



## Michigan Supreme Court

State Court Administrative Office

**Court Services Division**

Michigan Hall of Justice

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Lansing, Michigan 48909

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Jennifer Warner  
Director

February 18, 2020

TO: Michigan Court Forms Committee, Criminal Workgroup

FROM: Rebecca A. Schnelz, Forms and Resources Analyst

RE: Agenda and Materials for **March 5, 2020 Meeting**

PLACE: **Michigan Hall of Justice**, 925 West Ottawa, downtown Lansing

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Below is the agenda for the March 5, 2020, meeting of the Michigan Court Forms Committee, Criminal Workgroup. The meeting will be held in room 1S-69 and will begin at 9:30 a.m. Lunch reservations have been made for you. **If you cannot attend, please contact me at least two days before the meeting.** Please note that our office is located at 925 W. Ottawa Street, Lansing, MI 48915.

Please bring these agenda materials to the meeting. Although documentation is provided with the agenda, it would also be helpful to bring a copy of the Michigan Court Rules and any other resources you believe are necessary.

### 1. Minor Change

#### **CC 261, Waiver of Arraignment and Election to Stand Mute or Enter Not Guilty Plea**

The form will be modified to add a line beneath the attorney signature for the attorney's name to be typed or printed.

Draft provided.

#### **DC 225, Complaint, Misdemeanor**

#### **MC 200, Felony Set**

Race and sex will be added to the information collected on the form as required by LEIN.

### **CC 291, Advice of Rights (Circuit Court Plea)**

This form will be modified to be an MC form to accommodate use in both circuit and district courts.

### **MC 222, Request for Court-appointed Attorney and Order**

A suggestion was received to add a line after the word “charge” in box #1 to more clearly indicate that the actual charge should be written in. A fill-in line will be added to box #1.

Draft provided.

### **MC 229, Motion, Affidavit, and Bench Warrant**

Modifications will be made to the form to correct errors that occurred during previous revisions to the form. Specifically, the title of the motion section will be revised to “Motion and Affidavit.” Under the “Bench Warrant” header, the following language will be reinserted, “Respondent failed to comply with an order of this court. TO ANY PEACE OFFICER OR COURT OFFICER AUTHORIZED TO MAKE ARREST, I order you to arrest:”. Under the “Return” section, the caption under the signature line will be revised to, “Peace Officer.”

Draft provided.

### **MC 235, Motion for Destruction of Biometric Data and Arrest Record**

The citation to MCL 28.243 in the use note will be corrected to reflect the proper subsection of the statute, which was modified by 2018 PA 67. The citation will be corrected to read MCL 28.243(14)(h).

Draft provided.

## **2. DC 226, Warrant, Misdemeanor**

A judge has suggested that this form should be modified to include space for the individual requesting the warrant to swear to specific factual allegations. The judge suggests that the current design of the form includes a statement that the judge/magistrate finds probable cause, but relies only on the attached citation, which frequently only states the charge and provides no facts upon which probable cause may be found. The judge questions whether this meets the court rule requirement of MCR 6.102(B):

Probable Cause Determination. A finding of probable cause may be based on hearsay evidence and rely on factual allegations in the complaint, affidavits from the complainant or others, the testimony of a sworn witness adequately preserved to permit review, or any combination of these sources.

MCL 764.9d provides:

- (1) Except as otherwise provided by sections 9f and 9g, a police officer or other public servant who has issued and served an appearance ticket, at or before the time the appearance ticket is returnable, shall file or cause to be filed in the local criminal court in which it is returnable a complaint charging the person named in the appearance ticket with the offense specified therein.
- (2) If the complaint is not sufficient on its face, and if the court is satisfied that a complaint sufficient on its face cannot be drawn and filed on the basis of the available facts or evidence, it shall dismiss the complaint.

Should a space for factual allegations be added to the form, or is it sufficient for a judge to use judicial discretion and deny the request for warrant when there is insufficient information included in the attached citation?

### **3. MC 203, Writ of Habeas Corpus**

A suggestion was received to modify item 3 to add a reference to a referee. The item currently directs that the person be brought “before the Honorable \_\_\_\_\_.” The suggestion is to modify the language to indicate that the hearing is before a judge or referee to reflect the fact that individuals are also brought before referees.

Should item 3 be modified to include a referee?

### **4. MC 240, Pretrial Release Order**

- A. A suggestion was made to add options under the section regarding third party bond posters that would allow the poster to direct that the bond be returned to the poster or applied to the defendant’s fines/costs/assessment instead.

Should the options be added to the form?

- B. A suggestion was made to add a checkbox to item 4t of the form to indicate whether the address listed is the victim’s address.

MCL 780.758(2) provides:

The work address and address of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim shall not be in the court file or ordinary court documents except as contained in a transcript of the trial.

Item 4t of the form provides for ordering the defendant not to enter specified premises or areas. It is suggested that a conflict arises when the specified address is the victim's, which is not to be included in the court file per statute, but the defendant is entitled to receive specific notice of any restrictions so he or she can avoid a violation. The purpose of the checkbox would be to give notice to the court clerk entering the document to remove the victim's address from the publicly accessible file.

An alternative suggestion was made that no address should appear in item 4t and the defendant should be given a specific geographical area that is forbidden. This would keep the victim's specific address off any documents, but would not provide specificity to the defendant.

Alternatively, it was suggested that this is an issue that should be resolved legislatively because MCL 780.758 pertains to a victim, whereas MC 240 has more to do with a protective order where the defendant already knows where the protected person lives and is specifically being told not to go there.

Should the form be modified to add a checkbox to item 4t to indicate when it is a victim's address?

## **5. MC 245, Motion and Order for Discharge from Probation**

A suggestion was received to add MSP CJIC as a distribution recipient to the form.

The distribution list for MC 294, Order Delaying Sentence, includes the Michigan State Police CJIC as a recipient. CJIC is included because orders that include protective conditions must be placed on LEIN. MCL 771.3(4). Where there is local capability, these orders are entered on LEIN locally.

The suggestor states that when an order for discharge from probation that includes protective conditions is entered, the order is frequently not being sent to LEIN for removal because there is no reminder in the distribution list to distribute a copy for that purpose.

Should the form distribution be modified to include MSP CJIC?

## **6. MC 263, Motion/Order for Nolle Prosequi**

A suggestion was received to modify the instruction to the clerk at the bottom of the form to include that a copy should be provided to the MSP if item 7 is checked. Item 7 directs that the MSP and the arresting agency shall destroy specific records and that MSP shall remove any LEIN entries.

During the comment period, an additional request was received to address a perceived procedural issue with the form. The requestor stated:

...the form fails to take into account the explicit provisions of MCL 28.243(8)(b) which provides the prosecutor 60 days from the date of the order of dismissal to object to the destruction:

“If the prosecutor of the case agrees at any time after the case is dismissed, or if the prosecutor of the case or the judge of the court in which the case was filed does not object within 60 days from the date an order of dismissal was entered for cases in which the order of dismissal is entered after the effective date of the amendatory act that added this subdivision, both of the following apply:

- (i) The arrest record, all biometric data, and fingerprints shall be expunged or destroyed, or both, as appropriate.
- (ii) Any entry concerning the charge shall be removed from the LEIN.”

The form order requires immediate action and circumvents and effectively nullifies the statutory provision giving the prosecutor 60 days to object. The form should be modified to properly reflect the statutory requirements.

Should the form be modified to include instructions to provide the form to MSP? Should any modifications be made to incorporate an objection time period?

Draft provided.

## **7. MC 294, Order Delaying Sentence**

A suggestion was made to include four additional condition options to the order. The suggestor states that these are “standard” conditions that get ordered under the “other” item and it would be more efficient to have the options on the form for the court to select. The conditions are:

1. Not violate any criminal law of any unit of government.
2. Not leave the state without the consent of this court.

3. Make a truthful report to the probation officer monthly, or as often as the probation officer may require, either in person or in writing, as required by the probation officer.
4. Notify the probation officer immediately of any change of address or employment status.

Should these four items be added to the form as options?

#### **8. MC 308, Summons Regarding Bond Violation**

A suggestion was received to modify this form to include an option for a court to summon a defendant for a bond modification without needing a bond violation. MCR 6.106(H)(2) provides for a court to modify a prior release decision on its own initiative, which doesn't require that a bond violation has occurred.

Should this option be added to the form? If yes, how should the revised form be titled?

#### **9. MC 399 – Motion to Set Aside Forfeiture and Discharge of Bond and Notice of Hearing**

At its 2019 meeting, the committee modified item 1 of this form to clarify that the judgment in question may or may not have been paid within 56 days of the forfeiture judgment. This was in response to a suggestion that there are many times when the court enters a judgment against a surety bondsman, and then the surety brings the defendant into court before ever paying the judgment.

Members agreed that the form should accommodate the suggestion because it is inefficient to have a surety pay the judgment and then have the same amount of money returned. The committee split item 1 into two checkboxes. Item 1 now reads, "The above bond was forfeited and a judgment of \$\_\_\_\_\_  was paid to the court on \_\_\_(Date)\_\_\_, within 56 days of the entry of the forfeiture judgment.  has not been paid and 56 days has not passed since entry of the forfeiture judgment."

During typesetting, additional concerns regarding the form were raised and the form was held for further discussion by the committee. Specifically, it was determined that the form was also missing certain legal findings/requirements before a set aside can occur (i.e. apprehension within 1 year and, if a surety bond, that the bond was paid within 56 days if defendant was apprehended more than 56 days but less than 1 year after the forfeiture).

The following additional modifications to the form are recommended:

- 1) Modify item 2 to indicate that the defendant was apprehended within one year.
- 2) Add an additional item or sub-item that applies to sureties and details whether the defendant was apprehended with 56 days of the forfeiture judgment or whether the defendant was apprehended more than 56 days, but less than one year, after the entry of

the forfeiture judgment and the judgment was paid to the court in full within 56 days of entry.

- 3) Add an additional item that indicates whether the county has been repaid its cost for apprehending the person. If it has not, provide the option for a request that the court take a portion of the forfeited judgment to pay the county the balance.

Should the additional options be added to the form?

Draft with 2019 changes provided.

#### **10. MC 399a, Order on Motion to Set Aside Forfeiture and Discharge of Bond**

A comment was received that MC 399a should be modified to include statutory references to MCL 765.28 (surety bond) and MCL 765.15 (non-surety bond) in both items 2 and 5 of the form. Item 2 is a finding whether the requirements of MCL 765.28 have or have not been met. Item 5 includes an order to assess costs and deduct them from the judgment pursuant to MCL 765.15. The commenter noted that the court may order either type of bond, so item 2 should reference both. In addition, under item 5, assessment of costs is allowed by statute for both types of bonds, so both relevant statutes should be listed.

Should items 2 and 5 of the form be modified to include references to both MCL 765.28 and MCL 765.15?

#### **11. New Form, Commitment Form**

A request was received for development of a new form to act as a standardized commitment form for processing individuals into a facility following a court appearance. The requestor noted that they have received over 30 different form variations from courts for this purpose which frequently do not provide clear direction to the sheriff/facility as to how to process the defendant. According to the requestor, this leads to confusion and errors. The requestor seeks a simple one page form for communication between the court and the facility.

Alternatively, the current practice of some courts is to reissue an MC 240, Pretrial Release Order, after each hearing. However, unless conditions are modified at the hearing, reissuing this order is not appropriate and can be burdensome on the courts and sheriff/facility.

Should a form be developed to convey commitment information between a court and the sheriff/facility following a hearing? If so, what information should be included on the form?

## **12. New Form: Felony Advice of Rights, District Court Arraignment**

A request was received for development of a felony advice of rights form for use at district court arraignments. The requestor noted that, in district court felony arraignments, a notice is needed to read to the defendant, or for the defendant to read and sign, because there are additional rights beyond those in a misdemeanor, i.e., the probable cause conference and preliminary examination. MCL 766.4. The suggestor noted that many magistrates are creating their own scripts to address the issue.

There is a question as to whether a writing may be used for the requested purpose. The court rule defining procedure for felony arraignments is MCR 6.104(E). MCR 6.104(E) does not explicitly state that a writing can be used. Compare this to the corollary misdemeanor rule, MCR 6.610(D), which specifically allows a writing to be used.

Historically, the court rule has been interpreted to mean that a writing cannot be used for MCR 6.104(E), because a writing is not specifically authorized. However, in 2018, the committee created MC 446, Probation Violation Arraignment Advice of Rights, despite the applicable court rule being silent on the use of a writing.

At the time MC 446 was created, there was concern raised about the risk that courts will replace the oral advice of rights with the writing and stop advising defendants on the record. Members of the committee did not think courts would skip the oral advice on the record.

However, the rule does not authorize a writing in this instance. The creation of a form was previously rejected by the forms committee in 2000.

Should a felony advice of rights for arraignments in district court be created?

## **13. New Form: Misdemeanor Advice of Rights and Request for Appellate Counsel**

A request was received from two district court judges to develop a misdemeanor advice of rights and request for counsel form. The judges noted that while there is a form available for circuit court, the same was not true in district court.

In addition, given the infrequency of appeals from district court and varying court practices, there had not been a common tool developed for use. The judges also noted the need to have a clear, standard method for defendants to request appellate counsel rather than continue with the variety of unclear communications that the courts currently receive from defendants. The suggestion is that having a form would standardize the court's obligations on when and what the judge should advise the defendant, and provide a mechanism for the defendant to clearly state a request for appellate counsel.

A sample form was submitted with the suggestion for development of a new SCAO form. In reviewing the sample, the question arose as to whether the form should contain the necessary

financial information from the defendant, similar to CC 265 and CC 403, rather than require the submission of a separate form.

Should a new form be created?

The sample form is provided for review.

**14. NEW FORM: MC 243, Order of Probation**  
**DC 243, Order of Probation (Misdemeanor)**  
**CC 243a, Order of Probation**

- A. At its 2019 meeting, the committee considered a suggestion to delete forms CC 243a and DC 243 and then create a new order of probation to be used in both circuit and district courts. The issue being addressed was that, under MCR 6.008(D), circuit courts are required to sentence all defendants bound over to circuit court on a felony but who eventually plead guilty to, or are found guilty of, a misdemeanor. Prior to the existence of this rule, circuit courts remanded misdemeanors back to district court and forms CC 243a and DC 243, Orders of Probation were almost exclusively used in the specific court they were designed for. With the addition of MCR 6.008(D), circuit courts need the deferral options and other clauses in form DC 243 when sentencing a misdemeanor case.

