mail to the clerk of that court for filing;~~

~~(b) give prompt notice of its filing to all other parties, unless the parties agree otherwise by stipulation in writing or on the record.~~

(G) [Unchanged.]

RULE 2.315. VIDEO DEPOSITIONS.

(A)-(D) [Unchanged.]

(E) Filing; Notice of Filing. If a party requests that the deposition be filed, the person who made the recording shall

(1)-(3) [Unchanged.] A video deposition cannot be electronically filed with the court.

(F)-(I) [Unchanged.]

RULE 2.603. DEFAULT AND DEFAULT JUDGMENT.

(A) Entry of Default; Notice; Effect.

(1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the clerk must enter the default of that party if that fact is:

(a) known to the clerk of the court, or

(b) ~~and that fact is~~ verified in the manner prescribed by MCR 1.109(D)(3) and filed with the court in ~~the~~ request for default; ~~the clerk must enter the default of that party.~~

(2)-(3) [Unchanged.]

(B)-(E) [Unchanged.]

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(B) [Unchanged.]

(C) Forms. ~~The state court administrator~~State Court Administrative Office shall publish approved forms for use in garnishment proceedings. ~~The verified request and writ forms approved by the State Court Administrative Office must be used. Separate forms shall be used for periodic and nonperiodic garnishments. The verified statement, writ, and~~The disclosure filed in garnishment proceedings must be substantially in the form approved by the state court administratorState Court Administrative Office.

(D) Request for and Issuance of Writ. The clerk of the court that entered the judgment shall review the request. The clerk shall issue a writ of garnishment if the writ appears to be correct, complies with these rules and the Michigan statutes, and if the plaintiff, or someone on the plaintiff's behalf, makes and files a statement verified in the manner provided in MCR 1.109(D)(3) stating:

(1)-(3) [Unchanged.]

(4) whether the garnishee is to make all payments directly to the plaintiff or the plaintiff's attorney or to send the funds to the court.

(E) Writ of Garnishment.

(1) The writ of garnishment ~~must have attached or must include a copy of the~~and the verified statement requesting for issuance of the writ ~~must be included on the same form, and~~ The writ must include information that will permit the garnishee to identify the defendant, such as the defendant's address, social security number, employee identification number, federal tax identification number, employer number, or account number, if known.

(2) [Unchanged.]

(3) The writ shall direct the garnishee to:

(a)-(d) [Unchanged.]

(e) ~~in the discretion of the court and~~ in accordance with subrule (J), ~~order the garnishee either to~~

(i) make all payments directly to the plaintiff or the plaintiff's attorney or

(ii) send the funds to the court, in the manner as specified by the plaintiff in the writrequest under subrule (D)(4).

(4) [Unchanged.]

(5) The writ shall inform the defendant that unless the defendant files objections within 14 days after the service of the writ on the defendant or as otherwise provided under MCL 600.4012,

(a) without further notice the property or debt held ~~pursuant to~~under the garnishment may be applied to the satisfaction of the plaintiff's judgment, and

(b) periodic payments due to the defendant may be withheld and paid according to subrule (3)(e) until the judgment is satisfied ~~and in the discretion of the court~~ paid directly to the plaintiff.

(6) [Unchanged.]

(F)-(I) [Unchanged.]

(J) Payment.

(1) After 28 days from the date of the service of the writ on the garnishee, the garnishee shall transmit all withheld funds to the plaintiff, plaintiff's attorney, or the court as directed by the court pursuant to subrule (E)(3)(e) unless notified that objections have been filed.

(2)-(7) [Unchanged.]

(K)-(T) [Unchanged.]

RULE 3.222. UNIFORM COLLABORATIVE ACT PROCESS AND AGREEMENTS.

(A)-(B) [Unchanged.]

(C) Establishing Jurisdiction and Starting the Statutory Waiting Period. At any time after a collaborative law participation agreement is signed, if the parties are not already under the court's jurisdiction, the parties may commence an action to submit to the court's jurisdiction.

(1) [Unchanged.]

(2) To commence an action at any time before the conclusion of the collaborative law process, the parties shall file a petition for court jurisdiction and declaration of intent to file a proposed final judgment or proposed final order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and shall state the type of action corresponding to the assigned case type code ~~in~~under MCR 8.117-~~(listed under Case File Management Standard (A)6)~~. The petition shall:

(i)-(v) [Unchanged.]

The petition may also contain a request to waive the six-month statutory waiting period under MCL 552.9f.

(b)-(e) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 3.618. EMANCIPATION OF MINOR.

(A)-(F) [Unchanged.]

(G) Order. To fulfill requirements of the Social Security Administration, the court must provide the minor with a copy of the order of emancipation that includes the minor's full social security number, if the minor has one. The court shall not include the minor's social security number on the order maintained in the court's file.

(1) The minor must show his or her social security card to the judge at the hearing and the judge shall enter the number on the minor's copy of the order. If the minor does not bring his or her social security card to the hearing or does not have a social security card, the minor can present his or her social security card to the clerk of the court at a later date, and after verifying the identity of the minor, the clerk of the court shall enter the social security number on a copy of the order to be given to the minor.

(2) The order must be entered on a form approved by the State Court Administrative Office, consisting of two parts. The first part is placed in the case file and shall not contain the minor's social security number. The second part shall contain the minor's social security number and a statement that the order is a certified copy of the order on file with the court except that the social security number appears only on the minor's copy of the order. The minor's copy of the order shall be signed by the clerk of the court. There is no fee for the certified copy.

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(C) [Unchanged.]

(D) Service of Process. A copy of the summons and complaint and all attachments must be served on the defendant by first-class mail. Unless the court does the mailing and keeps a record, the plaintiff must perfect the mail service by attaching a postal receipt to the proof of service. Where e-Filing is implemented, the plaintiff must serve the defendant by first-class mail and file proof of service with the court. In addition to mailing, the defendant must be served in one of the following ways:

(1)-(3) [Unchanged.]

(E)-(O) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(B) [Unchanged.]

(C) Filing of Documents and Other Materials. The clerk of the court shall process and maintain documents filed with the court as prescribed by Michigan Court Rules and the Michigan Trial Court Records Management Standards and all filed documents must be file stamped in accordance with these standards. The clerk of the court may only reject documents submitted for filing that do not comply with MCR 1.109(D)(1) and (2), are not signed in accordance with MCR 1.109(E), or are not accompanied by a required filing fee or a request for fee waiver, unless already waived or suspended by court order. Documents prepared or issued by the court for placement in the case file are not subject to rejection by the clerk of the court and shall not be stamped filed but shall be recorded in the case history as required in subrule (D)(1)(a) and placed in the case file.

(D) Records Kept by the Clerk of the Court. The clerk of the court shall maintain the following case records in accordance with the Michigan Trial Court Records Management Standards. Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court pursuant to subrule (I) must be designated accord-

ingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court under subrule (I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed.

(1) [Unchanged.]

(a) Case History. The clerk shall create and maintain a case history of each case, known as a register of actions, in the court's automated case management system. The automated case management system shall be capable of chronologically displaying the case history for each case and shall also be capable of searching a case by number or party name (previously known as numerical and alphabetical indices) and displaying the case number, date of filing, names of parties, and names of any attorneys of record. The case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court Records Management Standards. Each entry shall be brief, but shall show the nature of each item filed, each ~~order or judgment of item issued by~~ the court, and the returns showing execution. ~~Each entry~~The case history entry of each item filed shall be dated with not only the date of filing (if relevant), but with and the date and initials of the person recording the action, except where the entry is recorded by the electronic filing system. In that instance, the entry shall indicate that the electronic filing system recorded the action. The case history entry of each order, judgment, opinion, notice, or other item issued by the court shall be dated with the date of entryissuance and the initials of and shall indicate the person recording the action.

(b) [Unchanged.]

(2)-(4) [Unchanged.]

(E)-(L) [Unchanged.]

Staff comment: The proposed amendments of MCR 1.109, 2.002, 2.302, 2.306, 2.315, 2.603, 3.101, 3.222, 3.618, 4.201, and 8.119 are the latest proposed revisions as part of the design and implementation of the statewide electronic-filing system.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 April 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigan-supremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered December 27, 2019:

PROPOSED AMENDMENT OF MCR 7.118.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.118 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigan/supremecourt/rules/pages/default.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 the proposal in its present form.

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

RULE 7.118. APPEALS FROM THE MICHIGAN PAROLE BOARD.

(A)-(C) [Unchanged.]

(D) Application for Leave to Appeal.

(1)-(2) [Unchanged.]

(3) Manner of Filing. An application for leave must comply with MCR 7.105, must include statements of jurisdiction and venue, and must be served on the parole board and the prisoner. If the victim seeks leave, the prosecutor must be served. If the prosecutor seeks leave, the victim must be served if the victim requested notification under MCL 780.771.

(a) [Unchanged.]

(b) Service on a prisoner incarcerated in a state correctional facility must be accomplished by serving the application for leave on the warden or administrator, along with the form approved by the State Court Administrative Office for personal service on a prisoner. Otherwise, service must be accomplished by certified mail, return receipt requested, as described in MCR 2.103(C) and MCR 2.104(A)(2) or in compliance with MCR 2.105(A)(2). In addition to the pleadings, service on the prisoner must also include a notice in a form approved by the State Court Administrative Office advising the prisoner that:

(i) the prisoner may respond to the application for leave to appeal through ~~retained~~ counsel or in propria persona, although no response is required, and that an indigent prisoner is entitled to appointment of counsel, and

(ii) [Unchanged.]

(c) [Unchanged.]

(d) If a prosecutor or victim files an application for leave to appeal, the circuit court shall appoint counsel for a prisoner who is indigent.

(4) [Unchanged.]

(E)-(J) [Unchanged.]

Staff Comment: This proposal, suggested by the Prisons and Corrections Section of the State Bar of Michigan, would require counsel to be appointed to an indigent prisoner when an application for leave to appeal a grant of parole is filed by the prosecutor or victim. The right to counsel also would be included on the notice to be provided the prisoner.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 April 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-13. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigan/supremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered March 11, 2020:

PROPOSED ADOPTION OF A MANDATORY CONTINUING JUDICIAL EDUCATION PROGRAM.

On order of the Court, the Court is considering adoption of a mandatory continuing judicial education program for the state's justices, judges, and quasi-judicial officers. The program is intended to promote and sustain competence and professionalism in Michigan's judiciary, and ensure continued proficiency in the core competencies of Michigan's judicial education curriculum, including knowledge about the current law, integrity and demeanor, communication skills, and administrative capacity.

Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

Administrative Order No. 2020-X — Mandatory Continuing Judicial Education Program

1. Requirement.

(A) General Requirement. As of X/X/XXXX, every judicial officer must complete a program of continuing judicial education as described in this order.

(B) Exceptions and Exemptions. There shall be no exceptions to or exemptions from this requirement (including waivers, extensions, or deferments) except in limited instances only with approval of the Judicial Education Board.

2. Definitions. The following words and phrases, when used in this order, shall have the following meanings (unless the context clearly indicates otherwise):

(A) “Accredited Provider” is an individual or organization that offers continuing judicial education activities that are consistent with the requirements established under this order.