After discussion, the committee agreed to retain both forms, but modify DC 243 for use in circuit court. Members stated that the separate forms contain different clauses for payment as well as deferral options. Members also commented that, depending on the court, MDOC may or may not supervise misdemeanors sentenced in circuit court.

The committee added circuit court to the header and changed the form index from DC to MC. In addition, the committee created a new item 7 that will allow courts to direct payment of the supervision fee to the Department of Corrections or District Court probation staff.

During typesetting, a second page had to be added to the form to incorporate the changes. Concern was raised that the multi-page format might create some issues to be resolved and the form was not published. Since that time, the form has undergone further development as part of the format revisions to all SCAO-approved forms, as has CC 243a. As a result, the two forms were merged together to create a new MC 243 that encompasses both district and circuit needs.

A draft of the revised form in the new standard formatting is provided.

Should the form be approved as presented?

- B. A suggestion was received to add an additional item to the order portion of the form that would read, “No use or possession of alcohol or controlled substances, submit to PBT/Urine test upon request.” The suggestor states that adding this to the form as an option would save time because it is almost always ordered at sentencing.

Should this option be added to the order?

**15. New Form: Defendant’s Statement of Understanding, Rejection of Offer of Negotiated Guilty Plea**

A suggestion was received to create a form for use in situations where the defendant is rejecting the offer of a negotiated guilty plea. It was suggested that the availability of a form would help to avoid issues pursuant to *Lafler v Cooper*, 132 S Ct 1376 (2012), and *Missouri v Frye*, 132 S Ct 1399 (2012). The suggestor provided a copy of form currently used by a federal judge as an example.

Should a form be developed?

Sample provided.

## **Item 1**

**STATE OF MICHIGAN  
JUDICIAL CIRCUIT  
COUNTY**

**WAIVER OF ARRAIGNMENT AND  
ELECTION TO STAND MUTE OR  
ENTER NOT GUILTY PLEA**

**CASE NO.**



ORI MI- Court address Court telephone no.

THE PEOPLE OF THE STATE OF MICHIGAN

v

Defendant's name, address, and telephone no.		
CTN/TCN	SID	DOB

The defendant and the attorney for the defendant acknowledge that

1. we have received a copy of the information and/or supplemental information filed in this case.
2. the defendant has read the information(s), or had it read or explained to him/her.
3. we each understand the substance of the charge(s).
4. the defendant waives arraignment in open court.
5. the defendant  pleads not guilty to the charge(s).  stands mute to the charge(s) and requests the court to enter a plea of not guilty.

Defendant's attorney signature Bar no.

Defendant's signature

Address

Address

City, state, zip Telephone no.

City, state, zip Telephone no.

Name of person with whom defendant resides, and relationship

Defendant's employer

Attorney name (type or print)

**ENTRY OF PLEA**

A plea of not guilty is entered on behalf of the defendant. Bond/Bail is continued.

Date

Judge Bar no.



<b>STATE OF MICHIGAN JUDICIAL DISTRICT</b>	<b>WARRANT MISDEMEANOR</b>	<b>CASE NO.</b>
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<b>ORI MI-</b>	<b>Court address</b>	<b>Court telephone no.</b>
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<b>THE PEOPLE OF</b> <input type="checkbox"/> The State of Michigan  <input type="checkbox"/> _____ <b>v</b>	Defendant's name and address
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Victim or complainant
Complaining witness

Codefendant(s) (if known)	Date: On or about
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City/Twp./Village	County in Michigan	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB
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Police agency report no.	Charge	Maximum penalty
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<input type="checkbox"/> A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.	<input type="checkbox"/> Oper/Chauf. <input type="checkbox"/> CDL	Vehicle Type	Defendant DLN
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Witnesses

**STATE OF MICHIGAN, COUNTY OF \_\_\_\_\_ .**

To any peace officer or court officer authorized to make an arrest: The complaining witness has filed a sworn complaint in this court stating that on the date and the location described, the defendant, contrary to law,

Upon examination of the complaint, I find probable cause to believe defendant committed the offense set forth. **THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN,**

a. I order you to arrest and bring defendant before the \_\_\_\_\_ District Court immediately.

b. I order you to bring defendant before the \_\_\_\_\_ District Court.

c. The defendant may be released when interim cash bail is posted in the amount of \$ \_\_\_\_\_ for personal appearance before the court.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge/Magistrate

\_\_\_\_\_  
Bar no.

By virtue of this warrant, the defendant has been taken into custody as ordered.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Peace officer

Approved, SCAO

Information - Circuit court  
Original complaint - Court  
Warrant - Court

Bindover/Transfer - Circuit/Juvenile court  
Complaint copy - Prosecutor  
Complaint copy - Defendant/Attorney

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>INFORMATION FELONY</b>	<b>CASE NO.  DISTRICT CIRCUIT</b>
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District Court ORI: MI-

Circuit Court ORI: MI-

Defendant's name and address THE PEOPLE OF THE STATE OF MICHIGAN v				Victim or complainant	
Codefendant(s) (if known)				Complaining witness	
Date: On or about					
City/Twp./Village	County in Michigan	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB
Police agency report no.	Charge			Maximum penalty	
<input type="checkbox"/> A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.		<input type="checkbox"/> Oper./Chauf. <input type="checkbox"/> CDL	Vehicle Type	Defendant DLN	

Witnesses

**STATE OF MICHIGAN, COUNTY OF \_\_\_\_\_**  
**IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN:** The prosecuting attorney for this county appears before the court and informs the court that on the date and at the location described, the defendant:

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

By: \_\_\_\_\_

\_\_\_\_\_  
Date

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>COMPLAINT FELONY</b>	<b>CASE NO.  DISTRICT CIRCUIT</b>
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District Court ORI: MI-

Circuit Court ORI: MI-

Defendant's name and address  THE PEOPLE OF THE STATE OF MICHIGAN    v				Victim or complainant	
Codefendant(s) (if known)				Complaining witness	
City/Twp./Village	County in Michigan	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB
Police agency report no.	Charge			Maximum penalty	
<input type="checkbox"/> A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.		<input type="checkbox"/> Oper./Chauf. <input type="checkbox"/> CDL	Vehicle Type	Defendant DLN	

Witnesses

**STATE OF MICHIGAN, COUNTY OF \_\_\_\_\_ .**

The complaining witness says that on the date and at the location described, the defendant, contrary to law,

The complaining witness asks that defendant be apprehended and dealt with according to law.

Warrant authorized on \_\_\_\_\_ by:  
Date

---

Prosecuting official

Security for costs posted

I declare under the penalties of perjury that this complaint has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

\_\_\_\_\_  
Complaining witness signature

\_\_\_\_\_  
Date

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>WARRANT FELONY</b>	<b>CASE NO.  DISTRICT CIRCUIT</b>
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District Court ORI: MI-

Circuit Court ORI: MI-

Defendant's name and address  THE PEOPLE OF THE STATE OF MICHIGAN v				Victim or complainant	
Codefendant(s) (if known)				Complaining witness	
Date: On or about				Date: On or about	
City/Twp./Village	County in Michigan	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB
Police agency report no.	Charge			Maximum penalty	
<input type="checkbox"/> A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.		<input type="checkbox"/> Oper./Chauf. <input type="checkbox"/> CDL	Vehicle Type	Defendant DLN	

Witnesses

**STATE OF MICHIGAN, COUNTY OF \_\_\_\_\_.**

**To any peace officer or court officer authorized to make arrest:** The complaining witness has filed a sworn complaint in this court stating that on the date and the location described, the defendant, contrary to law,

Upon examination of the complaining witness, I find that the offense charged was committed and that there is probable cause to believe that defendant committed the offense. THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN,

a. I order you to arrest and bring defendant before the \_\_\_\_\_ District Court immediately.

b. I order you to bring defendant before the \_\_\_\_\_ District Court.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge/Magistrate

\_\_\_\_\_  
Bar no.

**See return on next page.**

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>BINDOVER/TRANSFER AFTER PRELIMINARY EXAMINATION FELONY</b>	<b>CASE NO.  DISTRICT CIRCUIT</b>
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District Court ORI: MI-

Circuit Court ORI: MI-

Defendant's name and address  THE PEOPLE OF THE STATE OF MICHIGAN    v				Victim or complainant	
Codefendant(s) (if known)				Complaining witness	
Date: On or about				Date: On or about	
City/Twp./Village	County in Michigan	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB
Police agency report no.	Charge			Maximum penalty	
<input type="checkbox"/> A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.		<input type="checkbox"/> Oper./Chauf. <input type="checkbox"/> CDL	Vehicle Type	Defendant DLN	

Date: \_\_\_\_\_

District judge: \_\_\_\_\_ Bar no. \_\_\_\_\_

Reporter/Recorder	Cert.no.
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Represented by counsel	Bar no.
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**EXAMINATION WAIVER**

1. I, the defendant, understand:
  - a. I have a right to employ an attorney.
  - b. I may request a court-appointed attorney if I am financially unable to employ one.
  - c. I have a right to a preliminary examination where it must be shown that a crime was committed and probable cause exists to charge me with the crime.
2. I voluntarily waive my right to a preliminary examination and understand that I will be bound over to circuit court on the charges in the complaint and warrant (or as amended).

Defendant attorney \_\_\_\_\_ Bar no. \_\_\_\_\_ Defendant \_\_\_\_\_

I consent to this waiver: \_\_\_\_\_ Prosecuting attorney \_\_\_\_\_ Bar no. \_\_\_\_\_

**ADULT BINDOVER**

3. Examination was waived on \_\_\_\_\_ .  
Date \_\_\_\_\_
4. Examination was held on \_\_\_\_\_ and it was found that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed the offense.
5. The defendant is bound over to circuit court to appear on \_\_\_\_\_ at \_\_\_\_\_ .  
Date \_\_\_\_\_ Time \_\_\_\_\_  
 on the charge(s) in the complaint.  
 on the amended charge(s) of \_\_\_\_\_

\_\_\_\_\_ MCL/PACC Code \_\_\_\_\_

6. Bond is set in the amount of \$ \_\_\_\_\_ . Type of bond: \_\_\_\_\_  Posted

\_\_\_\_\_ Date \_\_\_\_\_ Judge \_\_\_\_\_ Bar no. \_\_\_\_\_

**Certification of transmittal and bindover/transfer for juvenile are printed on the next page.**

**JUVENILE BINDOVER/TRANSER**

- 3. Examination was waived on \_\_\_\_\_ .  
Date
- 4. Examination was held on \_\_\_\_\_ and it was found that  
Date
  - there is probable cause that a life offense occurred and there is probable cause that the juvenile committed the life offense.
  - there is no probable cause that a life offense occurred or there is no probable cause that the juvenile committed the life offense, but some other offense occurred that if committed by an adult would constitute a crime, and there is probable cause to believe the juvenile committed that offense.
- 5. The juvenile is bound over to circuit court criminal division to appear on \_\_\_\_\_ at \_\_\_\_\_ .  
Date Time
  - on the charge(s) in the complaint.
  - on the amended charge(s) of \_\_\_\_\_
  - \_\_\_\_\_ MCL/PACC Code \_\_\_\_\_ .
- 6. This case is transferred to the family division of the circuit court for further proceedings
  - immediately.
  - on \_\_\_\_\_ at \_\_\_\_\_ .  
Date Time
- 7. Bond is set in the amount of \$ \_\_\_\_\_. Type of bond: \_\_\_\_\_  Posted

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge Bar no.

MCL 766.14(2), MCR 6.911

**CERTIFICATION**

I certify that on this date I have transmitted to the \_\_\_\_\_ circuit court criminal division the prosecutor's authorization for a warrant application, the complaint, a copy of the register of actions, and any recognizances received.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Court clerk

**Note:** Send a copy of this bindover to the Michigan State Police Criminal Justice Information Center.

<b>STATE OF MICHIGAN JUDICIAL CIRCUIT COUNTY</b>	<b>ADVICE OF RIGHTS (CIRCUIT COURT PLEA)</b>	<b>CASE NO.</b>
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Court address

Court telephone no.

You have offered to plead guilty or nolo contendere in this matter. Before accepting your plea, the court must be convinced that you understand the following.

1. If your plea is accepted, you will not have a trial of any kind and you will be giving up the rights you would have at a trial, including the right:
  - (a) to be tried by a jury;
  - (b) to be presumed innocent until proved guilty;
  - (c) to have the prosecutor prove beyond a reasonable doubt that you are guilty;
  - (d) to have the witnesses against you appear at the trial;
  - (e) to question the witnesses against you;
  - (f) to have the court order any witnesses you have for the defense to appear at the trial;
  - (g) to remain silent during the trial;
  - (h) to not have that silence used against you; and
  - (i) to testify at the trial if you want to testify.
  
2. If your plea is accepted, you may be giving up the right to appeal issues that would otherwise be appealable if you were convicted at a trial. Further, any appeal from your conviction and sentence pursuant to this plea will be by application for leave to appeal and not by right.
  
3. Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown. If you are not able to pay due to financial hardship, contact the court immediately to request a payment alternative. MCR 6.425(E)(3).

You will be required to state, orally on the record, that you have read and understand all the above, and that you agree to waive all the above rights.

\_\_\_\_\_ Date

\_\_\_\_\_ Defendant signature

\_\_\_\_\_ Defendant name (print)

\_\_\_\_\_ Address

\_\_\_\_\_ City, state, zip Telephone no.

**USE NOTE:** If defendant is given a foreign-language version of this form to read, the English version and the foreign-language version must be filed in the case.

<b>STATE OF MICHIGAN                  JUDICIAL DISTRICT                  JUDICIAL CIRCUIT</b>	<b>REQUEST FOR                  COURT-APPOINTED ATTORNEY                  AND ORDER</b>	<b>CASE NO.</b> <div style="border: 2px solid blue; padding: 5px; display: inline-block; margin-top: 5px;"> <b>DRAFT</b> </div>
---	---	--

ORI \_\_\_\_\_ Court address \_\_\_\_\_ Court telephone no. \_\_\_\_\_  
 MI- \_\_\_\_\_

THE PEOPLE OF  The State of Michigan  
 \_\_\_\_\_  
 \_\_\_\_\_

v

Defendant's name, address, and telephone no.  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

CTN	SID	DOB
-----	-----	-----

**REQUEST**

The defendant requests a court-appointed attorney and submits the following information.

<p><b>1. CHARGE</b> _____ <input type="checkbox"/> Misdemeanor                  _____ <input type="checkbox"/> Felony                  Next hearing: _____ <input type="checkbox"/> Paternity                  Date _____                  Bail amount: \$ _____ <input type="checkbox"/> Bond posted</p>	<p><b>2. RESIDENCE</b> <input type="checkbox"/> Live with parents  <input type="checkbox"/> Rent <input type="checkbox"/> Own <input type="checkbox"/> Room/Board</p> <p><b>3. MARITAL STATUS</b>  <input type="checkbox"/> Single <input type="checkbox"/> Divorced <input type="checkbox"/> Dependents: _____  <input type="checkbox"/> Married <input type="checkbox"/> Separated <span style="float: right;">Number</span></p>
<p><b>4. INCOME</b> Employer name and address _____                  _____                  Other Income State monthly amount and source (DHHS, VA, rent, pensions, spouse, unemployment, etc.).                  _____</p>	<p>Length of employment _____                  Average take-home pay \$ _____  <input type="checkbox"/> weekly <input type="checkbox"/> monthly <input type="checkbox"/> every two weeks</p>
<p><b>5. ASSETS*</b> State value of car, home, bank deposits, inmate accounts, bonds, stocks, etc.                  _____</p>	
<p><b>6. OBLIGATIONS*</b> Itemize monthly rent, installment payments, mortgage payments, child support, etc.                  _____</p>	
<p><b>7. CONTRIBUTION TOWARD ATTORNEY COSTS</b>                  I understand that I may be required to contribute to the cost of an attorney.                  Date: _____ Signature: _____</p>	

\*Use other side for additional information/comments.

**ORDER**

8. \_\_\_\_\_ is appointed to represent the defendant.  
 Name \_\_\_\_\_ Bar no. \_\_\_\_\_
9. The petition is denied because:

\_\_\_\_\_  
 Date Judge Bar no.





**STATE OF MICHIGAN**  
JUDICIAL DISTRICT  
JUDICIAL CIRCUIT  
COUNTY

**MOTION FOR DESTRUCTION OF  
BIOMETRIC DATA AND ARREST RECORD**

**CASE NO.**



ORI \_\_\_\_\_ Court address \_\_\_\_\_ Court telephone no. \_\_\_\_\_

MI-  
Police Report No.

<input type="checkbox"/> The State of Michigan  THE PEOPLE OF <input type="checkbox"/> _____  _____	<b>v</b>	Defendant/Juvenile name, address, and telephone no.		
		CTN/TCN	SID	DOB
<input type="checkbox"/> Juvenile In the matter of _____				

Count	CRIME	CHARGE CODE(S) MCL citation/PACC Code

USE NOTE: This form is for use when the arresting agency or the Michigan State Police has failed to destroy the biometric data and arrest record as required by law or when the Michigan State Police has not destroyed the biometric data and arrest record because the defendant has had a prior conviction as stated in MCL 28.243(12)(h). This form is not for use in conjunction with setting aside an adjudication pursuant to MCL 712A.18e or setting aside a conviction pursuant to MCL 780.621.

1. I, (14)(h) **MOTION**, state that on \_\_\_\_\_, \_\_\_\_\_  
Name (type or print) Date

- I was found not guilty of all offense(s) charged in this case, and the arresting agency and/or Michigan State Police has not destroyed the biometric data and arrest record as required by law.
- I was found not to be within the provisions of MCL 712A.2.
- The charges in this case were dismissed by nolle prosequi before trial, and the arresting agency and/or Michigan State Police has not destroyed the biometric data and arrest record as required by law.

2. This motion does not pertain to any sentence imposed under MCL 333.7411, MCL 600.1076(4), MCL 762.11-MCL 762.15, MCL 769.4a, MCL 750.350a, MCL 750.430, or to one of the crimes listed in MCL 28.243(14).

3. **I REQUEST** that my biometric data and arrest record be destroyed by the arresting agency and/or Michigan State Police.

\_\_\_\_\_  
Date Signature

**NOTICE OF HEARING**

A hearing will be held on this motion on \_\_\_\_\_ at \_\_\_\_\_  
Date Time  
at \_\_\_\_\_ before Hon. \_\_\_\_\_  
Location Bar no.

**CERTIFICATE OF MAILING**

I certify that on this date I served a copy of this motion and notice of hearing on the parties or their attorneys by first-class mail addressed to their last-known addresses as defined by MCR 2.107(C)(3).

\_\_\_\_\_  
Date Signature

## **Item 2**



## **Item 3**

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>WRIT OF HABEAS CORPUS</b>	<b>CASE NO.</b>
---	------------------------------	-----------------

Court address \_\_\_\_\_ Court telephone no. \_\_\_\_\_

**IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN:**

TO: \_\_\_\_\_, the agency or person having custody of

Name \_\_\_\_\_ I.D. no. \_\_\_\_\_ Date of birth \_\_\_\_\_

To bring prisoner to court in the case of:  
People of  
**v**

To inquire into detention/custody of:

**IT IS ORDERED:**

1. Answer this writ, stating the authority under which you  restrain the prisoner.  exercise custody over the minor child. File your answer with the  court  judge by \_\_\_\_\_  
Date

2. Deliver the person named in this writ into the custody of \_\_\_\_\_  
Name/Title/Agency  
for:  the prosecution of \_\_\_\_\_,  felony.  misdemeanor.  
Charge and MCL citation or PACC code  
 \_\_\_\_\_  
Specify purpose (witness testimony, etc.).

Immediately after the prisoner completes his/her appearance, the prisoner shall be returned to your custody.

3. Bring the person named in this writ before the Honorable \_\_\_\_\_  
Name Bar no.  
at \_\_\_\_\_, on \_\_\_\_\_ at \_\_\_\_\_  
Location of court Date Time  
Bring this writ with you.

4. Produce the prisoner via compatible two-way interactive video technology for the purpose indicated above on \_\_\_\_\_  
Date at \_\_\_\_\_  
Time

5. Fees are allowed in the amount of \$ \_\_\_\_\_.

\_\_\_\_\_  
Date Judge Bar no.

**PROOF OF SERVICE**

STATE OF MICHIGAN, COUNTY OF \_\_\_\_\_

I certify that on \_\_\_\_\_ at \_\_\_\_\_, I personally served the original writ of habeas  
Date Time  
corpus on \_\_\_\_\_  
Name

\_\_\_\_\_  
Date Signature

**WRIT OF HABEAS CORPUS**

Case No. \_\_\_\_\_

Required only under MCR 3.303

**ANSWER**

STATE OF MICHIGAN, COUNTY OF \_\_\_\_\_

I, \_\_\_\_\_, state:  
Name

1. I do not have \_\_\_\_\_ under my custody, power, or restraint.  
Person name in writ

2. On \_\_\_\_\_ by authority of \_\_\_\_\_,  
Date  
\_\_\_\_\_ was  released.  
 transferred to \_\_\_\_\_ (exhibits attached).  
Location

3. I have \_\_\_\_\_ under my custody, power, or restraint under a  
Person named in writ

- warrant charging the prisoner with the offense of \_\_\_\_\_
- commitment
- other: \_\_\_\_\_

issued by \_\_\_\_\_ . A copy of the document is attached and the original  
Name  
will be produced at the hearing.

I declare that the statements above are true to the best of my information, knowledge, and belief.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title

When required by MCR 3.303(L)(2)

**NOTICE TO PROSECUTING ATTORNEY**

TO: The prosecuting attorney of \_\_\_\_\_ County

You are notified that the annexed writ of habeas corpus has been issued. \_\_\_\_\_  
is believed to have custody of the prisoner. Name/Title/Agency

\_\_\_\_\_  
Date

Prisoner  Attorney/Bar no.

\_\_\_\_\_  
Address

\_\_\_\_\_  
City, state, zip Telephone no.

## **Item 4**

<b>STATE OF MICHIGAN                  JUDICIAL DISTRICT                  JUDICIAL CIRCUIT</b>	<b>PRETRIAL RELEASE ORDER</b>  <input type="checkbox"/> <b>AMENDED CONDITIONS</b> <input type="checkbox"/> <b>AMENDED LEIN EXPIRATION DATE</b>	<b>CASE NO.</b>  <input type="checkbox"/> Bound Over from District Court District Case No:
---	---	---

<b>ORI MI-</b>	<b>Court address</b>	<b>Court telephone no.</b>
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THE PEOPLE OF <input type="checkbox"/> The State of Michigan _____ <input type="checkbox"/> _____  <input type="checkbox"/> Juvenile In the matter of _____	<b>v</b>	Defendant's name, address, and telephone no.  _____  Date of birth _____ CTN/TCN _____
---	----------	--

Date of arrest	Type of offense <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Felony	Arresting agency	Agency file no.
Offense(s)		Statute/ordinance citation(s)	
Purpose of next appearance		Time of appearance	Date of appearance
Place of appearance <input type="checkbox"/> At the court address above <input type="checkbox"/> Other:			
<b>TYPE OF BOND:</b> <input type="checkbox"/> Personal recognizance <input type="checkbox"/> Cash/Surety <input type="checkbox"/> Cash/Surety/10% Cash <input type="checkbox"/> Real property* <input type="checkbox"/> *Proof of value and interest in real property is required.		Full bail amount \$	Bond set by Judge/Magistrate

1.  a. Release on personal recognizance shall be ordered as required by MCR 6.106(C).  
 b. Release on personal recognizance will not reasonably ensure  appearance.  public safety.
2. Under 18 USC 922(g)(8), the court found, at a hearing, that the defendant/juvenile represents a credible threat to the physical safety of one or more persons as defined in 18 USC 922(g)(8) and 18 USC 921(a)(32) and named in item 4q.  
 \*\*Needed for NCIC.

**IT IS ORDERED:**

3.  a. The defendant/juvenile shall post a new bond and comply with the terms and conditions in item 4.  
 b. The bond previously ordered is continued, and the defendant/juvenile shall comply with the terms and conditions in item 4.
4. The defendant/juvenile shall comply with the following terms and conditions that are checked:
  - a. Personally appear for any examination, arraignment, trial, sentencing, or at any time and place as directed by this court. If represented by an attorney in this case, any notice to appear may be given to the defendant's attorney instead of the defendant.
  - b. Abide by any judgment entered in this case and surrender to serve any sentence imposed.
  - c. Do not leave the State of Michigan without the permission of this court.
  - d. Do not commit any crime while released.
  - e. Immediately notify this court, in writing, of any change of address or telephone number.
  - f. Make reports to a court agency as specified by this court or the agency.
  - g. Do not use  alcohol.  marijuana.  illegal controlled substances.
  - h. Participate in a substance abuse testing or monitoring program.

**(See additional page for more conditions)**

**IT IS ORDERED** (continued):

- i. Participate in a specified treatment program for any physical or mental condition, including substance abuse.
- j. Comply with restrictions on personal association, place of residence, place of employment, or travel.
- k. Surrender driver's license or passport.
- l. Continue to seek employment.
- m. Comply with the following curfew: \_\_\_\_\_
- n. Continue or begin an educational program.
- o. Remain in the custody of a responsible member of the community. The community member agrees to monitor the defendant/juvenile and report any violation of these release conditions to the court.
- p. Do not possess or purchase a firearm or other dangerous weapon.
- q. Do not harass, intimidate, beat, molest, wound, stalk, threaten, or engage in other conduct that would place any of the following persons or a child of any of the following persons in reasonable fear of bodily injury: spouse, former spouse, individual with whom the defendant has a child in common, resident or former resident of the defendant's household.
- r. Do not assault, harass, intimidate, beat, molest, wound, or threaten the following person(s):

\_\_\_\_\_  
Name(s)

- s. Do not have (or cause any third party to have) any direct or indirect contact with the following person(s):  
**(Note: This condition also applies while the defendant/juvenile is in custody.)**

\_\_\_\_\_  
Name(s)

- t. Do not enter the following specified premises or areas:

\_\_\_\_\_  
Address or other location

- May go to the address once, accompanied by a peace officer, to remove personal belongings.

- u. Other:

- 5. The  sheriff  \_\_\_\_\_  
Custodial agency/Facility

shall hold the defendant/juvenile named above in its care and custody until bond is posted and the terms and conditions specified in item 4 are acknowledged. The defendant/juvenile shall be brought to all court appearances while in custody or as otherwise ordered. The sheriff or director or designee of the custodial facility is authorized to obtain and consent to routine, nonsurgical medical and dental care for the juvenile and emergency medical, dental, and surgical treatment of the juvenile.

- 6. This order shall be entered into LEIN, is effective when signed, and expires on \_\_\_\_\_ .  
**(Note: Check when release is subject to conditions necessary to protect 1 or more named persons under MCL 765.6b or for NCIC.)**

Height	Weight	Race	Sex	Date of birth	Hair color	Eye color	Other identifying information

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge/Magistrate

\_\_\_\_\_  
Bar no.

**ACKNOWLEDGMENT OF PRETRIAL RELEASE CONDITIONS**

I acknowledge and understand the terms and conditions of my release from jail. If I fail to perform all the terms and conditions, I may be subject to arrest without a warrant, jail, contempt of court, and new conditions of release. If my release is revoked and a bond was posted, the full amount of my bond, regardless of who posted it, may be forfeited. If I am arrested for a violation of these terms and conditions in another state, I waive all extradition proceedings and will be immediately returned to this state.

**NOTICE OF FIREARMS RESTRICTION:** If item 4q is a condition of my release, federal and/or state law may prohibit me from possessing or purchasing ammunition or a firearm (including a rifle, pistol, or revolver).