(B) “Approved Course” is a learning opportunity offered by a nonaccredited provider, but which is consistent with the requirements established under this order.

(C) “Alternative Education Activity” is a learning opportunity that is not otherwise specifically addressed here, but which is consistent with the requirements established under this order.

(D) “Board” is the Judicial Education Board established by this order.

(E) “MCJE” is the mandatory continuing judicial education to be provided under this order.

(F) “Judicial Officer” is a Justice, appellate court judge, full-time judge, part-time judge, retired judge assigned by SCAO as a visiting judge, full-time quasi-judicial officer (including a district court magistrate or circuit court family division referee), or a part-time quasi-judicial officer (including a district court magistrate or a circuit court family division referee).

3. Judicial Education Board.

(A) Establishment. The Supreme Court establishes the Judicial Education Board.

(B) Purpose. The primary purpose of the Board is to guide development and delivery of continuing judicial education to all judicial officers.

(C) Composition. The Board shall consist of twelve members appointed by the Supreme Court as follows:

- (i) 2 members selected from judges of the Court of Appeals;
- (ii) 2 members selected from judges of the Circuit Court;
- (iii) 2 members selected from judges of the District Court;
- (iv) 2 members selected from judges of the Probate Court;
- (v) 3 members selected from quasi-judicial officers; and
- (vi) 1 member selected as a retired judge.

(D) Leadership. The Supreme Court shall appoint from the members of the Board a chair and vice-chair who shall serve one-year terms, which may be renewed. The Board may designate other officers and form committees as it deems appropriate.

(E) Term of Board Members. The members serve three-year terms. A member may not serve more than two full terms unless a member is appointed to fill a mid-term vacancy. In such a situation, the member shall serve the remainder of that term and may be reappointed to serve up to two more full terms. Terms of the initial board members shall be staggered to ensure reasonable continuity.

(F) Action by the Board. Seven board members shall constitute a quorum. The Board shall act only with the concurrence of at least seven

board members. The Board may adopt rules providing for participation of teleconference meetings or the use of other technology to enable maximum participation.

(G) Responsibilities of the Board.

(i) Accreditation and Approval Decisions. The Board shall make decisions regarding accreditation of providers and approval of courses consistent with the purpose and standards set forth in this order.

(ii) Noncompliance Appeals. The Board shall hear and decide appeals from judicial officers determined to be out of compliance with this order's requirements.

(iii) Waiver, Extension, Deferment. The Board shall hear and decide requests from judicial officers for waiver, extension, or deferment from the requirements in this order.

(iv) Reporting and Budget. The Board shall report at least annually to the Supreme Court on its activities, and annually propose a budget for the Board and submit it to the Supreme Court for approval.

(v) Incidental Responsibilities. The Board shall undertake all incidental tasks attendant to the above activities, including providing essential notices and recordkeeping activities.

(vi) Rules for Mandatory Continuing Judicial Education. The Board shall prepare a set of rules governing continuing judicial education for review and approval by the Supreme Court to replace this order. The proposed rules must be submitted to the Court no later than X/X/XXXX.

(H) Compensation and Expenses. Board members shall receive no compensation for services provided under these rules, but they shall be reimbursed by the Board for their reasonable and necessary expenses in attendance at meetings and in otherwise fulfilling their responsibilities.

(I) Immunity. The Board and its members, employees, and agents are absolutely immune from suit for conduct and communications arising out of the performance of their duties under this act. In addition, any other person is immune from suit for statements and communications transmitted solely to the Board or its staff related to the requirements contained in this order.

4. Minimum Continuing Judicial Education Requirements.

(A) General Requirements. Commencing X/X/XXXX, every judicial officer annually shall complete a minimum of 12 hours of continuing judicial education. The hours shall be distributed as follows:

(i) 3 hours in the subject area of integrity and demeanor (including ethics); and

(ii) 9 hours in the subject area of judicial practice and related areas as defined by the Board.

(B) Fulfillment.

(i) Course Attendance and Alternatives. The MCJE requirement shall be fulfilled by attending the required number of MCJE courses delivered by the Michigan Judicial Institute or Accredited Providers, or by completing a MCJE activity approved by the Board as sufficient to meet the MCJE general requirement.

(ii) Courses Offered by MJJ. At least six of the annual MCJE required hours shall be earned through courses offered by the Michigan Judicial Institute.

(iii) Distance Learning Courses. Up to four of the annual MCJE required hours may be earned through Board-approved computer-based or distance education courses.

(iv) Teaching or Alternative Educational Activity. Up to four of the annual MCJE required hours may be earned through Board-approved teaching or alternative education activities. The activity must be approved in advance of including such activity in the required hours.

(C) Newly-elected or Appointed Judicial Officers. Every newly-elected or appointed judicial officer serving in a general or limited jurisdiction court shall attend the New Judge/New Magistrate/New Referee Orientation Program as applicable (administered by the Michigan Judicial Institute) in its entirety at his or her first opportunity. This requirement shall be in addition to the annual MCJE requirements described elsewhere in this order.

(D) Newly-appointed Chief Judges. Every newly-appointed chief judge shall attend the New Chief Judge Orientation Program (administered by the Michigan Judicial Institute) in its entirety as his or her first opportunity. This requirement shall be in addition to the annual MCJE requirements described elsewhere in this order.

5. Waivers, Extensions, Deferrals.

(A) Waiver. Except as provided in subsection (d), the Board may waive the MCJE requirements for a period of not more than one year upon a finding by the Board of undue hardship or circumstances beyond the control of the judicial officer which prevent him or her from complying in any reasonable manner with the MCJE requirement.

(B) Extensions of Waivers. A waiver may be extended upon application to the Board and Board approval. Upon termination of the waiver, the Board may make such additional MCJE requirements as it deems appropriate.

(C) Deferrals. Deferment is available to a judge who has left judicial office by reason of resignation or retirement and who has been approved for assignment under the SCAO Guidelines for Assignment following retirement or resignation. A judge who seeks a judicial assignment but who has not completed the annual judicial education requirement shall complete the MCJE requirement by the deadline of the assignment year and will have until the following compliance deadline to complete the standard requirement plus the deferred MCJE requirements, not to exceed two (2) times the current annual requirement.

(D) Members of the Armed Forces.

(i) Waiver. Upon written request to the Board, the MCJE requirements will be waived in their entirety for any compliance period in which a judicial officer is a member of the Armed Forces serving on full-time active duty.

(ii) Termination of Active Duty. Within thirty days after termination of active duty, the judicial officer must notify the Board and will be required to comply with MCJE requirements for the forthcoming year.

6. Standards for Approval of MCJE Activities.

(A) General Standards. All MCJE activities approved for credit shall meet the following standards:

(i) The activity shall have significant intellectual or practical content, the primary objective of which is to improve a judicial officer's knowledge of current law and/or professional capacity in the following competency areas: communication, integrity and demeanor, and administrative capacity to fulfill their judicial responsibilities.

(ii) The activity shall be an organized program of learning to deal with matters directly related to subjects that satisfy the objectives of these rules.

(iii) Each MCJE activity shall be open to all judicial officers interested in the subject matter or with a docket assignment complementary to the subject matter of the MCJE activity and there shall be no attendance restrictions, except as may be permitted by the Board, upon application from a provider, where:

(a) attendance is restricted based on objective criteria for a bona fide educational objective to enhance the MCJE activity; or

(b) membership in the provider organization is open to all interested judicial officers of a particular type (judges or quasi-judicial officers) on a reasonable nondiscriminatory basis and cost.

(v) The program leaders or lecturers shall be qualified with the practical and/or academic experience necessary to conduct the program effectively.

(vi) Each attendee shall be provided with thorough, high quality and carefully prepared written course materials before or at the time of the activity. Although written materials may not be appropriate to all courses, they are expected to be utilized whenever possible.

(vii) The course or activity must be presented in a suitable setting to create a positive educational environment.

(viii) The Board will take into consideration the special needs of disabled and incapacitated judicial officers in gaining access to and participation in MCJE activities. The Board shall require providers to make reasonable accommodations for disabled and incapacitated judicial officers.

(B) Distance Education. Distance learning courses—including computer-based and teleconference programs—may be approved for credit provided that they meet interactive, technical, and accreditation standards set forth by the Board, as well as the following terms and conditions:

(i) Seminars viewed at remote sites by electronic transmission will be approved for credit if they offer the opportunity for learner engagement and interaction.

(ii) Only distance learning courses pre-approved for credit or conducted by Accredited Providers may be taken for credit.

7. Credit for MCJE Activities.

(A) Accreditation or Approval. Credit will be given only for completion of MCJE activities that are accredited or approved by the Board.

(B) Course Length. No course of instruction less than 60 minutes shall be considered eligible for MCJE credit.

(C) Credit. One hour of credit will be awarded for each 60 minutes of instruction.

(D) Credit Increments. Credit will be awarded in 30 minute increments beyond the first 60 minutes.

(E) Local Education Activities. Local education activities will be subject to approval by the Board for credit upon submission of appropriate documentation. Accreditation will be determined by the Board according to the standards set forth in 6(A).

(F) Approval of MCJE Activities Conducted by Nonaccredited Providers, Alternative Education Activities, and Teaching Activities.

(i) General Statement. Courses offered by a provider that is not an accredited MCJE provider, alternative education activities, and teaching activities that are consistent with the purposes of this order may qualify for MCJE credit, subject to the following terms and conditions.

(ii) Individual Approval Required. All MCJE activities conducted by a non-accredited provider, alternative education activity, or teaching activity must be individually approved by the Board for credit.

(iii) Requests for Approval. A judicial officer should request Board approval for MCJE activities conducted by a non-accredited provider, alternative education activities, or teaching activities at least 60 days prior to the activity, but in all cases, the judicial officer must request such approval no more than 30 days after completing the activity for the request to be considered.

(iv) Form of Application. The application shall be in the form and with such documentation required by the Board.

(v) Additional Information. Upon request by the Board, the applicant shall submit to the Board information concerning the course or activity, including the brochure describing the activity and the qualifications of anticipated speakers, the method or manner of presentation of materials, and, if requested, a set of the materials.

(vi) Courses Pertaining to Nonjudicial Subjects or Deemed to Fall Below Minimum Standards. If a course does not bear entirely on at least one of the four core competencies comprising Michigan's judicial education curriculum outlined in Section 6 (i.e., legal knowledge and ability, communication, integrity and demeanor, or administrative capacity), or the manner of presenting the course is deemed to fall below minimum standards, the Board may determine that such course is entitled to no credit or may assign such partial credit as it deems appropriate.

(vii) Teaching Activities. The following additional terms and conditions apply to credit for teaching activities:

(a) Credit will be given on the basis of two hours credit for each one hour of presentation to a peer audience where the applicant has prepared quality written materials for use in the presentation.

(b) Credit for repeat presentations or presentations without such written materials (whether peer presentations or nonjudicial presentations) will be given only for the actual time of presentation.

(c) Credit will be given on the basis of one hour of credit for each hour of presentation where the applicant has prepared quality written materials for use in the presentation to a nonjudicial audience.