\_\_\_\_\_  
Date

\_\_\_\_\_  
Defendant/Juvenile's signature

**Bond deposited by Defendant:** If all the terms and conditions of pretrial release are met, the money deposited (bond) will be used to pay any fine, state minimum costs, restitution, statutory assessments, and other costs imposed. Any balance will be returned to me as authorized by statute and court rule.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Defendant's signature

**Bond deposited by**  **Third Party:**  **Surety/Agent:** I understand and agree that if the defendant fails to appear, the money deposited (bond) may be forfeited and a judgment entered for the entire amount of the bond. If the defendant appears as directed, the full amount of the bond will be returned to me unless I deposited a 10% cash bond. In that instance, the court will return only 90% of the bond to me.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of depositor/surety/agent and identification (i.e. DLN)

\_\_\_\_\_  
Name of depositor/surety/agent (type or print)

\_\_\_\_\_  
Address

\_\_\_\_\_  
City, state, zip

\_\_\_\_\_  
Telephone no.

**Note:** If a third party or surety posted bond for the defendant, the court clerk may provide the third party or surety with a copy of the terms and conditions of release.

## **Item 5**

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>MOTION AND ORDER FOR DISCHARGE FROM PROBATION</b>	<b>CASE NO.</b>
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<b>ORI</b>	<b>Court address</b>	<b>Court telephone no.</b>
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<b>MI- Police Report No.</b>  THE PEOPLE OF <input type="checkbox"/> The State of Michigan <input type="checkbox"/> _____ _____	<b>v</b>	Defendant's name, address, and telephone no.  <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">CTN/TCN</td> <td style="width:33%;">SID</td> <td style="width:33%;">DOB</td> </tr> </table>	CTN/TCN	SID	DOB
CTN/TCN	SID	DOB			

Date of probation	Offense
Term of probation	

I respectfully move this court to discharge the defendant from probation for the following reasons:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Probation officer

**ORDER OF PROBATION DISCHARGE**

1. **THE COURT FINDS** that all conditions of probation  were  were not successfully completed.  
 The defendant was ordered to:
- a. Drug treatment court and  did  did not successfully complete the program.
  - b. Veterans treatment court and  did  did not successfully complete the program.
  - c. Mental health treatment court and  did  did not successfully complete the program.

**IT IS ORDERED:**

2. The defendant is discharged from probation supervision. Any unfulfilled financial obligations or conditions of the sentence imposed by this court can be pursued according to law.
3. The plea or finding of guilt under the:
- Controlled Substance Act (MCL 333.7411)  Parental Kidnapping Act (MCL 750.350a)
  - Drug Treatment Court (MCL 600.1076)  Penal Code; Practicing under Influence (MCL 750.430)
  - Veterans Treatment Court (MCL 600.1206)  Spouse Abuse Act (MCL 769.4a)
  - Mental Health Treatment Court (MCL 600.1095)  Penal Code; Human Trafficking Victim (MCL 750.451c)
- is set aside and the case is dismissed. The records of arrest and discharge or dismissal in this case shall be retained as a **nonpublic record** according to law.
4. The defendant is released from the status of Youthful Trainee under the Holmes Youthful Trainee Act (MCL 762.14) and the case is dismissed. The record of arrest and discharge or dismissal in this case shall be retained as a **nonpublic record** according to law.
5. The plea or finding of guilt under the Michigan Liquor Control Code; Minor in Possession (MCL 436.1703) is set aside and the case is dismissed. The court shall maintain a **nonpublic record** of the matter according to law.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge/Magistrate Bar no.

If item 1a, 1b, 3, or 4 is checked, the clerk of the court shall advise the Michigan State Police Criminal Justice Information Center of the disposition as required under MCL 769.16a.

## **Item 6**

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>MOTION/ORDER OF NOLLE PROSEQUI</b>	<b>CASE NO.</b> <div style="border: 2px solid blue; padding: 5px; display: inline-block; background-color: #0056b3; color: white; font-weight: bold;">DRAFT</div>
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ORI \_\_\_\_\_ Court address \_\_\_\_\_ Court telephone no. \_\_\_\_\_

MI- \_\_\_\_\_  
Police Report No. \_\_\_\_\_

THE PEOPLE OF _____ <input type="checkbox"/> The State of Michigan <input type="checkbox"/> _____	v	Defendant's name, address, and telephone no. _____ _____ _____ CTN/TCN _____ SID _____ DOB _____
---	---	--

Juvenile In the matter of \_\_\_\_\_

Count	CRIME	CHARGE CODE(S) MCL citation/PACC Code

**MOTION**

\_\_\_\_\_, prosecuting official, moves for a nolle prosequi in this case for the following reason(s):

\_\_\_\_\_  
Date Prosecuting official Bar no.

**ORDER**

**IT IS ORDERED:**

- 1. Motion for nolle prosequi is granted and the case is dismissed without prejudice.
- 2. Motion for nolle prosequi is granted as to the following charge(s), which are dismissed without prejudice:  
\_\_\_\_\_
- 3. Motion for nolle prosequi is denied.
- 4. Defendant/Juvenile shall be immediately discharged from confinement in this case.
- 5. Bond is canceled and shall be returned after costs are deducted.
- 6. Bond is continued on the remaining charge(s).
- 7. The Michigan State Police and arresting agency shall destroy the arrest record, biometric data, and, as applicable, DNA profile for the dismissed charge(s). The Michigan State Police shall also remove any LEIN entry concerning any dismissed charge(s).

\_\_\_\_\_  
Date Judge/Magistrate Bar no.

1, 2, or 7

If item 1 or 2 is checked, the clerk of the court shall provide a copy of this order to the Michigan State Police.

## **Item 7**

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>ORDER DELAYING SENTENCE</b>	<b>CASE NO.</b>
---	--------------------------------	-----------------

ORI \_\_\_\_\_ Court address \_\_\_\_\_ Court telephone no. \_\_\_\_\_  
MI- \_\_\_\_\_

**Police Report No.**

THE PEOPLE OF  The State of Michigan  
 \_\_\_\_\_  
 \_\_\_\_\_

v

Defendant' name, address, and telephone no.		
CTN/TCN	SID	DOB

**THE COURT FINDS:**

1. The defendant was found guilty on \_\_\_\_\_ of the crime(s) stated below:  
Date

Count	CONVICTED BY			DISMISSED BY*	CRIME	CHARGE CODE(S) MCL citation/PACC Code
	Plea*	Court	Jury			

\*Insert "G" for guilty plea, "NC" for nolo contendere, or "MI" for guilty but mentally ill, "D" for dismissed by court, or "NP" for dismissed by prosecutor/plaintiff.

2. Defendant  represented by an attorney: \_\_\_\_\_  
 advised of right to counsel and appointed counsel and knowingly, intelligently, and voluntarily waived that right.
3. Conviction reportable to Secretary of State\*\*.
4. HIV testing and sex offender registration are completed. Defendant's driver's license number \_\_\_\_\_
5. The defendant has been fingerprinted according to MCL 28.243.
6. A DNA sample is already on file with the Michigan State Police from a previous case. No assessment is required.

**IT IS ORDERED:**

7. The sentence is delayed until \_\_\_\_\_ . The reason for the delay is:  
not to exceed one year

8. The defendant is placed under the supervision of \_\_\_\_\_ .

9. The defendant shall pay:

State Minimum	Crime Victim	Restitution	DNA Assess.	Court Costs	Attorney Fees	Fine	Other Costs	Total
\$	\$	\$	\$	\$	\$	\$	\$	\$

The due date for payment is \_\_\_\_\_. Fine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed.

- The defendant shall serve \_\_\_\_\_ days in jail for failure to pay on time, as part of a conditional sentence. Prior to enforcement of jail time for failing to pay, the court must determine the defendant's ability to pay.
10. The defendant shall complete the following rehabilitative services.  
 Alcohol Highway Safety Education  Treatment ( outpatient  inpatient  residential  mental health)  
 Specify:
11. The vehicle used in the offense shall be immobilized or forfeited. (See separate order.)
12. Other:

\_\_\_\_\_  
Date Judge Bar no.

**NOTE:** This is not a final order. At the conclusion of the delay, a final order must be entered.

\*\*Currently, convictions are reportable to the Secretary of State under MCL 257.625(21)(a), MCL 257.732, MCL 324.80131, MCL 324.81134(12), MCL 324.81135(7), MCL 324.82157, and MCL 333.7408a(12).

## **Item 8**

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>SUMMONS REGARDING BOND VIOLATION</b>	<b>CASE NO.</b>
---	---	-----------------

ORI \_\_\_\_\_ Court address \_\_\_\_\_ Court telephone no. \_\_\_\_\_  
MI- \_\_\_\_\_

Police Report No. \_\_\_\_\_

THE PEOPLE OF	<input type="checkbox"/> The State of Michigan <input type="checkbox"/> _____ _____
---------------	---

v

Defendant's name, address, and telephone no.		
CTN/TCN	SID	DOB

**TO DEFENDANT, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN:**

You are ordered to appear in court

at  \_\_\_\_\_  
 the above address

on \_\_\_\_\_ at \_\_\_\_\_ for the following alleged bond violation(s):  
Date Time

Failure to appear at the stated time and place may subject you to arrest.

\_\_\_\_\_  
Date Judge Bar no.

If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

**CERTIFICATE OF MAILING**

I certify that on this date a copy of this motion and summons was served upon the defendant and his/her attorney by first-class mail addressed to their last-known address as defined by MCR 2.107(C)(3).

\_\_\_\_\_  
Date Signature

## Item 9

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>MOTION TO SET ASIDE FORFEITURE AND DISCHARGE OF BOND AND NOTICE OF HEARING</b>	<b>CASE NO.</b> <div style="border: 1px solid black; background-color: #0056b3; color: white; padding: 5px; display: inline-block; margin-top: 5px;">Committee Markup</div>
---	---	--

ORI \_\_\_\_\_ Court address \_\_\_\_\_ Court telephone no. \_\_\_\_\_  
MI- \_\_\_\_\_

THE PEOPLE OF <input type="checkbox"/> The State of Michigan <input type="checkbox"/> _____ _____ _____	v	Defendant name, address, and telephone no. _____ _____ _____			
		<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">CTN</td> <td style="width:33%;">SID</td> <td style="width:33%;">DOB</td> </tr> </table>	CTN	SID	DOB
CTN	SID	DOB			
Name and address of surety or other depositor posting bond _____					

Offense(s) _____			
*Amount of bail bond forfeited \$ _____	Date of forfeiture judgment _____	TYPE OF BOND:	<input type="checkbox"/> Personal recognizance <input type="checkbox"/> 10% bond* <input type="checkbox"/> Cash <input type="checkbox"/> Surety* <input type="checkbox"/> Real property

**MOTION**

1. The above bond was forfeited and a judgment of \$ \_\_\_\_\_ [ ] was paid to the court on \_\_\_\_\_, within 56 days of the entry of the forfeiture judgment. [ ] has not been paid and 56 days has not passed since entry of the forfeiture judgment.
2. The defendant was apprehended by \_\_\_\_\_ on \_\_\_\_\_ and \_\_\_\_\_ Date  
 is incarcerated at \_\_\_\_\_. (Proof of apprehension/incarceration is attached.)  
 is not incarcerated.
3. The ends of justice have not been thwarted.
4. I request that the forfeiture order be set aside and that the judgment amount of \$ \_\_\_\_\_, minus the costs, be returned to \_\_\_\_\_.  
Name of surety or other depositor

\_\_\_\_\_  
Date \_\_\_\_\_  
Signature of surety/depositor/attorney

**NOTICE OF HEARING**

A hearing on the above motion will be held on \_\_\_\_\_ at \_\_\_\_\_ at \_\_\_\_\_.  
Date Time Location

\_\_\_\_\_  
Date \_\_\_\_\_  
Signature

If you require special accommodations to use the court because of disabilities or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

**CERTIFICATE OF MAILING**

I certify that on this date I served a copy of this motion and notice of hearing on the parties or their attorneys and the surety or other depositor by first-class mail addressed to their last-known addresses as defined by MCR 2.107(C)(3).

\_\_\_\_\_  
Date \_\_\_\_\_  
Signature

## **Item 10**

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>ORDER ON MOTION TO SET ASIDE FORFEITURE AND DISCHARGE OF BOND</b>	<b>CASE NO.</b>
---	--	-----------------

<b>ORI MI-</b>	Court address	Court telephone no.
--------------------	---------------	---------------------

THE PEOPLE OF <input type="checkbox"/> The State of Michigan <input type="checkbox"/> _____ _____	<b>v</b>	Defendant name, address, and telephone no. _____ <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">CTN</td> <td style="width:33%;">SID</td> <td style="width:33%;">DOB</td> </tr> </table>	CTN	SID	DOB
CTN	SID	DOB			

Name and address of surety or other depositor posting bond
--

Offense(s)			
*Amount of bail bond forfeited \$ _____	Date of forfeiture judgment _____	TYPE OF BOND: <input type="checkbox"/> Personal recognizance <input type="checkbox"/> 10% bond* <input type="checkbox"/> Cash <input type="checkbox"/> Surety* <input type="checkbox"/> Real property	

1. Date of hearing: \_\_\_\_\_ Judge: \_\_\_\_\_  
Date Bar no.

**THE COURT FINDS:**

2. The requirements of MCL 765.28     have     have not    been met.
3. The costs of apprehension are \$ \_\_\_\_\_ and     have     have not    been paid.

**IT IS ORDERED:**

4. The motion is denied.
5. The bond forfeiture is set aside and the bond is discharged. Assessment of costs of apprehension in the amount of  
       \$ \_\_\_\_\_ shall be deducted from the judgment pursuant to MCL 765.15.
6. Judgment in the amount of \$ \_\_\_\_\_ shall be returned to the surety/depositor.
7. Other:

Date	Judge	Bar no.
------	-------	---------

**CERTIFICATE OF SERVICE**

I certify that on this date I served a copy of this order on the plaintiffs or their attorneys by  
 personal service.             first-class mail addressed to their last-known address(es) as defined in MCR 2.107(C)(3).

Date	Signature
------	-----------

**THE CODE OF CRIMINAL PROCEDURE (EXCERPT)**  
**Act 175 of 1927**

**765.15 Bail; cash, check, or security; disposition upon forfeiture or discharge of bond or bail.**

Sec. 15. (1) If bond or bail is forfeited, the court shall enter an order upon its records directing the disposition of the cash, check, or security within 45 days of the order. The treasurer or clerk, upon presentation of a certified copy of such order, shall dispose of the cash, check, or security pursuant to the order. The court shall set aside the forfeiture and discharge the bail or bond, within 1 year from the time of the forfeiture judgment, in accordance with subsection (2) if the person who forfeited bond or bail is apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person.

(2) If bond or bail is discharged, the court shall enter an order with a statement of the amount to be returned to the depositor. If the court ordered the defendant to pay a fine, costs, restitution, assessment, or other payment, the court shall order the fine, costs, restitution, assessment, or other payment collected out of cash bond or bail personally deposited by the defendant under this chapter, and the cash bond or bail used for that purpose shall be allocated as provided in section 22 of chapter XV. Upon presentation of a certified copy of the order, the treasurer or clerk having the cash, check, or security shall pay or deliver it as provided in the order to the person named in the order or to that person's order.

(3) If the cash, check, or security is in the hands of the sheriff or any officer other than the treasurer or clerk, the officer holding it shall dispose of the cash, check, or security as the court orders upon presentation of a certified copy of the court's order.

**History:** 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17177;—CL 1948, 765.15;—Am. 1970, Act 78, Imd. Eff. July 16, 1970;—Am. 1970, Act 226, Eff. Apr. 1, 1970;—Am. 1993, Act 343, Eff. May 1, 1994.

**Former law:** See section 4 of Act 332 of 1919.

**THE CODE OF CRIMINAL PROCEDURE (EXCERPT)**  
**Act 175 of 1927**

**765.28 Failure to appear; notice to surety; service; judgment; execution; set aside of forfeiture order; discharge of bail or surety bond; conditions.**

Sec. 28. (1) If a defendant fails to appear, within 7 days after the date of the failure to appear the court shall serve each surety notice of the failure to appear. The notice must be served upon each surety in person, left at the surety's last known business address, electronically mailed to an electronic mail address provided to the court by the surety, or mailed by first-class mail to the surety's last known business address. However, if the notice is served by first-class mail, it must be mailed separately from the notice of intent to enter judgment. Each surety must be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. Execution must be awarded and executed upon the judgment in the manner provided for in personal actions.

(2) Except as provided in subsection (3), the court shall set aside the forfeiture and discharge the bail or surety bond within year from the date of forfeiture judgment if the defendant has been apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person. If the bond or bail is discharged, the court shall enter an order to that effect with a statement of the amount to be returned to the surety.

(3) Subsection (2) does not apply if the defendant was apprehended more than 56 days after the bail or bond was ordered forfeited and judgment entered and the surety did not fully pay the forfeiture judgment within that 56-day period.

**History:** 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17190;—CL 1948, 765.28;—Am. 2002, Act 659, Eff. Apr. 1, 2003;—Am. 2004, Act 332, Imd. Eff. Sept. 23, 2004;—Am. 2017, Act 174, Eff. Feb. 19, 2018.

**Compiler's note:** In subsection (2), the words "within year from the date of forfeiture judgment" evidently should read "within 1 year from the date of forfeiture judgment."

## **Item 12**

Michigan Compiled Laws Annotated

Michigan Court Rules of 1985

Chapter 6. Criminal Procedure

Subchapter 6.100. Preliminary Proceedings

MI Rules MCR 6.104

Rule 6.104 Arraignment on the Warrant or Complaint

Effective: August 14, 2019

Currentness

**(A) Arraignment Without Unnecessary Delay.** Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of this rule, or must be arraigned without unnecessary delay by use of two-way interactive video technology in accordance with MCR 6.006(A).

**(B) Place of Arraignment.** An accused arrested pursuant to a warrant must be taken to a court specified in the warrant. An accused arrested without a warrant must be taken to a court in the judicial district in which the offense allegedly occurred. If the arrest occurs outside the county in which these courts are located, the arresting agency must make arrangements with the authorities in the demanding county to have the accused promptly transported to the latter county for arraignment in accordance with the provisions of this rule. If prompt transportation cannot be arranged, the accused must be taken without unnecessary delay before the nearest available court for preliminary appearance in accordance with subrule (C). In the alternative, the provisions of this subrule may be satisfied by use of two-way interactive video technology in accordance with MCR 6.006(A).

**(C) Preliminary Appearance Outside County of Offense.** When, under subrule (B), an accused is taken before a court outside the county of the alleged offense either in person or by way of two-way interactive video technology, the court must advise the accused of the rights specified in subrule (E)(2) and determine what form of pretrial release, if any, is appropriate. To be released, the accused must submit a recognizance for appearance within the next 14 days before a court specified in the arrest warrant or, in a case involving an arrest without a warrant, before either a court in the judicial district in which the offense allegedly occurred or some other court designated by that court. The court must certify the recognizance and have it delivered or sent without delay to the appropriate court. If the accused is not released, the arresting agency must arrange prompt transportation to the judicial district of the offense. In all cases, the arraignment is then to continue under subrule (D), if applicable, and subrule (E) either in the judicial district of the alleged offense or in such court as otherwise is designated.

**(D) Arrest Without Warrant.** If an accused is arrested without a warrant, a complaint complying with MCR 6.101 must be filed at or before the time of arraignment. On receiving the complaint and on finding probable cause, the court must either issue a warrant or endorse the complaint as provided in MCL 764.1c. Arraignment of the accused may then proceed in accordance with subrule (E).

**(E) Arraignment Procedure; Judicial Responsibilities.** The court at the arraignment must

(1) inform the accused of the nature of the offense charged, and its maximum possible prison sentence and any mandatory minimum sentence required by law;

(2) if the accused is not represented by a lawyer at the arraignment, advise the accused that

(a) the accused has a right to remain silent,

(b) anything the accused says orally or in writing can be used against the accused in court,

(c) the accused has a right to have a lawyer present during any questioning consented to, and

(d) if the accused does not have the money to hire a lawyer, the court will appoint a lawyer for the accused;

(3) advise the accused of the right to a lawyer at all subsequent court proceedings and, if appropriate, appoint a lawyer;

(4) set a date for a probable cause conference not less than 7 days or more than 14 days after the date of the arraignment and set a date for preliminary examination not less than 5 days or more than 7 days after the date of the probable cause conference;

(5) determine what form of pretrial release, if any, is appropriate; and

(6) ensure that the accused has had biometric data collected as required by law.

The court may not question the accused about the alleged offense or request that the accused enter a plea.

**(F) Arraignment Procedure; Recording.** A verbatim record must be made of the arraignment.

**(G) Plan for Judicial Availability.** In each county, the court with trial jurisdiction over felony cases must adopt and file with the state court administrator a plan for judicial availability. The plan shall

- (1) make a judicial officer available for arraignments each day of the year, or
  
- (2) make a judicial officer available for setting bail for every person arrested for commission of a felony each day of the year conditioned upon
  - (a) the judicial officer being presented a proper complaint and finding probable cause pursuant to MCR 6.102(A), and
  
  - (b) the judicial officer having available information to set bail.

This portion of the plan must provide that the judicial officer shall order the arresting officials to arrange prompt transportation of any accused unable to post bond to the judicial district of the offense for arraignment not later than the next regular business day.

### Credits

[Adopted effective October 1, 1989. Amended October 1, 1989, effective April 1, 1990; February 19, 1990, effective April 1, 1990; August 3, 1994, effective October 1, 1994, 446 Mich; July 13, 2005, effective January 1, 2006, 473 Mich; December 22, 2014, effective January 1, 2015, 497 Mich. Amended effective May 27, 2015, 498 Mich; August 14, 2019, 503 Mich.]

### Editors' Notes

#### COMMENTS

Staff Comment to 1989 Adoption

MCR 6.104 is a new rule.

Subrule (A) implements the requirement for prompt arraignment of a person arrested with a warrant, MCL 764.26, or without a warrant, MCL 764.13. The rule recognizes, however, that prompt arraignment is not required if an arrested person is “released beforehand.” This may occur as a result of outright release of an arrested person by the police agency because of the decision not to file a complaint, or because the defendant was released on a secured or unsecured recognizance issued by a judge or magistrate in lieu of prompt arraignment. When a delay becomes “unnecessary” and what its effect is on the admissibility of evidence are left to case law. See, for example, *People v Cipriano*, 431 Mich 315 (1988).

Subrule (B) makes some modifications in existing law. With regard to an accused arrested *without a warrant* in the county in which an alleged offense occurred, it implements the requirement of MCL 764.13 that the accused be taken “before a magistrate of the judicial district in which the offense is charged to have been committed.” With regard to an accused arrested *with a warrant* in the county in which the alleged offense occurred, the rule requires that the accused be taken before “a court specified in the warrant.” MCR 6.102(C) permits the warrant to command a peace officer to bring the accused before a

magistrate of the judicial district in which the offense is charged to have been committed “or some other designated court.” These latter quoted provisions accommodate the requirement for prompt arraignments, including weekends, by allowing specification in the warrant of another court, such as one shared by the judicial districts for the purpose of conducting weekend or nonbusiness-hour arraignments. This does not imply, however, that an accused arrested without a warrant may not be taken before a court that is not in the judicial district in which the offense occurred but that is authorized to conduct weekend or nonbusiness-hour arraignments for that court.

The remainder of the procedure described in this subrule, setting forth responsibilities pertaining to an accused arrested in a county outside the one in which the offense occurred, is new. The rule provides that on the arrest of an accused in such a county, the arresting agency “must make arrangements with the authorities in the demanding county” to have the accused promptly transported to that county for arraignment as required by this rule. This does not imply that it is the arresting agency’s responsibility to transport the accused to the demanding county if the authorities in the demanding county refuse to provide such transportation. In such a situation, the arresting agency has the option of itself providing the transportation or taking the accused to a local court for a “preliminary appearance” as provided in subrule (C).

Subrule (C) sets forth the procedure that the local court must follow in conducting a preliminary appearance occurring outside the county of the offense and the duty of the arresting agency if the accused is not released as a result of that appearance. At that appearance the court’s duty is solely to advise the unrepresented accused of *Miranda* rights and decide if the accused may be released on a secured or unsecured recognizance to appear “within the next 14 days” before a court in the judicial district in which the offense occurred. The recognizance promptly must be delivered or mailed to the appropriate court. If the accused is not released, the arresting agency has no option other than to “arrange prompt transportation” of the accused to the judicial district of the offense. Accordingly, if the police agency in the demanding county still declines to provide prompt transportation of the accused, that responsibility will fall on the arresting agency.

Subrule (D) repeats the procedure set forth in MCL 764.1c. The rule’s substitution of the terminology “probable cause” for the statutory terminology “reasonable cause” does not indicate a substantive difference.

Subrule (E) sets forth the arraignment procedure that must be followed by a court authorized to perform the arraignment of the accused. The procedure has some requirements extending beyond current practice. Requiring the arraigning court to give *Miranda* rights to an unrepresented accused is new and addresses Fifth and Sixth Amendment concerns. Subrule (E)(6) implements a statutory requirement for the arraigning court to ensure that the accused has been fingerprinted. MCL 764.29. The last sentence of subrule (E) prohibits the court from questioning the accused “about the alleged offense” but does not preclude other questioning pertinent to the court’s performance of its arraignment functions.

Subrule (F) is new but does not state a new requirement.

#### Staff Comment to 1990 Amendment

The February 9, 1990 amendment of MCR 6.104(G) [effective April 1, 1990] is a slightly altered version of a proposal made by the Michigan District Judges Association.

#### Staff Comment to 1994 Amendment

In 1994, MCR 6.104(E)(4) and MCR 6.907(C)(2) were amended to reflect the change made by 1994 PA 167, which extended from 12 to 14 days the period within which a preliminary examination must be conducted. MCL 766.4. A similar change was

also made in MCR 6.445(C), concerning the timing of a probation revocation hearing.

Staff Comment to 2005 Amendment

On March 12, 2002, the Court appointed the Committee on the Rules of Criminal Procedure to review the rules to determine whether any of the provisions should be revised. The committee issued its report on June 16, 2003, recommending numerous amendments to existing rules, plus some new rules. A public hearing on the committee's recommendations was held May 27, 2004.

The Court adopted the committee's recommendations with respect to the amendments of Rules 2.511, 6.102, 6.104, 6.107, 6.112, 6.303, 6.304, 6.310, 6.311, 6.402, 6.412, 6.414, 6.419, 6.420, 6.427, 6.615, and 6.620, and the adoption of a new Rule 6.428.

Staff Comment to January, 2015 Amendment

The amendments of MCR 6.006, 6.104, 6.110, and 6.111 and adoption of new Rule 6.108 create procedural rules for conducting probable cause conferences and amend current provisions of the preliminary examination court rules to coordinate with 2014 PA 123 and 124.

Staff Comment to May, 2015 Amendment

The Court retained the amendments that became effective January 1, 2015, and adopted additional amendments of MCR 6.108 and MCR 6.110 to provide further clarification as suggested in comment letters received by the court.

Staff Comment to 2019 Amendment

These amendments update cross-references and make other nonsubstantive revisions to clarify the rules.

MI Rules MCR 6.104, MI R RCRP MCR 6.104  
Current with amendments received through November 1, 2019.

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Michigan Compiled Laws Annotated  
Michigan Court Rules of 1985  
Chapter 6. Criminal Procedure  
Subchapter 6.600. Criminal Procedure in District Court

MI Rules MCR 6.610

Rule 6.610. Criminal Procedure Generally

Effective: September 1, 2019  
Currentness

**(A) Precedence.** Criminal cases have precedence over civil actions.

**(B) Pretrial.** The court, on its own initiative or on motion of either party, may direct the prosecutor and the defendant, and, if represented, the defendant's attorney to appear for a pretrial conference. The court may require collateral matters and pretrial motions to be filed and argued no later than this conference.

**(C) Record.** Unless a writing is permitted, a verbatim record of the proceedings before a court under subrules (D)-(F) must be made.