(G) Carry Forward Credits. A judicial officer may carry forward a balance of credit hours earned in excess of the annual MCJE requirement—including computer-based and distance learning credits, which shall retain their character as such—for the succeeding reporting year, subject to the following limitations.

(i) Credit Limitation. No more than one times the current annual MCJE requirement may be carried forward into the succeeding reporting year.

(ii) Time Limitation. No MCJE credit may be carried forward more than one succeeding reporting year.

(iii) Credit Attributes. Carry forward credits retain the same attributes (subject matter, manner of presentation) that they would have had if used in the year in which they were earned.

(H) Law School and Graduate School Courses. Law school and graduate school courses taken as a student may qualify for MCJE credit, computed in accordance with these standards, subject to the following terms and conditions:

(i) Courses must otherwise qualify for credit, and the law school or graduate school courses in question cannot be required to qualify for the awarding of a basic degree.

(ii) Courses offered toward graduate or advanced degrees may receive credit, upon submission of appropriate documents and approval by the Board.

(iii) One hour of MCJE credit may be given for each approved law school/graduate credit hour awarded by the school (or the non-credit equivalent).

(iv) The school offering the course shall be a law school accredited by the American Bar Association or a regionally-accredited college or university.

(v) The course offers a learning opportunity which is consistent with the scope and purposes of this order.

(I) Self Study. Self study will not be approved for credit.

8. Accreditation of Mandatory Continuing Judicial Education Providers.

(A) Application. Application may be made for accreditation as an Accredited Provider by submitting the appropriate form to the Board.

(B) Evaluations. The provider shall develop and implement methods to evaluate its course offerings to determine their effectiveness and the extent to which they meet the needs of judicial officers and, upon a request from the Board, provide course evaluations by the attendees on such forms as the Board shall approve.

(C) Period of Accreditation.

(i) General Rule. The grant of accreditation shall be effective for a period of two years from the date of the grant.

(ii) Continuation of Accreditation. The accreditation may be continued for an additional two year period if the provider files an application

for continued accreditation with the Board before the end of the provider's accreditation period, subject to further action by the Board.

(D) Conditional Accreditation. In considering whether to continue an approved provider's accreditation, the Board shall determine if there are pending or past breaches of these rules by the approved provider. The Board, at its discretion, may condition continuation upon the provider meeting additional requirements specified by the Board.

(E) Termination. If an application for continuation is not filed within 30 days before the end of the provider's accreditation period, the provider's accredited status will terminate at the end of the period. Any application received thereafter shall be considered by the Board as an initial application for Accredited Provider status.

(F) Revocation. Accredited Provider status may be revoked by the Board if the requirements specified by the Board are not met or if, upon review of the provider's performance, the Board determines that content of the course material or the quality of the MCJE activities or provider's performance does not meet the standards set forth in this order.

9. Standards for Accredited Provider Status. Accredited Provider status may be granted at the discretion of the Board to applicants that satisfy one of the following requirements:

(A) The provider has presented, within the past two years prior to the date of the application, five separate programs of judicial education which meet the standards of quality set forth in these rules;

(B) The provider has demonstrated to the Board that its judicial education activities have consistently met the standards of quality set forth in this order; or

(C) The provider is an American Bar Association-accredited law school.

10. Accreditation of a Single Course or MCJE Activity by a Provider. A provider of MCJE activities that has not qualified as an Accredited Provider may apply for accreditation of a single MCJE activity in a form provided by the Board, subject to the following terms and conditions:

(A) The Board may require submission of a detailed description of the provider, the course, the course materials, and the lectures.

(B) Application by a provider for accreditation of a single MCJE activity should be submitted prior to the date of presentation of the activity. Application for retroactive approval must be made within 30 days after the event or activity.

(C) The MCJE activity must meet the standards set forth in this order.

11. Reporting.

(A) Reporting Responsibility. Reporting shall be the responsibility of the individual judicial officer.

(B) Form of Reporting of MCJE Activities. A judicial officer shall report accredited MCJE activities to the Board in a manner approved by the Board.

(C) Time for Reporting. A judicial officer should report accredited MCJE activities within 30 days after successfully completing the activity.

(D) Annual Compliance Reporting. All judicial officers shall report MCJE compliance in writing within 30 days after the end of each calendar year.

12. Compliance.

(A) Records.

(i) Recordkeeping by the Board. The Board shall maintain a record of MCJE attendance for each judicial officer to whom this order applies. These records shall be made available as the Board shall determine, but shall at least establish whether the judge met the required standard for a particular reporting period.

(ii) Recordkeeping by Judicial Officers. Each active judicial officer shall maintain records sufficient to establish compliance with the MCJE requirement in the event of a dispute or inconsistency.

(B) Annual Status Notification. The Board will notify each judicial officer of his or her MCJE status three months prior to the end of the reporting period and will provide a final compliance notice within 60 days after the end of the reporting period. The final compliance notice shall include the hours earned during the reporting period which have been reported and carryover hours, if applicable.

(C) Noncompliance and Compliance Disputes.

(i) Notification. If a judicial officer fails to comply with this order, or is determined by the Board to have failed to fully comply with the MCJE requirements, such judicial officer shall be notified in writing by the Board of the nature of the noncompliance and be given 180 days from the date of the notice to remedy the noncompliance.

(ii) Evidence of Compliance or Hearing Request. Within 30 days after the date of the notice of noncompliance, the judicial officer shall either submit evidence of compliance or request a hearing.

(iii) Hearing. If the judicial officer timely files a request for a hearing under this subsection, the Board shall schedule a hearing. The hearing shall be held at least ten days after written notice to the judicial officer. In addition, the State Court Administrator, or his or her designee, is required to attend a hearing held under this provision, and is entitled to notice in the same manner as the judicial officer.

(iv) Reasonable Cause for Noncompliance. If the Board finds that the judicial officer had reasonable cause for noncompliance, the judicial officer shall have 180 days from the date of notice of the Board's decision to correct the noncompliance. If compliance is not achieved within the 180 day period, the Board shall proceed as provided.

(v) Report to Judicial Tenure Commission and State Court Administrator. If a judicial officer fails to remedy noncompliance within 180 days after the later of the date of the notice of noncompliance or the date of a decision from the Board finding reasonable cause for noncompliance, the Board shall report that fact to the Judicial Tenure Commission and the State Court Administrator for their consideration.

(vi) Sanctions by State Court Administrator. Upon receiving notice from the Board of a judge's noncompliance, the State Court Administrator may impose an appropriate sanction, separate from any judicial sanction recommended by the JTC.

(D) Crediting Hours During a Period of Noncompliance. Credit hours earned shall be first applied to satisfy the requirements of the compliance period that was the subject of the notice to the judicial officer before any excess credits earned during the notice period may be applied to subsequent requirements.

13. Remedial Education. Upon being notified that a judicial officer is not performing as expected or required of the position, the State Court Administrator may require that a judicial officer engage in remedial education. Any remedial education required of a judicial officer will be in addition to the annual MCJE requirements of all judicial officers.

14. Confidentiality. The files, records, and proceedings of the Board as they relate to or arise out of any alleged failure of a judicial officer to satisfy the requirements of this order shall be deemed confidential and shall not be disclosed except in furtherance of the duties of the Board or upon the request of the affected judicial officer or as they may be introduced in evidence or otherwise produced in proceedings under this order.

Staff Comment: This proposed administrative order would establish a mandatory continuing judicial education program for the state's justices, judges, and quasi-judicial officers.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-33. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

MARKMAN, J. (*concurring*). I support the Court's decision to publish for public comment the proposed administrative order for mandatory continuing judicial education (CJE), but write to raise the following questions that might perhaps be addressed in the course of such comment:

First, given that Michigan has lacked mandatory CJE since its formation, what should be viewed as the most compelling present rationale for such a program?

Second, if CJE is not to devolve into an assemblage of "make-work" requirements, how should mandatory CJE programs be designed to ensure that they are of genuinely lasting value to those who exercise the judicial power of the state, as well as the public these persons serve?

Third, should mandatory CJE include a testing component in which judges demonstrate that they have actually gained useful or practical legal insight, or otherwise derived benefit, from these programs?

Fourth, in developing a mandatory CJE curriculum, do we wish to give emphasis to “nuts-and-bolts” courses such as those currently offered by the Michigan Judicial Institute, or do we want to give emphasis to “law school-oriented” courses such as jurisprudence, the evolution of the common law, and legal history? And in emulating the mandatory CJE requirements of Pennsylvania, as our proposal does, should there be some sense that courses offered in that state such as “America’s Fascination with Serial Killers,” “Best Practices for Handling Sovereign Citizen Litigants,” and “Storytelling and Persuasion Skills for Lawyers” are to be discouraged or avoided?

Fifth, is there any basis to agree or disagree with Justice BERNSTEIN in his dissent that if mandatory CJE is adopted, mandatory continuing legal education (CLE) for attorneys will likely follow? And if it *is* to follow, and in light of the fact that Michigan has lacked mandatory CLE since its formation, what should be viewed as the most compelling present rationale for such a program?

Sixth, what is inadequate about the present range of *voluntary* CJE programs currently offered by the Michigan Judicial Institute and elsewhere? If the only difference is that the current proposal is mandatory and MJI and other programs are voluntary, what, if anything, does this portend for the success of the newly created requirement?

Seventh, because the judiciary, as with any other governmental entity, is expected to serve as a responsible custodian of public funds, how significant a consideration should new program costs be as to whether mandatory CJE is adopted and its specific form?

Eighth, what will be the impact upon the expedition of the judicial process of 591 judges throughout the state being obligated to convene and participate in mandatory CJE programs?

Ninth, must distinctive curriculums be established for the trial and appellate judges of the state? For circuit, probate, and district judges?

Tenth, by what means can it best be ensured that mandatory CJE programs remain neutral and even-handed in their influence upon substantive judicial perspectives?

BERNSTEIN, J. (*dissenting*). I agree that the goal of continuing judicial education is a fine one—however, my problem lies with the idea of mandating educational goals for an already burdened judiciary. We should respect the autonomy of individual judicial officers to choose for themselves; the government should not seek to intervene in these individual decisions. Stated simply, I believe that any of the problems that continuing judicial education seeks to correct could be better addressed in private forums by private actors.

Moreover, should continuing judicial education become a reality in Michigan, I fear that continuing legal education for all attorneys might come next.

Order Entered March 19, 2020:

PROPOSED AMENDMENTS OF MCR 3.971, 3.972, 3.973, 3.977, 3.993, 7.202, AND 7.204.

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.971, 3.972, 3.973, 3.977, 3.993, 7.202, and 7.204 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 will also be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

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

RULE 3.971. PLEAS OF ADMISSION OR NO CONTEST.

(A) [Unchanged.]

(B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

(1)-(7) [Unchanged.]

(8) the respondent may be barred from challenging the assumption of jurisdiction in an appeal from ~~an~~the order terminating parental rights if they do not timely file an appeal of the initial dispositional order under MCR ~~7.2043.993(A)(1), 3.993(A)(2)~~; or a delayed appeal under MCR 3.993(C).

(C)-(D) [Unchanged.]

RULE 3.972. TRIAL.

(A)-(E) [Unchanged.]

(F) Respondent's Rights Following Trial and Possible Disposition. If the trial results in a verdict that one or more statutory grounds for jurisdiction has been proven, the court shall advise the respondent orally or in writing that:

(1)-(2) [Unchanged.]

(3) the respondent may be barred from challenging the assumption of jurisdiction if they do not timely file an appeal under MCR ~~7.2043.993(A)(1), 3.993(A)(2)~~; or a delayed appeal under MCR 3.993(C).

(G) [Unchanged.]

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(F) [Unchanged.]

(G) Respondent's Rights Upon Entry of Dispositional Order. When the court enters an initial order of disposition following adjudication the court shall advise the respondent orally or in writing:

(1)-(3) [Unchanged.]

(4) the respondent may be barred from challenging the assumption of jurisdiction or the removal of the minor from a parent's care and custody in an appeal from the order terminating parental rights if they do not timely file an appeal under MCR ~~7.2043.993(A)(1)~~, 3.993(A)(2); or a delayed appeal under MCR 3.993(C).

(H)-(J) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) [Unchanged.]

(2) Appointment of Appellate Counsel~~Attorney Request and appointment of appellate counsel is governed by MCR 3.993.~~

(a) ~~If a request is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.~~

(b) ~~In a case involving the termination of parental rights, the order described in (J)(2) and (3) must be entered on a form approved by the State Court Administrator'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) ~~Transcripts. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order the complete transcripts of all proceedings prepared at public expense.~~

(K) [Unchanged.]

RULE 3.993 APPEALS.

(A)-(C) [Unchanged.]

(D) Request and Appointment of Counsel.

(1) A request for appointment of appellate counsel must be made within 14 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion.

(2) If a request for appointment of appellate counsel is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.

(3) The order described in subrule (D)(2) must be entered on a form approved by the State Court Administrator'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.

(E) Transcripts. If the court appoints appellate counsel for respondent, the court must order the complete transcripts of all proceedings prepared at public expense.

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(4) [Unchanged.]

(5) "custody case" means a domestic relations case in which the custody of a minor child is an issue, an adoption case, or a child protective proceeding, or delinquency case in which a dispositional order removing the minor from the minor's home is an issue~~case in which the family division of circuit court has entered an order terminating parental rights or an order of disposition removing a child from the child's home;~~

(6) [Unchanged.]

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) Except where another time is provided by law or court rule, an appeal of right in any civil case must be taken within 21 days. The period runs from the entry of:~~An appeal of right in a civil action must be taken within~~

~~(a) 21 days after entry of the judgment or order appealed from;~~

~~(b) 21 days after the entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other~~

relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period provided by (a), (c), or (d) of this subrule or within further time the trial court has allowed for good cause during that 21-day period;

(c) ~~an order appointing counsel~~ 14 days after entry of an order of the family division of the circuit court terminating parental rights under the Juvenile Code, or entry of an order denying a motion for new trial, rehearing, reconsideration, or other postjudgment relief from an order terminating parental rights, if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period; or

(d) ~~an order denying a timely request for appointment of counsel in a civil case in which an indigent party is entitled to appointed counsel. The request is considered timely if received by the trial court within the time for claiming an appeal as provided by (a) or (b) of this subrule or another time provided by law.~~

~~If a party in a civil action is entitled to the appointment of an attorney and requests the appointment within 14 days after the final judgment or order, the 14-day period for the taking of an appeal or the filing of a postjudgment motion begins to run from the entry of an order appointing or denying the appointment of an attorney. If a timely postjudgment motion is filed before a request for appellate counsel, the party may request counsel within 14 days after the decision on the motion.~~

(2)-(3) [Unchanged.]

(B)-(H) [Unchanged.]

Staff Comment: The proposed amendments of MCR 3.971, 3.972, 3.973, 3.977, 3.993, 7.202 and 7.204 would make the appeal process for child protective cases uniform (instead of having a separate process for cases involving termination of parental rights). The amendments also would make the appeal period uniform (21 days) for all child protections cases.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 amendment may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-21. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered March 19, 2020:

PROPOSED AMENDMENTS OF MCR 6.310, 6.425, 6.428, 6.429, 6.431, 7.204, 7.205, 7.208, 7.211, AND 7.305 AND PROPOSED ADOPTION OF MCR 1.112.

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.310, 6.425, 6.428, 6.429, 6.431, 7.204, 7.205, 7.208, 7.211, 7.305, and a proposed addition of Rule 1.112 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

[Rule 1.112 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.112. FILINGS BY INCARCERATED INDIVIDUALS.

If filed by an unrepresented individual who is incarcerated in a prison or jail, a pleading or other document must be deemed filed on the date of deposit in the institution's outgoing mail. Timely filing may be shown by a receipt of mailing or sworn statement setting forth the date of deposit and that postage has been prepaid.

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1)-(4) [Unchanged.]

~~(5) If a motion to withdraw plea is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a plea was accepted on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to withdraw a plea in a Michigan court.~~

(D)-(E) [Unchanged.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A) Presentence Report; Contents.

(1) [Unchanged.]

(2) On request, the probation officer must give the defendant's attorney notice and a reasonable opportunity to attend the presentence interview.

(2) [Renumbered (3) but otherwise unchanged.]

~~(3) Regardless of the sentence imposed, the court must have a copy of the presentence report and of any psychiatric report sent to the Department of Corrections. If the defendant is sentenced to prison, the copies must be sent with the commitment papers.~~

(B) [Unchanged.]

~~(C) Presentence Report; Disclosure After Sentencing. After sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the presentence report and any attachments to it. The court must exempt from disclosure any information the sentencing court exempted from disclosure pursuant to subrule (B).~~

(D) [Relettered (C) but otherwise unchanged.]

~~(E)~~ Sentencing Procedure.

(1) [Unchanged.]

(2) Resolution of Challenges and Corrections.

(a) If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge, or determines that it will not take the challenged information into account in sentencing, or otherwise determines that the report should be corrected, it must order direct the probation officer to (i) correct the report, or delete the challenged information in the report, whichever is appropriate, and if ordered to correct the report, the probation officer must (ii) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections, certify that the report has been corrected, and ensure that no prior version of the report is used for classification, programming, or parole purposes.

(b) [Unchanged.]

(3) [Unchanged.]

(E) Presentence Report; Retention and Disclosure after Sentencing. Regardless of the sentence imposed, the Department of Corrections must retain the presentence report reflecting any corrections ordered under subrule (D)(2). On written request or order of the court, the Department of Corrections must provide the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, with a copy of the report. On written request, the court must provide the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, with copies of any documents that were presented for consideration at sentencing, including the court's initial copy of the presentence report if corrections were made after sentencing. If the court exempts or orders

the exemption of any information from disclosure, it must follow the exemption requirements of subrule (B).

(F)-(G) [Unchanged.]

RULE 6.428. RESTORATION OF APPELLATE RIGHTS~~REISSUANCE OF JUDGMENT.~~

If the defendant ~~did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, whether convicted by plea or at trial, was denied the right to appellate review or the appointment of appellate counsel due to errors by the defendant's prior attorney or the court, or other factors outside the defendant's control,~~ the trial court shall issue an order restarting the time in which to file an appeal ~~or request counsel of right.~~

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) [Unchanged.]

(B) Time for Filing Motion.

(1)-(4) [Unchanged.]

(5) ~~If a motion to correct an invalid sentence is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a judgment of conviction and sentence is entered on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to correct an invalid sentence in a Michigan court.~~

(C) [Unchanged.]

RULE 6.431. NEW TRIAL.

(A) Time for Making Motion.

(1)-(4) [Unchanged.]

(5) ~~If a motion for new trial is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which the trial court rendered its decision on or after the effective date of this~~

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

(B)-(D) [Unchanged.]

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) [Unchanged.]

(2) An appeal of right in a criminal case must be taken

(a)-(d) [Unchanged.]

(e) ~~If a claim of appeal is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the claim as a pro se party, the claim shall be deemed presented for filing on the date of deposit of the claim 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 claims of 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.~~

A motion for rehearing or reconsideration of a motion mentioned in subrules (A)(1)(b) or (A)(2)(d) does not extend the time for filing a claim of appeal, unless the motion for rehearing or reconsideration was itself filed within the 21- or 42- day period.

(3) [Unchanged.]

(B)-(H) [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.]

(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(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)-(H) [Unchanged.]

RULE 7.208. AUTHORITY OF COURT OR TRIBUNAL APPEALED FROM.

(A) [Unchanged.]

(B) Postjudgment Motions in Criminal Cases.

(1) ~~Within~~ ~~No later than 56 days after the commencement of the time~~ for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for a new trial, for judgment of acquittal, to withdraw a plea, or to correct an invalid sentence.

(2) [Unchanged.]

(3) The trial court shall hear and decide the motion within ~~56~~²⁸ days of filing, unless the court determines that an adjournment is necessary to secure evidence needed for the decision on the motion or that there is other good cause for an adjournment.

(4)-(6) [Unchanged.]

(C)-(J) [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) Motion to Remand.

(a) ~~Within the time provided for filing the appellant's brief,~~ ~~t~~The appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show:

(i)-(ii) [Unchanged.]

A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at a hearing.

(b)-(c) [Unchanged.]

(d) If a motion to remand is ~~filed~~^{granted}, further proceedings in the Court of Appeals are stayed until ~~the motion is denied or the trial court proceedings are completed~~^{completion of the proceedings in the trial court pursuant to the remand}, unless the Court of Appeals orders otherwise.

(e)-(f) [Unchanged.]

(2)-(9) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 7.305. APPLICATION FOR LEAVE TO APPEAL.

(A)-(B) [Unchanged.]

(C) When to File.

(1)-(4) [Unchanged.]

~~(5) Late Application, Exception. Late applications will not be accepted except as allowed under this subrule. If an application for leave to appeal in a criminal case is not received within the time periods provided in subrules (C)(1) or (2), and 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 was prepaid. The exception applies to applications from decisions of the Court of Appeals rendered on or after March 1, 2010. This exception also applies to an inmate housed in a federal or other state correctional institution who is acting pro se in a criminal appeal from a Michigan court.~~

~~(6)-(8) [Renumbered (5)-(7) but otherwise unchanged.]~~

~~(D)-(I) [Unchanged.]~~

Staff comment: The proposed amendments were submitted by the State Appellate Defender Office and would address several issues.

First, it would expand the prisoner mailbox rule to all legal filings (not just claims of appeal and postjudgment motions) made by a person incarcerated in prison or jail (not just prison, as under the current rule). This part of the proposal includes a new MCR 1.112, and elimination of specific prison mailbox provisions in MCR 6.310(C)(5), MCR 6.429(B)(5), MCR 6.431(A)(5), MCR 7.204(A)(2)(e), MCR 7.205(A)(3), and MCR 7.305(C)(5). One difficulty with this expansion is the fact that most jails do not have a mail log system like that in place in prisons. Second, the proposal would expand certain time frames for filing and deciding postjudgment motions in criminal cases, as reflected in the amendments of MCR 7.208 and MCR 7.211. Third, the proposal would reconfigure and expand the “Reissuance of Judgment” rule, as shown in the proposed amendments of MCR 6.428. Finally, the proposal (as shown in proposed amendments of MCR 6.425) would require a probation officer to give defendant’s attorney notice and a reasonable opportunity to attend the presentence interview, require a probation agent to not only correct a report but certify that the correction has been made, and “ensure that no prior version of the report is used for classification, programming, or parole purposes.” This portion of the proposal also would require the Michigan Department of Corrections to provide the prosecutor, defendant, or defense lawyer with a copy of the presentence investigation report, and further require the court to provide to the parties any documents presented for consideration at sentencing, including any PSIR considered before corrections were made.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File Nos. 2018-33/2019-20/2019-38. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigan-supremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered March 19, 2020:

PROPOSED AMENDMENT OF MCR 7.314.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.314 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx>].