**(D) Arraignment; District Court Offenses.**

(1) Whenever a defendant is arraigned on an offense over which the district court has jurisdiction, the defendant must be informed of

- (a) the name of the offense;
- (b) the maximum sentence permitted by law; and
- (c) the defendant's right
  - (i) to the assistance of an attorney and to a trial;
  - (ii) (if subrule [D][2] applies) to an appointed attorney; and
  - (iii) to a trial by jury, when required by law.

The information may be given in a writing that is made a part of the file or by the court on the record.

(2) An indigent defendant has a right to an appointed attorney whenever the offense charged requires on conviction a minimum term in jail or the court determines it might sentence to a term of incarceration, even if suspended.

If an indigent defendant is without an attorney and has not waived the right to an appointed attorney, the court may not sentence the defendant to jail or to a suspended jail sentence.

(3) The right to the assistance of an attorney, to an appointed attorney, or to a trial by jury is not waived unless the defendant

(a) has been informed of the right; and

(b) has waived it in a writing that is made a part of the file or orally on the record.

(4) The court may allow a defendant to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement signed by the defendant and any defense attorney of record, reciting the general nature of the charge, the maximum possible sentence, the rights of the defendant at arraignment, and the plea to be entered. The court may require that an appropriate bond be executed and filed and appropriate and reasonable sureties posted or continued as a condition precedent to allowing the defendant to be arraigned without personally appearing before the court.

**(E) Pleas of Guilty and Nolo Contendere.** Before accepting a plea of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1) The court shall determine that the plea is understanding, voluntary, and accurate. In determining the accuracy of the plea,

(a) if the defendant pleads guilty, the court, by questioning the defendant, shall establish support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading, or

(b) if the defendant pleads nolo contendere, the court shall not question the defendant about the defendant's participation in the crime, but shall make the determination on the basis of other available information.

(2) The court shall inform the defendant of the right to the assistance of an attorney. If the offense charged requires on conviction a minimum term in jail, the court shall inform the defendant that if the defendant is indigent the defendant has the right to an appointed attorney. The court shall also give such advice if it determines that it might sentence to a term of incarceration, even if suspended.

(3) The court shall advise the defendant of the following:

(a) the mandatory minimum jail sentence, if any, and the maximum possible penalty for the offense,

(b) that if the plea is accepted the defendant will not have a trial of any kind and that the defendant gives up the following rights that the defendant would have at trial:

- (i) the right to have witnesses called for the defendant's defense at trial,
- (ii) the right to cross-examine all witnesses called against the defendant,
- (iii) the right to testify or to remain silent without an inference being drawn from said silence,
- (iv) the presumption of innocence and the requirement that the defendant's guilt be proven beyond a reasonable doubt.

(4) A defendant or defendants may be informed of the trial rights listed in subrule (3)(b) as follows:

- (a) on the record,
- (b) in a writing made part of the file, or
- (c) in a writing referred to on the record.

Except as provided in subrule (E)(7), if the court uses a writing pursuant to subrule (E)(4)(b) or (c), the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(5) The court shall make the plea agreement a part of the record and determine that the parties agree on all the terms of that agreement. The court shall accept, reject or indicate on what basis it accepts the plea.

(6) The court must ask the defendant:

- (a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;
- (b) whether anyone has threatened the defendant; and
- (c) whether it is the defendant's own choice to plead guilty.

(7) A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if

- (a) the court decides that the combination of the circumstances and the range of possible sentences makes the situation proper for a plea of guilty or nolo contendere;

(b) the defendant acknowledges guilt or nolo contendere, in a writing to be placed in the district court file, and waives in writing the rights enumerated in subrule (3)(b); and

(c) the court is satisfied that the waiver is voluntary.

A “writing” includes digital communications, transmitted through electronic means, which are capable of being stored and printed.

(8) The following provisions apply where a defendant seeks to challenge the plea.

(a) A defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules. Such a motion may be made either before or after sentence has been imposed. After imposition of sentence, the defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.105(G)(2).

(b) If the trial court determines that a deviation affecting substantial rights occurred, it shall correct the deviation and give the defendant the option of permitting the plea to stand or of withdrawing the plea. If the trial court determines either a deviation did not occur, or that the deviation did not affect substantial rights, it may permit the defendant to withdraw the plea only if it does not cause substantial prejudice to the people because of reliance on the plea.

(c) If a deviation is corrected, any appeal will be on the whole record including the subsequent advice and inquiries.

(9) The State Court Administrator shall develop and approve forms to be used under subrules (E)(4)(b) and (c) and (E)(7)(b).

**(F) Sentencing.**

(1) For sentencing, the court shall:

(a) require the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence;

(b) provide copies of the presentence report (if a presentence report was prepared) to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain a copy of the report or an amended report. If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment to enable the moving party to review the presentence report and to prepare any necessary corrections, additions or deletions to present to the court, or otherwise advise the court of circumstances the prosecutor or defendant believes should be considered in imposing sentence. A presentence investigation report shall not include any address or telephone number for the home,

workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual. Upon request, any other address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness shall be exempted from disclosure unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual.

(c) inform the defendant of credit to be given for time served, if any.

(d) order the dollar amount of restitution that the defendant must pay to make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate. Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

(2) The court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3).

(3) Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction.

(4) Immediately after imposing a sentence of incarceration, even if suspended, the court must advise the defendant, on the record or in writing, that:

(a) if the defendant wishes to file an appeal and is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and

(b) the request for a lawyer must be made within 14 days after sentencing.

**(G) Motion for New Trial.** A motion for a new trial must be filed within 21 days after the entry of judgment. However, if an appeal has not been taken, a delayed motion may be filed within the time for filing an application for leave to appeal.

**(H) Arraignment; Offenses Not Cognizable by the District Court.** In a prosecution in which a defendant is charged with a felony or a misdemeanor not cognizable by the district court, the court shall

(1) inform the defendant of the nature of the charge;

(2) inform the defendant of

(a) the right to a preliminary examination;

- (b) the right to an attorney, if the defendant is not represented by an attorney at the arraignment;
- (c) the right to have an attorney appointed at public expense if the defendant is indigent; and
- (d) the right to consideration of pretrial release.

If a defendant not represented by an attorney waives the preliminary examination, the court shall ascertain that the waiver is freely, understandingly, and voluntarily given before accepting it.

#### **Credits**

[Adopted effective October 1, 1989. Amended July 20, 1999, effective October 1, 1999, 460 Mich; June 13, 2000, effective September 1, 2000, 462 Mich; December 21, 2000, effective April 1, 2001, 463 Mich; July 13, 2005, effective January 1, 2006, 473 Mich; January 23, 2007, effective May 1, 2007, 477 Mich; February 5, effective May 1, 2010, 485 Mich; July 1, 2010, effective July 1, 2010, 486 Mich; December 29, 2010, effective January 1, 2011, 487 Mich. Amended effective August 24, 2012, 492 Mich; March 9, 2016, 499 Mich. Amended May 25, 2016, effective September 1, 2016, 499 Mich; May 23, 2018, effective September 1, 2018, 501 Mich; May 22, 2019, effective September 1, 2019, 502 Mich.]

#### **Editors' Notes**

##### **COMMENTS**

Staff Comment to 1989 Adoption

MCR 6.610 contains the provisions formerly found in MCR 6.201.

Staff Comment to 1999 Amendment

The July 1999 amendment of subrules (D) and (E), effective October 1, 1999, was based on a recommendation from the Prosecuting Attorneys Association of Michigan, in light of statutory changes effected by 1998 PA 341, 1998 PA 342, and 1998 PA 350.

Staff Comment to 2000 Amendment

The amendment of MCR 6.610(E)(7) [effective September 1, 2000] establishes time limits for moving to withdraw pleas in district court criminal cases, comparable to those in circuit court cases. See MCR 6.311. New MCR 6.610(H) sets time limits for filing a motion for a new trial in district court criminal cases.

The amendment of MCR 7.103(B)(6) [effective September 1, 2000] places a 6-month time limit on applications for leave to appeal to circuit court, corresponding to the 12-month limit applicable in appeals to the Court of Appeals. See MCR 7.205(F) (3). As to judgments entered before the effective date of the amendment, the 6-month period specified in MCR 7.103(B)(6) begins on the effective date, September 1, 2000.

Staff Comment to 2001 Amendment

The December 21, 2000 amendment of subrules (D)(2) and (E)(2), effective April 1, 2001, was recommended by the Prosecuting Attorneys Association of Michigan, in light of the holding in *People v Reichenbach*, 459 Mich 109, 120 (1998), that, under both

the United States and the Michigan Constitutions, a defendant accused of a misdemeanor is entitled to appointed trial counsel only if “actually imprisoned.”

#### Staff Comment to 2006 Amendment

On March 12, 2002, the Court appointed the Committee on the Rules of Criminal Procedure to review the rules to determine whether any of the provisions should be revised. The committee issued its report on June 16, 2003, recommending numerous amendments to existing rules, plus some new rules. A public hearing on the committee's recommendations was held May 27, 2004.

The Court adopted the committee's recommendations with respect to the amendments of Rules 2.511, 6.102, 6.104, 6.107, 6.112, 6.303, 6.304, 6.310, 6.311, 6.402, 6.412, 6.414, 6.419, 6.420, 6.427, 6.615, and 6.620, and the adoption of a new Rule 6.428.

The committee's recommendation that Rule 6.610 be amended was adopted, except for committee's proposal to add a new 6.610(F) providing for discovery in district court.

#### Staff Comment to 2007 Amendment

The amendment of Rule 6.610 ensures that indigent defendants who are convicted in district court and sentenced to terms of incarceration, are aware of their right to counsel pursuant to *Halbert v Michigan*, 545 US 605 (2005), and *Shelton v Alabama*, 535 US 654 (2002). The amendment requires that after imposing a sentence of incarceration, even if suspended, the court must advise the defendant that if the defendant wishes to file an appeal and is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal if the request for a lawyer is made within 14 days after sentencing.

#### Staff Comment to May, 2010 Amendment

The amendments of Rules 6.425 and 6.610 of the Michigan Court Rules were submitted by the Representative Assembly of the State Bar of Michigan. The amendments increase the time within which a court is required to provide copies of the presentence report to the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, to at least two business days before the day of sentencing. If the report is not made available at least two days before sentencing, the prosecutor or defendant's lawyer, or the defendant, when not represented by a lawyer, is entitled to an adjournment to prepare any necessary corrections, additions, or deletions to present to the court. The revisions of these rules also prohibit the inclusion of specific information in the report about the victim or witness, and require that the court instruct those who review the report that they are precluded from making a copy of the report and must return their copy to the court before or at the defendant's sentencing. The confidentiality provision is based on MCL 791.229.

#### Staff Comment to July, 2010 Amendment

By order dated February 5, 2010, the Court adopted various amendments of MCR 6.425 and MCR 6.610 to require prosecutors and defendants to have access to the presentence investigation report at least two days before sentencing and allow adjournment if the parties do not receive the report in that time, to ensure the confidentiality of the PSI report, and to limit the victim or witness information that may be included in a PSI report. Following entry of the February order and shortly after its May 1, 2010, effective date, the Court considered the matter further, specifically with regard to mandatory confidentiality provisions that not only represented a significant change in current practice, but, also, underscored a fundamental tension between the explicit provisions of MCL 791.229, which describes who may have a copy of the report and for what purposes, and subsequent caselaw, which has expanded access of PSI reports in certain circumstances. In light of this tension, the Court has invited interested associations that oppose the language as adopted by the Court to approach the Legislature to resolve the conflict. However, if legislation on this subject is not enacted and effective by the end of this calendar year, an amendment to allow

prosecutors, defense counsel, and defendants to retain a copy of the presentence investigation report will automatically go into effect on January 1, 2011.

Staff Comment to 2011 Amendment

This order codifies statutory changes enacted as 2010 PA 247 and 2010 PA 248.

Staff Comment to 2012 Amendment

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

Staff Comment to March, 2016 Amendment

These amendments update cross-references that changed after the rule was adopted and make other nonsubstantive revisions.

Staff Comment to September, 2016 Amendment

The amendments of MCR 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 were submitted by the Michigan State Planning Body for the Delivery of Legal Services to the Poor. The rule revisions are intended to provide clarity and guidance to courts regarding what courts would be required to do before incarcerating a defendant for failure to pay.

Staff Comment to 2018 Amendment

The amendment of MCR 6.610 eliminates an arguable conflict by exempting pleas taken under subsection (E)(7) from the requirements of subsection (E)(4), and clarifies what constitutes a “writing” by incorporating digital communications.

Staff Comment to 2019 Amendment

The amendments more explicitly require restitution to be ordered at the time of sentencing as required by statute, and establish a procedure for modifying restitution amounts.

MI Rules MCR 6.610, MI R RCRP MCR 6.610  
Current with amendments received through November 1, 2019.

## **Item 13**

STATE OF MICHIGAN JUDICIAL DISTRICT COUNTY	<b>ADVICE OF RIGHTS AND ORDER REGARDING                  APPOINTMENT OF APPELLATE COUNSEL AND TRANSCRIPT</b> <input type="checkbox"/> Substitution of Counsel <input type="checkbox"/> Order Amended	CASE NO. AND SUFFIX  <span style="color: red; font-weight: bold; font-size: 1.2em;">SAMPLE</span>
Court Address		Court Telephone no.

THE PEOPLE OF THE STATE OF MICHIGAN  V
Defendant name, Last                      First                      Middle
Address, date of birth, and inmate no. (If known)

OFFENSE NAME	PACC CODE	SENTENCE(S)
Offense date for guilty plea		

**NOTICE TO DEFENDANT MCR 6.610(F)**

You have 21 Days from the date of your sentence to file a claim of appeal or an application for leave to appeal. If you are indigent, you must request the appointment of an appellate attorney within 14 days. You must submit form MC 222 with this request to verify current income and liabilities.

**REQUEST BY DEFENDANT**

1. I, \_\_\_\_\_ (Defendant's Name), want to appeal my sentence. I declare that I am indigent and without resources to hire an attorney to assist me with an appeal. I have completed form MC 222 in support of my request and attest that:

- I had Court Appointed Counsel at the Trial Court.
- I had a retained attorney at the Trial Court, but am currently unable to afford appellate counsel.
- I waived my right to counsel at the Trial Court, and am currently unable to afford appellate counsel.