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

RULE 7.314. CALL AND ARGUMENT OF CASES.

(A) [Unchanged.]

(B) Argument.

(1) In a calendar case in which one side is or both sides are entitled to oral argument, the time allowed for argument shall be provided in the order granting leave ~~is 30 minutes for each side unless the Court orders otherwise. When only one side is scheduled for oral argument, 15 minutes is allowed unless the Court orders otherwise.~~

(2) [Unchanged.]

The time for argument may be extended by Court order on motion of a party filed at least 14 days before the session begins or by the Chief Justice during the argument.

Staff comment: The proposed amendment of MCR 7.314 would eliminate the oral argument time period and instead provide for an amount of time established by the Court in the order granting leave to appeal.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-26. Your comments and the comments of others will be posted under the chapter affected by this proposal [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered March 19, 2020:

PROPOSED AMENDMENTS OF MCR 6.310, 6.429, 6.431, 6.509, AND 7.205 AND PROPOSED ADOPTION OF MCR 6.126.

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.310, 6.429, 6.431, 6.509, and 7.205 and a proposed addition of Rule 6.126 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 proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigan-supremecourt/rules/pages/default.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 the proposal in its present form.

[Rule 6.126 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.126. DECISION ON ADMISSIBILITY OF EVIDENCE.

Where the court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the court reconsider whether pretrial release is appropriate.

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1) The defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and (b)(i)-(iii) 6 months after sentence or within the time provided by subrule (C)(2).

(2) If 6 months have elapsed since sentencing, the defendant may file a motion to withdraw the plea if:

(a) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period;

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and

(c) the motion to withdraw the plea is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

(3)-(5) [Renumbered (2)-(4) but otherwise unchanged.]

(D)-(E) [Unchanged.]

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) [Unchanged.]

(B) Time for Filing Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and (b)(i)-(iii).

(a) within 6 months of entry of the judgment of conviction and sentence, or;

(b) if 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion to correct an invalid sentence if:

(i) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period;

(ii) The defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and

(iii) The motion to correct invalid sentence is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order or denying the appointment of counsel, the 42-day period runs from the date of that order.

(4)-(5) [Unchanged.]

(C) [Unchanged.]

RULE 6.431. NEW TRIAL.

(A) Time for Making Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and (b)(i)-(iii).

(a) ~~within 6 months of entry of the judgment of conviction and sentence, or~~

(b) ~~If 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion for new trial if:~~

(i) ~~the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period;~~

(ii) ~~the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and~~

(iii) ~~the motion for a new trial is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.~~

(4)-(5) [Unchanged.]

(B)-(D) [Unchanged.]

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(A)(1). The 6-month time limit provided by MCR 7.205(A)(4)(a), 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 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements. The time limit for an application for leave to appeal is jurisdictional. See MCR 7.203(B). The provisions of MCR 1.108 regarding computation of time apply. For purposes of this subrule, "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions. An application for leave to appeal must be filed within

(1) Except as otherwise provided in this rule, an application for leave to appeal must be filed within:

(a) 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule; or

(b) 21 days after entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the

initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period.

(2) In a criminal case involving a final judgment or final order entered in that case, an application for leave to appeal filed on behalf of the defendant must be filed within the later of:

(a) 6 months after entry of the judgment or order; or

(b) 42 days after:

(i) an order appointing appellate counsel or substitute counsel, or denying a request for appellate counsel, if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;

(ii) the filing of transcripts ordered under MCR 6.425(G)(1)(f), if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;

(iii) the filing of transcripts ordered under MCR 6.433, if the defendant requested the transcripts within 6 months after entry of the judgment or order to be appealed;

(iv) an order deciding a timely filed motion to withdraw plea under MCR 6.310(C), motion for directed verdict under MCR 6.419(C), motion to correct an invalid sentence under MCR 6.429(B), or motion for new trial under MCR 6.431(A); or

(v) an order deciding a timely filed motion for reconsideration of an order described in subrule (A)(2)(b)(iv).

A defendant relying on subrule (A)(2)(b) must provide a statement, supported by relevant documentation, explaining how the application meets the requirements of the subrule.

For purposes of subrules (A)(1) and (A)(2), “entry” means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal’s register of actions.

(3) In an appeal from an order terminating parental rights, an application for leave to appeal must be filed within 63 days, as provided by MCR 3.993(C)(2). 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(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.

(4) Delayed Application for Leave to Appeal.

(a) For appeals governed by subrule (A)(1), when an application is not filed within the time provided by that subrule, a delayed application for leave to appeal may be filed within 6 months of the entry of a judgment or order described in that subrule.

(b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may be filed within 21 days of the entry of the dismissal order or an order denying reconsideration of that order, provided that:

(i) the delayed application is taken from the same lower court judgment or order as the claim of appeal, and

(ii) the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

A delayed application under this rule must contain a statement of facts explaining the reasons for delay. The appellee may challenge the claimed reasons in the answer. The court may consider the length of and the reasons for delay in deciding whether to grant the delayed application.

(5) In a criminal case, if an inmate in the custody of the Michigan Department of Corrections, or in the custody of another state or federal penal institution, submits an application or delayed application for leave to appeal as a pro per party that is received by the court after the expiration of the periods set forth in this rule, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution where 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.

(6) In a criminal case, except as provided in subrule (4)(b), the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(B)-(D) [Unchanged.]

(E) Decision.

(1) [Unchanged.]

(2) The court may grant or deny the application,; enter a final decision,; grant other relief,; or request additional material from the record,; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed. The clerk shall enter the court's order and mail copies to the parties.

(3)-(4) [Unchanged.]

(F) ~~Expedited Decision~~Emergency Appeal. When a party requires a decision on an application by a date certain, the party may file a motion for immediate consideration of the application as provided in MCR 7.211(C)(6). When a motion for immediate consideration is filed, the time for submission of the application and motion is governed by MCR 7.211(C)(6). In all other respects, submission, decision, and further proceedings are as provided in subrule (E).

(1) If the order appealed requires acts or will have consequences within 56 days of the date the application is filed, appellant shall alert the clerk of that fact by prominent notice on the cover sheet or first page of the application, including the date by which action is required.

(2) When an appellant requires a hearing on an application in less than 21 days, the appellant shall file and serve a motion for immediate consideration, concisely stating facts showing why an immediate hearing is required. A notice of hearing of the application and motion or a transcript is not required. An answer may be filed within the time the court directs. If a copy of the application and of the motion for immediate consideration are personally served under MCR 2.107(C)(1) or (2), the application may be submitted to the court immediately on filing. If mail service is used, it may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. In all other respects, submission, decision, and further proceedings are as provided in subrule (E).

(3) Where the trial court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the trial court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the trial court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. The appealing party must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1). If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate.

(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 (E).

(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(3) Except as provided in subrules (G)(4) and (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) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the 6 months are counted from the time of entry of the order denying that motion; or

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further time the trial

court has allowed for good cause during that 21-day period, then the 6 months are counted from the entry of the order deciding the motion.

(4) The limitation provided in subrule (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(C), MCR 6.429(B), and MCR 6.431(A), or if

(a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period;

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel or for substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel, or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

A motion for rehearing or reconsideration of a motion mentioned in subrule (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 (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 (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 (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) The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

(H) Certified Concise Statement.

(1) When the Court of Appeals requires a certified concise statement of proceedings and facts, the appellant shall, within 7 days after the order requiring the certified concise statement is certified, serve on all

~~other parties a copy of a proposed concise statement of proceedings and facts, describing the course of proceedings and the facts pertinent to the issues raised in the application, and notice of hearing with the date, time, and place for settlement of the concise statement.~~

~~(2) Hearing on the proposed concise statement must be within 14 days after the proposed concise statement and notice is served on the other parties.~~

~~(3) Objections to the proposed concise statement must be filed in writing with the trial court and served on the appellant and any other appellee before the time set for settlement.~~

~~(4) The trial court shall promptly settle objections to the proposed concise statement and may correct it or add matters of record necessary to present the issues properly. When a court's discretionary act is being reviewed, the trial court may add to the statement its reasons for the act. Within 7 days after the settlement hearing, the trial court shall certify the proposed or a corrected concise statement of proceedings and facts as fairly presenting the factual basis for the questions to be reviewed as directed by the Court of Appeals. Immediately after certification, the trial court shall send the certified concise statement to the Court of Appeals clerk and serve a copy on each party.~~

Staff comment: The proposed amendments of MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and proposed addition of MCR 6.126 would clarify and simplify the rules regarding procedure in criminal appellate matters.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered March 19, 2020:

PROPOSED AMENDMENTS OF MCR 7.212 AND MCR 7.312.

On order of the Court, this is to advise that the Court is considering amendments of Rules 7.212 and 7.312 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the

proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

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

RULE 7.212. BRIEFS.

(A)-(I) [Unchanged.]

(J) Appendix.

~~(1) In all civil cases (except those pertaining to child protection proceedings, including termination of parental rights, and non-criminal delinquency proceedings under chapter XHA of the Probate Code and adoptions under chapter X), and in all appeals from administrative agencies, except those described in section (J)(5) of this rule, the appellant shall file and serve an appendix. The appellant's appendix shall contain a table of contents and copies of the following documents if they exist: Requirements. Except as provided in subrules (1)(a)-(f) of this rule, the appellant must file an individual or joint appendix with the appellant's brief. An appellee may file an appendix with the appellee's brief if the appellant's appendix does not contain all the information set forth in subrule (3) of this rule. The appellee's appendix should not contain any of the documents contained in the appellant's appendix except when including additional pages to provide a more complete context, but should only contain additional information described in subrule (3) that is relevant and necessary to the determination of the issues on appeal. To avoid duplication in cases with more than one appellant or appellee, the parties are encouraged to submit a joint appendix pursuant to subsection (4) rather than separate appendices. An appendix is not required in appeals from:~~

~~(a) Criminal proceedings.~~

~~(b) Child protective proceedings.~~

~~(c) Delinquency proceedings under chapter XIIA of the Probate Code.~~

~~(d) Adoption proceedings under chapter X.~~

~~(e) Involuntary mental health treatment proceedings under the Mental Health Code.~~

~~(f) The Michigan Public Service Commission where the record is available on the Commission's e-docket, or the Michigan Tax Tribunal where the record is available on the Tribunal's tax docket lookup page. In those cases, the parties' briefs shall cite to the document number and relevant pages in the electronic record.~~

~~(2) Form. The appendix must include a cover page or pages with the case caption that sets forth the parties' names and their designations (e.g., plaintiff-appellant), along with the appellate court and trial court~~

or tribunal docket numbers. The cover page(s) must also state whether the appendix is an "Appellant's Appendix," "Appellee's Appendix," or "Joint Appendix." Following the cover page(s), the appendix must include a table of contents that identifies each document with reasonable specificity and indicates both the appendix number or letter and the page number on which the first page of the document appears in the appendix. An appendix must be numbered sequentially in a prominent location at the bottoms of the pages. When the appendix is composed of multiple volumes, pagination must continue from one volume to the next. For multiple appendix volumes, each volume must include a cover page and table of contents, and the first volume must contain a complete table of contents referencing all volumes of the appendix. Each separate document in the appendix must be preceded by a title page that identifies the appendix number or letter and the title of the document.

(a) For an appendix filed in paper form, one signed copy that is separately bound from the brief shall be filed. The binding method should allow the easy dismantling of the appendix for scanning.

(b) For an appendix filed electronically:

(i) The appendix must be separate from the electronically-filed brief and should be transmitted as a single PDF document unless the file size is too large to do so, in which case the appendix should be divided into separate volumes.

(ii) The appendix must be text searchable and include bookmarks for each document in the appendix and for important information or sections within the documents.

(iii) The table of contents should link to the documents contained in the appendix or in that volume of the appendix.

(3) Content. The appendix must include copies of the following documents if they exist:

(a) The trial court or tribunal judgment or order(s) appealed from, including any written opinion, memorandum, findings of fact and conclusions of law stated on the record, in conjunction with the judgment or order(s) appealed from.;

(b) A copy of the trial court or tribunal register of actionsdocket sheet.;

(c) The relevant pages of any transcripts cited in support of the argumentappellant's position on appeal. Whenre appropriate, pages that precede or followthe appellant may attach pages preceding and succeeding the cited page should be includedcited if helpful to provide context to the citation. Submitting entire transcripts is discouraged unless necessary for the understanding of an argument. If a complete trial, deposition, or administrative transcript is filed, anthe index to such transcript must be included. Transcripts must contain only a single transcript page per document page, not multiple pages combined on a single document page.Only noncompressed (one sheet to a page) transcripts may be filed;

(d) WhenIf a jury instruction is challenged, the languagea copy of the instruction, any portion of the transcript containing a discussion of the instruction, and any relevant request for the instruction.;~~and~~

(e) Any other exhibit, pleading, or ~~other~~ evidence that was submitted to the trial court and that is relevant and necessary for the Court to consider in deciding the appeal. Briefs submitted in the trial court are not required to be included in the appendix unless they pertain to a contested preservation issue.

~~For material that is subject to an existing protective order, or for evidence that is not subject to such an order, but which contains information that is confidential or privileged, the procedures of MCR 7.211(C)(9) apply.~~

~~(4) Joint Appendix.~~

~~(a) The parties may stipulate to using a joint appendix, so designated, containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrules (J)(2) and (3) and shall be included with the initial appellant's brief or, for a joint appendix of multiple appellees, with the first appellee's brief to be filed.~~

~~(b) The stipulation to use a joint appendix may specify that any party may file, as a supplemental appendix, additional portions of the record not covered by the joint appendix.~~

~~(2) The appellee shall file and serve an appendix with its responsive brief only if the appellant's appendix does not contain all the information set forth in section (J)(1) of this rule. The appellee's appendix shall not contain any of the documents contained in the appellant's appendix, but shall only contain additional information described in section (J)(1) that is relevant and necessary to the determination of the issues raised in the appeal.~~

~~(3) Each volume of any appendix shall contain no more than 250 pages. The table of contents shall identify each document with reasonable definiteness, and indicate the volume and page of the appendix where the document is located. The cover to the appendix shall indicate in bold type whether it is the "Appellant's Appendix" or "Appellee's Appendix."~~

~~(a) For a paper appendix, each document shall also be tabbed. A paper appendix shall be bound separate from the brief. Five copies of the paper appendix shall be filed with the court.~~

~~(b) If an appendix is to be filed electronically, it must be filed as an independent .pdf file or a series of independent .pdf files. The table of contents for electronically filed appendixes shall contain bookmarks, linking to each document in the appendix.~~

~~(4) In cases involving more than one appellant or appellee, including cases consolidated for appeal, to avoid duplication each side shall, where practicable, file a joint rather than separate appendixes.~~

~~(5) This subsection does not apply to appeals arising from the Michigan Public Service Commission (in which the record is available on the Commission's e-docket) or the Michigan Tax Tribunal (in which the record is available on the Tribunal's tax docket lookup page). In those cases, the parties shall cite to the document number and relevant pages.~~

RULE 7.312. BRIEFS AND APPENDIXES IN CALENDAR CASES.

(A)-(C) [Unchanged.]

(D) Appendixes. Unless the Court orders otherwise, briefs in a calendar case or in a case being argued on an application must be filed with an individual or joint appendix that conforms with the requirements, form, and content of MCR 7.212(J), except that the exclusions listed in MCR 7.212(J)(1)(a)-(f) do not apply to the Supreme Court. The individual or joint appendix must also include a copy of the Court of Appeals opinion or order being appealed but need not include the briefs submitted in the Court of Appeals unless they pertain to a contested preservation issue.

(1) Form. Appendixes must be prepared in conformity with MCR 7.212(B), and shall be similarly endorsed as briefs under MCR 7.312(C) but designated as an appendix. Appendixes must be printed on both sides of the page and, if they encompass more than 20 sheets of paper, must also be submitted on electronic storage media in a file format that can be opened, read, and printed by the Court.

(2) Appellant's Appendix. An appendix filed by the appellant must be entitled "Appellant's Appendix," must be separately bound, and numbered separately from the brief with the letter "a" following each page number (e.g., 1a, 2a, 3a). Each page of the appendix must include a header that briefly describes the character of the document, such as the names of witnesses for testimonial evidence or the nature of the documents for record evidence. The appendix must include a table of contents and, when applicable, must contain:

- (a) the relevant docket entries of the trial court or tribunal and the Court of Appeals arranged in a single column;
- (b) the trial court judgment, order, or decision in question and the Court of Appeals opinion or order being appealed;
- (c) any relevant finding or opinion of the trial court;
- (d) any relevant portions of the pleadings or other parts of the record; and
- (e) any relevant portions of the transcript, including the complete jury instructions if an issue is raised regarding a jury instruction.

The items listed in subrules (D)(2)(a) to (e) must be presented in chronological order.

(3) Joint Appendix.

(a) The parties may stipulate to use a joint appendix, so designated, containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrule (D)(2) and shall be separately bound and served with the appellant's brief.

(b) The stipulation to use a joint appendix may provide that either party may file, as a supplemental appendix, any additional portion of the record not covered by the joint appendix.

(4) Appellee's Appendix. An appendix, entitled "Appellee's Appendix," may be filed. The appellee's appendix must comply with the provisions of subrule (D)(2) and be numbered separately from the brief with the letter "b" following each page number (e.g., 1b, 2b, 3b). Materials included in the appellant's appendix or joint appendix may not be repeated in the appellee's appendix, except to clarify the subject matter involved.

(E)-(J) [Unchanged.]

Staff comment: The proposed amendments of MCR 7.212 and 7.312 would allow practitioners to efficiently produce an appendix for all appellate purposes by making the appendix rule consistent within the Court of Appeals and Supreme Court.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered March 19, 2020:

PROPOSED AMENDMENT OF MCR 7.216.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.216 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 [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

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

RULE 7.216. MISCELLANEOUS RELIEF.

(A)-(B) [Unchanged.]

(C) Vexatious Proceedings; Vexatious Litigator.

(1)-(2) [Unchanged.]

(3) Vexatious Litigator. If a party habitually, persistently, and without reasonable cause engages in vexatious conduct under subrule (C)(1), the Court may, on its own initiative or on motion of another party, find

the party to be a vexatious litigator and impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Court without first obtaining leave, prohibiting the filing of actions in the Court without the filing fee or security for costs required by MCR 7.209 or MCR 7.219, or other restriction the Court deems just.

Staff comment: The proposed amendment of MCR 7.216 would enable the Court of Appeals to impose filing restrictions on a vexatious litigator, similar to the Supreme Court's rule (MCR 7.316).

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-31. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered March 19, 2020:

PROPOSED ADMINISTRATIVE ORDER REGARDING PROFESSIONALISM PRINCIPLES FOR LAWYERS AND JUDGES.

On order of the Court, this is to advise that the Court is considering the adoption of an Administrative Order regarding professionalism principles for lawyers and judges. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

**Administrative Order No. 2020-XX —
Professionalism Principles for Lawyers and Judges**

In fulfilling our professional responsibilities, we, as attorneys and officers of the court, must remain mindful of our obligations to the administration of justice and its truth-seeking process designed to effi-

ciently resolve disputes in a rational and peaceful manner. In serving in our professional capacity, we adhere to these principles of professionalism:

1. We are civil in our interactions with all people involved in a legal matter or the justice system.
2. We treat all people involved in a legal matter or the justice system with respect.
3. We cooperate with each other within the bounds of our justice system.
4. We extend professional courtesy to each other.
5. We do not engage in, or tolerate, conduct that may be perceived as rude, abrasive, hostile, or obstructive.
6. We do not disparage or attack other persons involved in the justice system, or employ hostile, demeaning, or humiliating words in written or oral communications or opinions.
7. We do not exhibit, act upon, or manifest bias against any person involved in a legal matter or the justice system.
8. We treat all people involved in a legal matter or the justice system fairly, regardless of their personal characteristics or viewpoints.
9. We act with honesty and integrity in our interactions with all people involved in a legal matter or the justice system and honor promises and agreements fairly reached.
10. We act in good faith and advance only those positions just under the facts and law.

COMMENTARY ON PROFESSIONALISM PRINCIPLES FOR LAWYERS AND JUDGES

Rule 1 of the Rules Concerning the State Bar provides, in part, that the “State Bar of Michigan shall . . . aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State.” To achieve these lofty goals, we have established ten principles of professionalism (“Principles”) as guidance to attorneys in the practice of law and judges during the adjudicative process on acceptable conduct in the practice of law. The Principles are not intended to form the basis for discipline, professional negligence, or sanctions, or to replace the Michigan Rules of Professional Conduct, the Michigan Code of Judicial Conduct, or the Michigan Court Rules, although many of the Principles are derived from them. Nevertheless, lawyers and judges together should exhibit the highest levels of professionalism to preserve and advance our noble profession, and to serve as exemplars to the public we serve.

The Principles are intertwined, but each Principle deserves to be singled out because of its individual importance to professionalism. Civility is the foundation for professionalism, and it requires respect, cooperation, courtesy, fairness, honesty, good faith, and integrity. Nor can civility exist in the presence of personal attacks, bias, or prejudice.

A lawyer is responsible to zealously represent a client, but zealous representation does not include unprofessional conduct. Unprofessional

conduct increases the cost of transactional matters and litigation and wastes judicial resources, with no benefit to the client and to the detriment of the legal profession, and most important, of our justice system.