I declare that the above statements are true to the best of my knowledge, information, and belief.

\_\_\_\_\_ Date  
Defendant's Signature Date

**IT IS HEREBY ORDERED**

- 2.  Defendant's request for appellate counsel is denied because  request is untimely  defendant is not indigent  criteria required by law for appointment of an attorney on a plea based conviction have not been met.
- 3.  Defendant's request is granted and \_\_\_\_\_, Esq., is hereby appointed appellate counsel for the Defendant in post-conviction proceedings.
- 4.  The Court reporter/recorder shall file with the trial court clerk any previously transcribed testimony or proceeding, and any other transcripts requested by counsel in this case not previously transcribed. Transcripts shall be filed within 28 days for pleas or 56 days for trial from the date ordered or requested. MCR 7.109(B) Report/Recorder shall be paid as provided by law.
- 5.  The clerk of the court shall immediately send to counsel a copy of the transcripts filed in the case along with those ordered by counsel as they become available.

\_\_\_\_\_ Date \_\_\_\_\_ Judge Bar no.

**CERTIFICATE OF SERVICE**

I certify that on this date I mailed a copy of:  
 This order granting defendant's request to appointed counsel, defendant, court recorder, prosecutor.  
 This order denying appointment of appellate counsel to defendant, prosecutor.

\_\_\_\_\_ Date \_\_\_\_\_ Clerk of the court Signature





## **Item 14**

<b>STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT</b>	<b>ORDER OF PROBATION</b>	<b>CASE NO. and JUDGE</b>
---	---------------------------	---------------------------

ORI \_\_\_\_\_ Court address \_\_\_\_\_ Court telephone no. \_\_\_\_\_

MI-  
Police Report No.

The People of _____ <input type="checkbox"/> The State of Michigan <input type="checkbox"/> _____ _____	<b>v</b>
--	----------

Defendant's name, address, and telephone no.	
CTN/TCN	SID

Probation officer	Offense	Term
-------------------	---------	------

<input type="checkbox"/> Judgment of guilt is deferred* under:		
<input type="checkbox"/> MCL 333.7411, Controlled Substance Act <input type="checkbox"/> MCL 750.451c, Human Trafficking Victim <input type="checkbox"/> MCL 750.430, Practicing under the Influence <input type="checkbox"/> MCL 750.350a Parental Kidnapping Act (for felonies only)	<input type="checkbox"/> MCL 769.4a, Spouse Abuse Act <input type="checkbox"/> MCL 762.14, Youthful Trainee Status <input type="checkbox"/> MCL 600.1070, Drug Treatment Court	<input type="checkbox"/> MCL 600.1095, Mental Health Court <input type="checkbox"/> MCL 600.1206, Veterans Court <input type="checkbox"/> MCL 436.1703, Minor in Possession

Under 18 USC 922(g)(8), the court found, at a hearing, that the defendant represents a credible threat to the physical safety of one or more persons as defined in 18 USC 922(g)(8) and 18 USC 921(a)(32) and named in item 8.  
 Needed for NCIC entry.

**IT IS ORDERED** that the defendant be placed on probation under the supervision of the probation officer named above for the term indicated, and the defendant shall:

1. Not violate any criminal law of any unit of government.
2. Not leave the state without the consent of this court.
3. Make a truthful report to the probation officer monthly, or as often as the probation officer may require, either in person or in writing, as required by the probation officer.
4. Notify the probation officer immediately of any change of address or employment status.
5. Not purchase or possess a firearm. (Needed for NCIC entry.)
6. Pay the following to the court:

Crime Victim Assessment... \$ _____	Costs..... \$ _____
Restitution..... \$ _____	Other (including any DNA assessment)... \$ _____
State Minimum Costs..... \$ _____	
Fines..... \$ _____	Total..... \$ _____

- a. The due date for payment is \_\_\_\_\_ .
- b. The total amount due shall be paid in installments of \$ \_\_\_\_\_ per \_\_\_\_\_ starting on \_\_\_\_\_ Date

and paid in full by the due date stated in the judgment of sentence or by \_\_\_\_\_ .  
 Fines, costs, and fees not paid within 56 days of the date owed or of any installment payment date are subject to a 20% late penalty on the amount owed.

7. Pay a supervision fee to the  court  Department of Corrections in the amount of \$ \_\_\_\_\_.

The fee is payable immediately.  The total amount due may be paid in installments of \$ \_\_\_\_\_

per \_\_\_\_\_ starting on \_\_\_\_\_ payable to the  court.  State of Michigan.  
Date

8. Comply with the attached wage assignment order.

9. Other: (Use this space for conditions for the protection of one or more named persons - also complete the LEIN order on Part 2 of this form. See back of form for required language when conditions are ordered pursuant to 18 USC 922[g][8].)

10. This order shall be entered into LEIN, is effective when signed, and expires on \_\_\_\_\_.

Height	Weight	Race	Sex	Hair color	Eye color	Other identifying information

Defendant's date of birth is provided on a personal identifying information form (MC 97.)

Failure to comply with this order may result in a revocation of probation and incarceration. If you are not able to pay due to financial hardship, contact the court immediately to request a payment alternative. MCR 6.425(E)(3).

\_\_\_\_\_  
Judge/Magistrate signature and date

**Required Language When Conditions are Issued Pursuant to 18 USC 922(g)(8):**

Use the following language when the conditions involve an intimate partner of the defendant or child of the intimate partner or defendant as defined in 18 USC 922(g)(8) and 18 USC 921(a)(32).

Defendant is restrained from harassing, stalking, or threatening, or engaging in other conduct that would place [insert name(s)] in reasonable fear of bodily injury.

For details about these conditions, see SCAO Administrative Memorandum 2008-02.

**DEFENDANT'S ACKNOWLEDGEMENT**

I have read or heard the above order of probation and have received a copy. I understand and agree to comply with this order. I also understand that federal and/or state law may prohibit me from possessing or purchasing ammunition or a firearm (including a rifle, pistol, or revolver) if the court found I represent a credible threat to the physical safety of a named person and/or explicitly prohibited (in item 8) the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury to that named person.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Defendant signature

If the judgment of guilt is deferred as stated above, the clerk of the court shall advise the Michigan State Police Criminal Justice Information Center of the disposition, **except for Minor in Possession**, as required under MCL 769.16a. A case in which judgment of guilt is deferred shall be maintained as a nonpublic record. \*If the judgment of guilt is deferred and the defendant is incarcerated, the clerk of the court should also advise the incarcerating agency of nonpublic record status.

<b>STATE OF MICHIGAN JUDICIAL DISTRICT</b>	<b>ORDER OF PROBATION (Misdemeanor)</b>	<b>CASE NO.</b>
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ORI Court address	Court telephone no.
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MI-  
Police Report No.

THE PEOPLE OF  The State of Michigan  
 \_\_\_\_\_  
 \_\_\_\_\_

v

Defendant's name, address, and telephone no.		
CTN/TCN	SID	DOB

Probation officer	Offense	Term
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Judgment of guilt is deferred\* under:

<input type="checkbox"/> MCL 333.7411, Controlled Substance Act	<input type="checkbox"/> MCL 769.4a, Spouse Abuse Act	<input type="checkbox"/> MCL 600.1095, Mental Health Court
<input type="checkbox"/> MCL 750.451c, Human Trafficking Victim	<input type="checkbox"/> MCL 762.14, Youthful Trainee Status	<input type="checkbox"/> MCL 600.1206, Veterans Court
<input type="checkbox"/> MCL 750.430, Practicing under the Influence	<input type="checkbox"/> MCL 600.1070, Drug Treatment Court	<input type="checkbox"/> MCL 436.1703, Minor in Possession

Under 18 USC 922(g)(8), the court found, at a hearing, that the defendant represents a credible threat to the physical safety of one or more persons as defined in 18 USC 922(g)(8) and 18 USC 921(a)(32) and named in item 8. \*\*Needed for NCIC entry. **IT IS ORDERED** that the defendant be placed on probation under the supervision of the probation officer named above for the term indicated, and the defendant shall:

1. Not violate any criminal law of any unit of government.
2. Not leave the state without the consent of this court.
3. Make a truthful report to the probation officer monthly, or as often as the probation officer may require, either in person or in writing, as required by the probation officer.
4. Notify the probation officer immediately of any change of address or employment status.
5. Not purchase or possess a firearm. (\*\*Needed for NCIC entry.)

6. Pay the following to the court:

Crime Victim Assessment.... \$ _____	Costs..... \$ _____
Restitution..... \$ _____	Supervision..... \$ _____
State Minimum Costs..... \$ _____	Other (including any DNA assessment)... \$ _____
Fines..... \$ _____	Total..... \$ _____

- a. The due date for payment is \_\_\_\_\_ .
- b. The total amount due shall be paid in installments of \$ \_\_\_\_\_ per \_\_\_\_\_ starting on \_\_\_\_\_ and paid in full by the due date stated in the judgment of sentence or by \_\_\_\_\_ Date

Fines, costs, and fees not paid within 56 days of the date owed or of any installment payment date are subject to a 20% late penalty on the amount owed.

7. Comply with the attached wage assignment order.
8. Other: (Use this space for conditions for the protection of one or more named persons - also complete the LEIN order on Part 2 of this form. See back of form for required language when conditions are ordered pursuant to 18 USC 922[g](8).)

Failure to comply with this order may result in a revocation of probation and incarceration. If you are not able to pay due to financial hardship, contact the court immediately to request a payment alternative. MCR 6.425(E)(3).

Date	Judge/Magistrate	Bar no.
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I have read or heard the above order of probation and have received a copy. I understand and agree to comply with this order. I also understand that federal and/or state law may prohibit me from possessing or purchasing ammunition or a firearm (including a rifle, pistol, or revolver) if the court found I represent a credible threat to the physical safety of a named person and/or explicitly prohibited (in item 8) the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury to that named person.

Date	Defendant signature
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If the judgment of guilt is deferred as stated above, the clerk of the court shall advise the Michigan State Police Criminal Justice Information Center of the disposition, **except for Minor in Possession**, as required under MCL 769.16a. A case in which judgment of guilt is deferred shall be maintained as a nonpublic record. \*If the judgment of guilt is deferred and the defendant is incarcerated, the clerk of the court should also advise the incarcerating agency of nonpublic record status.

<b>STATE OF MICHIGAN JUDICIAL DISTRICT</b>	<b>ORDER OF PROBATION (Misdemeanor)</b>	<b>CASE NO.</b>
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ORI	Court address	Court telephone no.
-----	---------------	---------------------

MI-  
Police Report No.

THE PEOPLE OF  The State of Michigan  
 \_\_\_\_\_  
 \_\_\_\_\_

v

Defendant's name, address, and telephone no.		
CTN/TCN	SID	DOB

Probation officer	Offense	Term
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Judgment of guilt is deferred\* under:

<input type="checkbox"/> MCL 333.7411, Controlled Substance Act	<input type="checkbox"/> MCL 769.4a, Spouse Abuse Act	<input type="checkbox"/> MCL 600.1095, Mental Health Court
<input type="checkbox"/> MCL 750.451c, Human Trafficking Victim	<input type="checkbox"/> MCL 762.14, Youthful Trainee Status	<input type="checkbox"/> MCL 600.1206, Veterans Court
<input type="checkbox"/> MCL 750.430, Practicing under the Influence	<input type="checkbox"/> MCL 600.1070, Drug Treatment Court	<input type="checkbox"/> MCL 436.1703, Minor in Possession

Under 18 USC 922(g)(8), the court found, at a hearing, that the defendant represents a credible threat to the physical safety of one or more persons as defined in 18 USC 922(g)(8) and 18 USC 921(a)(32) and named in item 8. \*\*Needed for NCIC entry. **IT IS ORDERED** that the defendant be placed on probation under the supervision of the probation officer named above for the term indicated, and the defendant shall:

1. Not violate any criminal law of any unit of government.
2. Not leave the state without the consent of this court.
3. Make a truthful report to the probation officer monthly, or as often as the probation officer may require, either in person or in writing, as required by the probation officer.
4. Notify the probation officer immediately of any change of address or employment status.
5. Not purchase or possess a firearm. (\*\*Needed for NCIC entry.)
6. Pay the following to the court:
 

Crime Victim Assessment.... \$ _____	Costs..... \$ _____
Restitution..... \$ _____	Supervision..... \$ _____
State Minimum Costs..... \$ _____	Other (including any DNA assessment)... \$ _____
Fines..... \$ _____	Total..... \$ _____

  - a. The due date for payment is \_\_\_\_\_.
  - b. The total amount due shall be paid in installments of \$ \_\_\_\_\_ per \_\_\_\_\_ starting on \_\_\_\_\_ and paid in full by the due date stated in the judgment of sentence or by \_\_\_\_\_ Date

Fines, costs, and fees not paid within 56 days of the date owed or of any installment payment date are subject to a 20% late penalty on the amount owed.
7. Comply with the attached wage assignment order.
8. Other: (Use this space for conditions for the protection of one or more named persons - also complete the LEIN order on Part 2 of this form. See back of form for required language when conditions are ordered pursuant to 18 USC 922[g][8].)

Failure to comply with this order may result in a revocation of probation and incarceration. If you are not able to pay due to financial hardship, contact the court immediately to request a payment alternative. MCR 6.425(E)(3).

Date _____	Judge/Magistrate _____	Bar no. _____
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**TO LOCAL LAW ENFORCEMENT:** The protective conditions in item 8 and the following identifying information of the defendant must be entered on the LEIN system. The court will notify local law enforcement of any amendments to or revocation of this order.

Height	Weight	Race	Sex	Date of birth	Hair Color	Eye Color	Other identifying information
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Effective date of conditions in item 8 _____	Expiration date of order _____
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Date _____	Judge/Magistrate _____	Bar no. _____
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**Required Language When Conditions are Issued Pursuant to 18 USC 922(g)(8):**

Use the following language when the conditions involve an intimate partner of the defendant or child of the intimate partner or defendant as defined in 18 USC 922(g)(8) and 18 USC 921(a)(32).