Besides adhering to the Principles, lawyers and judges work to achieve balance in their lives knowing that personal health and wellness are necessary for the best treatment of others. Lawyers and judges are also encouraged to devote time to reflect on their behaviors and interactions with others to grow and abide by the Principles.

The Principles offer general guidance in the practice of law for lawyers and judges, both inside and outside the courtroom, including in alternative dispute resolution proceedings. These examples provide a better understanding of the Principles; they are illustrative and not meant to encompass all specific conduct:

1. Lawyers

- We allow opposing counsel to make their arguments without interruption, and we fairly consider their arguments.
- We promptly respond to communications from clients and other attorneys.
- We confer early and in good faith to discuss the possibility of settlement, but not as a means to adjourn discovery or delay trial.
- We accurately represent, characterize, quote and cite facts and authorities in our written and oral communications.
- We draft documents that accurately reflect the parties' understandings, the court's rulings, and the facts.
- We do not engage in ex parte communications unless authorized by law.
- We only make proper objections grounded in rules of evidence and procedure.
- We are punctual and arrive sufficiently before, and are prepared for, all proceedings.
- We are punctual in our professional interactions with clients, attorneys and others outside of the court.
- We are considerate of the time schedules of lawyers, parties, and witnesses.
- We are reasonable and act in good faith in scheduling hearings, conferences, depositions, and other proceedings.
- We are respectful of the personal emergencies and exigencies of litigation or practice in scheduling.
- We attempt to verify the availability of necessary participants and witnesses before dates for hearings or trial are set, or, if that is not feasible, immediately after such dates have been set.
- We give notice of any scheduling changes or cancellations at the earliest practicable time.
- We only make good faith requests for time extensions.
- We agree to good faith, reasonable requests for time extensions and waivers of formal procedure if they are not prejudicial to the interests of our clients.

- We act in good faith in deciding when to file or serve motions and pleadings.
- We only make discovery requests reasonable in scope and nature.
- We respond promptly to reasonable discovery requests by the opposing party.
- We only engage in conduct during a deposition that is allowed in the presence of a judicial officer and is appropriate under court or evidentiary rules.
- We readily stipulate to undisputed facts.

2. Judges

- We are patient and respectful of a party's right to be heard and afford this opportunity.
- We do not condone a lawyer being uncivil to another lawyer or others, and we call such conduct to the attention of the offending lawyer on our own initiative.
- We see as paramount our obligations to the administration of justice to facilitate the resolution of the matters before us consistent with the law and in a civil manner.
- We endeavor to work with other judges to foster cooperation in our mutual goal of enhancing the administration of justice.
- We are courteous, respectful, and civil in opinions, ever mindful that we are the ultimate measure of the public's faith and confidence in our system of justice.
- We are punctual in convening the business of the court.
- We are considerate of the time schedules of lawyers, parties, and witnesses.
- We are respectful of the personal emergencies and exigencies of litigation or practice in scheduling.
- We assure that judicial proceedings are conducted with dignity, decorum, and courtesy.
- We maintain control of the proceedings, recognizing that we have both the obligation and authority to ensure that all proceedings are conducted in a civil manner.
- We do not engage in practices and procedures that needlessly increase litigation expense or contribute to unnecessary delay.
- We recognize that a lawyer has the right and duty to present a cause fully and properly and that a litigant has the right to a fair and impartial hearing. Within the practical limits of time, we allow lawyers to present proper arguments and to make an accurate record.
- We make all reasonable efforts to decide promptly all matters presented to us for decision.
- We assure that people with disabilities interacting with the court as lawyers, parties, witnesses, and jurors know the court's ability to make reasonable accommodations.
- We ensure that self-represented litigants have equal access to the legal system while still holding them to the same legal standards as a litigant represented by counsel.

- We ensure that our staff treats litigants, attorneys, and those persons interacting with the justice system with dignity and respect.
- We do not permit ex parte communications unless authorized by law.

Staff Comment: This administrative order would list various “Professionalism Principles” for lawyers and judges as submitted by the State Bar of Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-32. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered March 19, 2020:

PROPOSED ADMINISTRATIVE ORDER REGARDING ELECTION-RELATED LITIGATION.

On order of the Court, this is to advise that the Court is considering the adoption of an Administrative Order regarding election-related litigation. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

**Administrative Order No. 2020-XX —
Election-Related Litigation Procedures**

In an effort to promote the efficient and timely disposition of election-related litigation, the Court adopts the following requirements and procedural rules.

1. Court proceedings regarding an election matter lawsuit may not be instituted and orders may not be issued except upon a written

complaint filed pursuant to the pertinent MCR provision. A full and complete record of the proceedings must be kept.

2. Upon the filing of a complaint regarding an election matter, the following persons must be notified of the lawsuit as soon as practicable:

- (a) Supreme Court Clerk
- (b) State Director of Elections
- (c) Attorney General Civil Litigation, Employment, & Elections Division (if the complaint is against the state or one of its subdivisions).

The State Court Administrator will circulate a memo before each election that identifies the names and contact information for the individuals and offices listed above.

3. The chief judge or chief judge's designee of the court in which the election matter lawsuit is filed must provide the following information to the Supreme Court Clerk:

- (a) Case number and names of parties
- (b) Name of assigned judge and the telephone number where he or she can be reached
- (c) Brief statement of the issues, and
- (d) Brief statement of the case status.

4. Upon receiving notice of the lawsuit, the Supreme Court Clerk will notify the Chief Justice of the Supreme Court so the Court can decide whether the trial court should certify the controlling question(s) in conformity with the procedures set forth in MCR 7.308(A). The trial court may take preliminary action to move the case forward, such as establishing a briefing schedule or conducting a hearing on the matter. But an order or judgment granting or denying the relief requested may not enter until the Supreme Court Clerk notifies the trial court of the Court's decision regarding certification. An electronic copy of the final order or judgment, or an order granting a stay or injunctive relief, must be transmitted to the Supreme Court Clerk at the email address provided in the memo referenced above.

5. On or before the date of an election, the Court of Appeals will publish on the home page of its website information for contacting that court's clerk's office after business hours and the steps required of a party who might wish to seek emergency appellate relief.

Staff Comment: This administrative order would provide requirements and procedural rules to promote the efficient and timely disposition of election-related litigation.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-03. Your comments

and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered March 19, 2020:

PROPOSED AMENDMENTS OF MCR 2.403, 2.404, AND 2.405.

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.403, 2.404 and 2.405 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

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

RULE 2.403. CASE EVALUATION.

(A) Scope and Applicability of Rule.

(1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property unless the parties stipulate to an ADR process as outlined in subsections (A)(2)-(3) of this rule. Parties who participate in a stipulated ADR process approved by the court may not subsequently be ordered to participate in case evaluation without their written consent.

(2) Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178. In a case in which a discovery plan has been filed with the court under MCR 2.401(C), an included stipulation to use an ADR process other than case evaluation must:

- (a) identify the ADR process to be used;
- (b) describe its timing in relation to other discovery provisions; and,
- (c) be completed no later than 60 days after the close of discovery.

(3) In a case in which no discovery plan has been filed with the court, a stipulated order to use an ADR process other than case evaluation must:

- (a) be submitted to the court within 120 days of the first responsive pleading;

(b) identify the ADR process to be used and its timing in relationship to the deadlines for completion of disclosure and discovery; and,

(c) be completed no later than 60 days after the close of discovery.

(3)-(4) [Renumbered (4)-(5) but otherwise unchanged.]

(B) Selection of Cases.

(1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order after the filing of the answer

(a)-(b) [Unchanged.]

(c) if the parties have not submitted an ADR plan under subsection (A) on the judge's own initiative.

(2) [Unchanged.]

(C)-(H) [Unchanged.]

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, at least ~~714~~ days before the hearing, each party shall

(a)-(b) [Unchanged.]

(2) Each failure to timely file and serve the materials identified in subrule (1) and each subsequent filing of supplemental materials within ~~714~~ days of the hearing, subjects the offending attorney or party to a \$150 penalty to be paid in the manner specified in the notice of the case evaluation hearing. Filing and serving the materials identified in subrule (1) within 24 hours of the hearing subjects the offending attorney or party to an additional \$150 penalty.~~An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.~~

(3) [Unchanged.]

(J) [Unchanged.]

(K) Decision.

(1) Within ~~714~~ days after the hearing, the panel will make an evaluation and submit the evaluation to the ADR clerk. If an evaluation is made immediately following the hearing, the panel will provide a copy to the attorney for each party of its evaluation in writing. If an evaluation is not made immediately following the hearing, the evaluation must be served by the ADR clerk on each party within 14 days after the hearing. If an award is not unanimous, the evaluation must so indicate.

(2)-(5) [Unchanged.]

(L)-(N) [Unchanged.]

~~(O) Rejecting Party's Liability for Costs:~~

~~(1) If a party has rejected an 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. 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 case 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 after rejection of the case evaluation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

(4) In cases involving multiple parties, the following rules apply:

(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.

(c) Except as provided by subrule (O)(10), in a personal injury action, for the purpose of subrule (O)(1), the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault as determined under MCL 600.6304(1)-(2).

(5) If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule (O)(3)) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and

(b) it is fair to award costs under all of the circumstances.

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR 2.626.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

~~(7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution processes, at the expense of the parties, pursuant to MCR 2.410(C)(1).~~

~~(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,~~
- ~~(ii) to set aside the judgment, or~~
- ~~(iii) for rehearing or reconsideration.~~

~~(9) In an action under MCL 436.1801, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801(5).~~

~~(10) For the purpose of subrule (O)(1), in an action filed on or after March 28, 1996, and based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a verdict awarding damages shall be adjusted for relative fault as provided by MCL 600.6304.~~

~~(11) If 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.~~

RULE 2.404. SELECTION OF CASE EVALUATION PANELS.

(A) [Unchanged.]

(B) Lists of Case Evaluators.

(1)-(3) [Unchanged.]

(4) Specialized Lists. If the number and qualifications of available case evaluators makes it practicable to do so, the ADR clerk shall maintain

(a) [Unchanged.]

(b) where appropriate for the type of cases, separate sublists of case evaluators who primarily represent plaintiffs, primarily represent defendants, and neutral case evaluators whose practices are not identifiable as representing primarily plaintiffs or defendants. Neutral evaluators may be selected on the basis of the applicant's representing both plaintiffs and defendants, or having served as a neutral alternative dispute resolution provider, for a period of up to 15 years prior to an application to serve as a case evaluator.

(5)-(8) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 2.405. OFFERS TO STIPULATE TO ENTRY OF JUDGMENT.

(A) Definitions. As used in this rule:

(1)-(3) [Unchanged.]

(4) “Verdict” includes,

(a)-(b) [Unchanged.]

(c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment, including a motion entering judgment on an arbitration award.

(5) [Unchanged.]

(6) “Actual costs” means the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party’s last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment.

(B)-(C) [Unchanged.]

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

(1)-(2) [Unchanged.]

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. Interest of justice exceptions may apply, but are not limited to:

(i) cases involving offers that are token or de minimis in the context of the case; or

(ii) cases involving an issue of first impression or an issue of public interest.

(4)-(6) [Unchanged.]

(E) This rule does not apply to class action cases filed under MCR 3.501 Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.

Staff Comment: The proposed amendments were in large part produced by a workgroup convened by the State Court Administrative Office to review and offer recommendations about case evaluation.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 amendment may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered April 8, 2020:

PROPOSED AMENDMENT OF RULE 16 AND PROPOSED ADOPTION OF RULE 20 OF RULES CONCERNING THE STATE BAR OF MICHIGAN.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 16 and a proposed addition of Rule 20 of the Rules Concerning the State Bar of Michigan. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

[Rule 20 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 16. UNAUTHORIZED PRACTICE OF LAW.

Sec. 1. The State Bar of Michigan is hereby authorized and empowered to investigate matters pertaining to the unauthorized practice of law and, with the authority of its Board of Commissioners, to file and prosecute actions and proceedings with regard to such matters.

Sec. 2. The State Bar of Michigan has the power to issue subpoenas to require the appearance of a witness or the production of documents or other tangible things concerning its investigation of an unauthorized practice of law complaint. Subpoenas may be prepared by the investigative staff of the State Bar of Michigan and served after approval by the Chairperson of the Standing Committee on Unauthorized Practice of Law. The subpoena may be served by certified mail, return receipt requested, and delivery restricted to the addressee or via hand delivery. The subpoena may also be served by e-mail, if person to be served agrees.

A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or produce documents or tangible things, after being ordered to do so is in contempt. The State Bar of Michigan may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

A subpoena issued pursuant to this rule shall be sufficient authorization for seeking the production of documents or other tangible things outside the state of Michigan. If the deponent or the person possessing the subpoenaed information will not comply voluntarily, the proponent of the subpoena may utilize MCR 2.305(C) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present.

Sec. 3. A person is absolutely immune from suit for statements and communications transmitted solely to State Bar staff and their agents, the Standing Committee on the Unauthorized Practice of Law or the State Bar of Michigan Board of Commissioners or given in the course of an investigation of an unauthorized practice of law complaint. State Bar staff and their agents, the Standing Committee on the Unauthorized Practice of Law, and the State Bar of Michigan Board of Commissioners are absolutely immune from suit for conduct arising out of the performance of their duties concerning unauthorized practice of law complaints.

Sec. 4. Notwithstanding the confidentiality provisions of SBR 19, the State Bar of Michigan may disclose information concerning an unauthorized practice of law complaint and information obtained during the investigation of an unauthorized practice of law complaint to persons and entities authorized and empowered to investigate and prosecute unauthorized practice of law complaints in other states.

RULE 20. CLIENT PROTECTION FUND.

Sec. 1. The State Bar of Michigan, through its Board of Commissioners, is authorized and empowered to administer and investigate Client Protection Fund claims and to supervise the Client Protection Fund, which shall include, but not be limited to, receiving, holding, managing, disbursing monies from, and recouping monies paid by the Client Protection Fund.

The Client Protection Fund is a program established to reimburse clients who have been victimized by lawyers who violate the profession's ethical standards and misappropriate funds entrusted to them.

Sec. 2. All members are bound by the Client Protection Fund Rules.

Sec. 3. The State Bar of Michigan has the power to issue subpoenas to require the appearance of a witness or the production of documents or other tangible things concerning its administration and investigation of Client Protection Fund claims. The subpoena may be served by certified mail, return receipt requested, and delivery restricted to the addressee or via hand delivery. The subpoena may also be served by e-mail or other electronic form, if person to be served agrees.

A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or produce documents or tangible things, after being ordered to do so is in contempt. The State Bar of Michigan may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

A subpoena issued pursuant to this rule shall be sufficient authorization for seeking the production of documents or other tangible things outside the state of Michigan. If the deponent or the person possessing the subpoenaed information will not comply voluntarily, the proponent of the subpoena may utilize MCR 2.305(C) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present.

Sec. 4. A person is absolutely immune from suit for statements and communications transmitted solely to State Bar staff and their agents, the Standing Committee on the Client Protection Fund or the State Bar

of Michigan Board of Commissioners or given in the course of an investigation of a Client Protection Fund claim. State Bar staff and their agents, the Standing Committee on the Client Protection Fund, and the State Bar of Michigan Board of Commissioners are absolutely immune from suit for conduct arising out of the performance of their duties and responsibilities regarding the Client Protection Fund.

Sec. 5. Notwithstanding the confidentiality provisions of SBR 19, the State Bar of Michigan may disclose information concerning Client Protection Fund claims and information obtained during the investigation of Client Protection Fund claims to persons and entities authorized and empowered to investigate and administer Client Protection Fund claims in other states.

Staff Comment: The proposed amendment of Rule 16 and proposed addition of Rule 20 of the Rules Concerning the State Bar of Michigan would clarify the process of investigation of unauthorized practice of law claims and outline procedures for the Client Protection Fund.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-36. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered April 8, 2020:

PROPOSED AMENDMENTS OF MCR 3.804, 5.140, AND 5.404 AND PROPOSED ADOPTION OF MCR 3.811.

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.804, 5.140, and 5.404 and a proposed addition of Rule 3.811 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

[Rule 3.811 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.804. CONSENT AND RELEASE.

(A) [Unchanged.]

(B) Hearing on Consent to Adopt.

(1)-(2) [Unchanged.]

(3) Use of Videoconferencing Technology. Videoconferencing technology may not be used Except for a consent hearing under this subrule involving an Indian child pursuant to MCL 712B.13, ~~the court may allow the use of videoconferencing technology under this subchapter in accordance with MCR 2.407.~~

(C)-(D) [Unchanged.]

RULE 3.811. USE OF VIDEOCONFERENCING TECHNOLOGY.

Except as otherwise provided, the court may allow the use of videoconferencing technology for proceedings under this subchapter in accordance with MCR 2.407.

RULE 5.140. USE OF VIDEOCONFERENCING TECHNOLOGY.

(A)-(C) [Unchanged.]

~~(D) The court may not use videoconferencing technology for a consent hearing required to be held pursuant to the Michigan Indian Family Preservation Act and MCR 5.404(B).~~

(E) [Relettered but otherwise unchanged.]

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) [Unchanged.]

(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. The court may ~~not use~~

videoconferencing technology for the guardianship consent hearing required to be held under MCL 712B.13(1)~~the Michigan Indian Family Preservation Act~~ and this subrule.

(2)-(3) [Unchanged.]

(C)-(H) [Unchanged.]

Staff comment: The proposed amendments of MCR 3.804, 5.140, and 5.404 and proposed new MCR 3.811 would allow greater use of videoconferencing equipment in cases involving Indian children.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-47. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered April 8, 2020:

PROPOSED AMENDMENT OF RULE 4 OF RULES FOR THE BOARD OF LAW EXAMINERS.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 4 of the Rules for the Board of Law Examiners. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

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

RULE 4. POST-EXAMINATION PROCEDURES.

(A)-(C) [Unchanged.]

(D) A passing bar examination score is valid for three years.

Staff comment: The proposed amendment of BLE Rule 4 would explicitly state that a passing bar exam score is valid for three years, which is consistent with the character and fitness clearance expiration.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-04. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigan-supremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered May 20, 2020:

PROPOSED ADOPTION OF MICHIGAN COURT RULES MCR 2.226.

On order of the Court, this is to advise that the Court is considering a proposed addition of Rule 2.226 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

RULE 2.226. CHANGE OF VENUE; TRANSFER OF JURISDICTION; ORDERS.

(A) The court ordering a change of venue or transfer of jurisdiction shall enter all necessary orders pertaining to the certification and transfer of the action to the court to which the action is transferred on a form approved by the State Court Administrative Office.

(B) If a change of venue or transfer of jurisdiction order is not prepared as required under subrule (A), and the order lacks the information necessary for the receiving court to determine under which rule the transfer was ordered, the receiving court may refuse to accept the transfer.

(C) If a receiving court refuses to accept a transfer because of lack of necessary information under subrule (B), the clerk of the court in the receiving court shall prepare a notice of refusal on a form approved by the State Court Administrative Office and promptly return the case to the transferring court for a proper order.

(D) If a transferring court receives a refusal to accept a transferred case under subrule (C), the transferring court shall prepare a proper order in accordance with subrule (A) and retransfer the case within three business days.

Staff comment: The proposed addition of MCR 2.226 would clarify the process for change of venue and transfer orders.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered May 20, 2020:

PROPOSED AMENDMENT 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 [<http://courts.mi.gov/courts/michigan-supremecourt/rules/pages/default.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 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)-(B) [Unchanged.]

(C) Summons.

(1) [Unchanged.]

(2) The summons must state whether or not the action is brought in the county or district in which the premises or any part of the premises is situated.

~~(3)~~ The summons must also include the following advice to the defendant:

(a)-(d) [Unchanged.]

(e) The defendant has a right to have the case tried in the proper county, district, or court. The case will be transferred to the proper county, district, or court if the defendant moves the court for such transfer.

(D)-(E) [Unchanged.]

(F) Appearance and Answer; Default.

(1)-(2) [Unchanged.]

(3) Right to Proper Venue. If the plaintiff has indicated on the summons that the premises or any part of the premises is situated in a different county or district, the court must inform the defendant, at the hearing scheduled pursuant to section (C)(1) of this rule, of the right to motion the court to transfer the case to the county or district where the premises or any part of the premises is situated and that such a motion will be granted.

(a) The court may order change of venue on its own motion.

(b) A motion to change venue pursuant to this subrule and MCL 600.5706(4) may be made in writing before the date listed on the summons, pursuant to section (C)(1) of this rule, or orally in response to the court's advisement in this subrule.

(c) Transfer of the case shall be pursuant to MCR 2.223.

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

(G)-(O) [Unchanged.]

Staff comment: The proposed amendment of MCR 4.201 would require disclosure of the right to object to venue in actions brought under the Summary Proceedings Act for landlord/tenant proceedings in district court, consistent with MCL 600.5706.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-41. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigan-supremecourt/rules/court-rules-admin-matters/pages/default.aspx>].

Order Entered June 10, 2020:

PROPOSED AMENDMENTS OF MCR 2.108.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.108 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [<http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.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 the proposal in its present form.

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

RULE 2.108. TIME.

(A)-(B) [Unchanged.]

(C) Effect of Particular Motions and Amendments. When a motion or an amended pleading is filed, the time for pleading set in subrule (A) is altered as follows, unless a different time is set by the court:

(1) If a motion under MCR 2.115(A) or MCR 2.116 made before filing a responsive pleading is denied, the moving party must serve and file a responsive pleading within 21 days after notice of the denial. However, if the moving party, within 21 days, files an application for leave to appeal from the order, the time is extended until 21 days after the denial of the application unless the appellate court orders otherwise.

(2)-(4) [Unchanged.]

(D)-(F) [Unchanged.]

Staff comment: The proposed amendment of MCR 2.108 would provide a timeframe for a responsive pleading when a motion for more definite statement is denied.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-11. Your comments and the comments of others will be posted under the chapter affected by this proposal at [<http://courts.mi.gov/courts/michigan-supremecourt/rules/court-rules-admin-matters/pages/default.aspx>].