Defendant is restrained from harassing, stalking, or threatening, or engaging in other conduct that would place *[insert name(s)]* in reasonable fear of bodily injury.

For details about these conditions, see SCAO Administrative Memorandum 2008-02.

<b>STATE OF MICHIGAN JUDICIAL CIRCUIT COUNTY</b>	<b>ORDER OF PROBATION</b>	<b>CASE NO.</b>
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<b>ORI</b>	<b>Court address</b>	<b>Court telephone no.</b>
<b>MI- Police Report No.</b>		

THE PEOPLE OF  The State of Michigan  
 \_\_\_\_\_  
 \_\_\_\_\_

v

Defendant's name, address, and telephone no.		
CTN/TCN	SID	DOB

Probation officer	Offense and PACC	Term
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Judgment of guilt is deferred\* under:

<input type="checkbox"/> MCL 333.7411, Controlled Substance Act	<input type="checkbox"/> MCL 750.350a, Parental Kidnapping Act	<input type="checkbox"/> MCL 762.14, Youthful Trainee Status
<input type="checkbox"/> MCL 600.1070, Drug Treatment Court	<input type="checkbox"/> MCL 600.1095, Mental Health Court	<input type="checkbox"/> MCL 600.1206, Veterans Court

Under 18 USC 922(g)(8), the court found, at a hearing, that the defendant represents a credible threat to the physical safety of one or more persons as defined in 18 USC 922(g)(8) and 18 USC 921(a)(32) and named in item 9. \*\*Needed for NCIC entry. **IT IS ORDERED** that the defendant be placed on probation under the supervision of the probation officer named above for the term indicated, and the defendant shall:

1. Not violate any criminal law of any unit of government.
2. Not leave the state without the consent of this court.
3. Make a truthful report to the probation officer monthly, or as often as the probation officer may require, either in person or in writing, as required by the probation officer.
4. Notify the probation officer immediately of any change of address or employment status.

5. Not purchase or possess a firearm. (\*\*Needed for NCIC entry.)

6. Pay the following to the court:

Crime Victim Assessment.... \$ _____	Fines..... \$ _____
Restitution..... \$ _____	Costs..... \$ _____
State Minimum Costs..... \$ _____	Other (including any DNA assessment.. \$ _____
	Total..... \$ _____

- a. The due date for payment is \_\_\_\_\_ .
- b. The total amount due shall be paid in installments of \$ \_\_\_\_\_ per \_\_\_\_\_ starting on \_\_\_\_\_ and paid in full by the due date stated in the judgment of sentence or by \_\_\_\_\_ Date

Fines, costs, and fees not paid within 56 days of the date owed or of any installment payment date are subject to a 20% late penalty on the amount owed.

7. Pay a supervision fee to the Department of Corrections in the amount of \$ \_\_\_\_\_. The fee is payable immediately.

The total amount due may be paid in installments of \$ \_\_\_\_\_ per \_\_\_\_\_ starting on \_\_\_\_\_ payable to the State of Michigan. Date

8. Comply with the attached wage assignment order.

9. Other: (Use this space for conditions for the protection of one or more named persons - also complete the LEIN order on Part 2 of this form. See back of form for required language when conditions are ordered pursuant to 18 USC 922[g][8].)

Failure to comply with this order may result in a revocation of probation and incarceration. If you are not able to pay due to financial hardship, contact the court immediately to request a payment alternative. MCR 6.425(E)(3).

Date	Judge	Bar no.
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I have read or heard the above order of probation and have received a copy. I understand and agree to comply with this order. I also understand that federal and/or state law may prohibit me from possessing or purchasing ammunition or a firearm (including a rifle, pistol, or revolver) if the court found I represent a credible threat to the physical safety of a named person and/or explicitly prohibited (in item 9) the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury to that named person.

Date	Defendant signature
------	---------------------

If the judgment of guilt is deferred as stated above, the clerk of the court shall advise the Michigan State Police Criminal Justice Information Center of the disposition as required under MCL 769.16a. A case in which judgment of guilt is deferred shall be maintained as a nonpublic record. \*If the judgment of guilt is deferred and the defendant is incarcerated, the clerk of the court should also advise the incarcerating agency of nonpublic record status.

<b>STATE OF MICHIGAN JUDICIAL CIRCUIT COUNTY</b>	<b>ORDER OF PROBATION</b>	<b>CASE NO.</b>
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<b>ORI</b>	<b>Court address</b>	<b>Court telephone no.</b>
<b>MI- Police Report No.</b>		

THE PEOPLE OF <input type="checkbox"/> The State of Michigan <input type="checkbox"/> _____ _____	<b>v</b>	Defendant's name, address, and telephone no.  <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">CTN/TCN</td> <td style="width:33%;">SID</td> <td style="width:33%;">DOB</td> </tr> </table>	CTN/TCN	SID	DOB
CTN/TCN	SID	DOB			

Probation officer	Offense and PACC	Term
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<input type="checkbox"/> Judgment of guilt is deferred* under:		
<input type="checkbox"/> MCL 333.7411, Controlled Substance Act	<input type="checkbox"/> MCL 750.350a, Parental Kidnapping Act	<input type="checkbox"/> MCL 762.14, Youthful Trainee Status
<input type="checkbox"/> MCL 600.1070, Drug Treatment Court	<input type="checkbox"/> MCL 600.1095, Mental Health Court	<input type="checkbox"/> MCL 600.1206, Veterans Court

Under 18 USC 922(g)(8), the court found, at a hearing, that the defendant represents a credible threat to the physical safety of one or more persons as defined in 18 USC 922(g)(8) and 18 USC 921(a)(32) and named in item 9. \*\*Needed for NCIC entry. **IT IS ORDERED** that the defendant be placed on probation under the supervision of the probation officer named above for the term indicated, and the defendant shall:

1. Not violate any criminal law of any unit of government.
2. Not leave the state without the consent of this court.
3. Make a truthful report to the probation officer monthly, or as often as the probation officer may require, either in person or in writing, as required by the probation officer.
4. Notify the probation officer immediately of any change of address or employment status.

5. Not purchase or possess a firearm. (\*\*Needed for NCIC entry.)

6. Pay the following to the court:

Crime Victim Assessment.... \$ _____	Fines..... \$ _____
Restitution..... \$ _____	Costs..... \$ _____
State Minimum Costs..... \$ _____	Other (including any DNA assessment.. \$ _____
	Total..... \$ _____

a. The due date for payment is \_\_\_\_\_ .

b. The total amount due shall be paid in installments of \$ \_\_\_\_\_ per \_\_\_\_\_ starting on \_\_\_\_\_ and paid in full by the due date stated in the judgment of sentence or by \_\_\_\_\_ Date

Fines, costs, and fees not paid within 56 days of the date owed or of any installment payment date are subject to a 20% late penalty on the amount owed.

7. Pay a supervision fee to the Department of Corrections in the amount of \$ \_\_\_\_\_. The fee is payable immediately.

The total amount due may be paid in installments of \$ \_\_\_\_\_ per \_\_\_\_\_ starting on \_\_\_\_\_ payable to the State of Michigan. Date

8. Comply with the attached wage assignment order.

9. Other: (Use this space for conditions for the protection of one or more named persons - also complete the LEIN order on Part 2 of this form. See back of form for required language when conditions are ordered pursuant to 18 USC 922[g][8].)

Failure to comply with this order may result in a revocation of probation and incarceration. If you are not able to pay due to financial hardship, contact the court immediately to request a payment alternative. MCR 6.425(E)(3).

Date _____	Judge _____	Bar no. _____
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**TO LOCAL LAW ENFORCEMENT:** The protective conditions in item 9 and the following identifying information of the defendant must be entered on the LEIN system. The court will notify local law enforcement of any amendments to or revocation of this order.

Height	Weight	Race	Sex	Date of Birth	Hair Color	Eye Color	Other Identifying Information
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Effective date of conditions in item 9 _____	Expiration date of order _____
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Date _____	Judge/Magistrate _____	Bar no. _____
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**Required Language When Conditions are Issued Pursuant to 18 USC 922(g)(8):**

Use the following language when the conditions involve an intimate partner of the defendant or child of the intimate partner or defendant as defined in 18 USC 922(g)(8) and 18 USC 921(a)(32).

Defendant is restrained from harassing, stalking, or threatening, or engaging in other conduct that would place [insert name(s)] in reasonable fear of bodily injury.

For details about these conditions, see SCAO Administrative Memorandum 2008-02.

## **Item 15**

# SAMPLE

**DEFENDANT'S STATEMENT OF UNDERSTANDING PURSUANT TO  
*Lafler v. Cooper*, 132 S.Ct 1376 (2012) and  
*Missouri v. Frye*, 132 S.Ct. 1399 (2012).**

I, \_\_\_\_\_, acknowledge each of the following points:

1. The government has offered me the opportunity to enter a truthful guilty plea to:  
\_\_\_\_\_.
2. It is my right to either accept or reject the proposal. It is also my right to change my plea to guilty *without* any agreement with the government.
3. If I were to accept the government's proposal to truthfully plead guilty, there may be terms and conditions more favorable to me than if I were convicted at trial.
4. If I were to enter a truthful plea of guilty, I understand that, according to the government, my Sentencing Guidelines would likely be \_\_\_\_\_ to \_\_\_\_\_ months.
5. If I were to proceed to trial and be convicted as charged, I understand that, according to the government, my Sentencing Guidelines would likely be \_\_\_\_\_ to \_\_\_\_\_ months.
6. I know that a Guidelines Range is only a starting point in the sentencing process, so a sentence could be within, above, or below the Range in most cases.
7. I have had a full opportunity to talk with my attorney about my decision.
8. My attorney has explained the law and the pertinent facts known to him/her.
9. I know that some kinds of evidence are not required to be disclosed to me until presented at trial, so I probably have not seen and/or heard every bit of the evidence that may be presented against me in trial.
10. I am confident that I have a clear understanding of my situation both legally and factually. I have no remaining questions about this for my attorney to answer.
11. Having fully considered all the foregoing **IT IS MY DECISION TO REJECT THE OFFER OF A NEGOTIATED GUILTY PLEA** even though it may have terms and conditions that are more favorable to me than if I were to be convicted at trial.

Date: \_\_\_\_\_  
\_\_\_\_\_ Defendant's signature

 KeyCite Yellow Flag - Negative Treatment  
Declined to Extend by Turner v. United States, 6th Cir.(Tenn.), March 23, 2018

132 S.Ct. 1376  
Supreme Court of the United States

Blaine LAFLER, Petitioner  
v.

Anthony COOPER.  
No. 10–209.

Argued Oct. 31, 2011.

Decided March 21, 2012.

**Synopsis**

**Background:** After affirmance of convictions and sentence,  2005 WL 599740, petitioner, a state inmate who had been convicted of several offenses, including assault with intent to murder, after rejecting a guilty plea based on the advice of counsel, and who had been denied state postconviction relief, sought federal habeas corpus relief, claiming ineffective assistance of counsel. The United States District Court for the Eastern District of Michigan, Denise Page Hood, J.,  2009 WL 817712, conditionally granted the petition, requiring the state to offer petitioner the plea deal that he would have taken but for his attorney's ineffective assistance. State appealed. The United States Court of Appeals for the Sixth Circuit, Cornelia G. Kennedy, Circuit Judge,  376 Fed.Appx. 563, affirmed. State's petition for certiorari was granted.

**Holdings:** The Supreme Court, Justice Kennedy, held that:

[1] petitioner was prejudiced by counsel's deficient performance in advising petitioner to reject the plea offer and go to trial, and

[2] proper remedy for counsel's ineffective assistance was to order the State to reoffer the plea agreement, and then, if petitioner accepted the offer, the state trial court could exercise its discretion regarding whether to resentence.

Vacated and remanded.

Justice Scalia filed a dissenting opinion, which Justice Thomas joined and Chief Justice Roberts joined in part.

Justice Alito filed a dissenting opinion.

West Headnotes (29)

[1] **Criminal Law**

 Guilty pleas; plea negotiations, plea hearings, motion to withdraw

Defendants' Sixth Amendment right to counsel extends to the plea-bargaining process. U.S.C.A. Const.Amend. 6.

627 Cases that cite this headnote

[2] **Criminal Law**

 Plea

During plea negotiations defendants are entitled to the effective assistance of competent counsel. U.S.C.A. Const.Amend. 6.

680 Cases that cite this headnote

[3] **Criminal Law**

 Plea

The two-part *Strickland v. Washington* test for ineffective assistance of counsel applies to challenges to guilty pleas based on ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

204 Cases that cite this headnote

[4] **Criminal Law**

 Deficient representation in general

The performance prong of the *Strickland* test for ineffective assistance of counsel requires a defendant to show that counsel's representation fell below an objective standard of reasonableness. U.S.C.A. Const.Amend. 6.

359 Cases that cite this headnote

[5] **Criminal Law**  
🔑Prejudice in general

To establish the prejudice prong of the *Strickland* test for ineffective assistance of counsel, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

973 Cases that cite this headnote

[6] **Criminal Law**  
🔑Plea

In the context of pleas, to establish the prejudice prong of the *Strickland* test for ineffective assistance of counsel, a defendant must show the outcome of the plea process would have been different with competent advice. U.S.C.A. Const.Amend. 6.

678 Cases that cite this headnote

[7] **Criminal Law**  
🔑Plea

In the context of a defendant having rejected a plea offer from the prosecution based on the deficient advice of counsel and having stood trial, the defendant, to establish the prejudice prong of the *Strickland* test for ineffective assistance of counsel, must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would

have been presented to the court, i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances, and also that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. U.S.C.A. Const.Amend. 6.

1635 Cases that cite this headnote

[8] **Criminal Law**  
🔑Critical stages

The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. U.S.C.A. Const.Amend. 6.

324 Cases that cite this headnote

[9] **Criminal Law**  
🔑Critical stages

The Sixth Amendment's protections against ineffective assistance of counsel are not designed simply to protect the trial, even though counsel's absence in critical stages of a criminal proceeding may derogate from the accused's right to a fair trial. U.S.C.A. Const.Amend. 6.

103 Cases that cite this headnote

[10] **Criminal Law**  
🔑Critical stages

The constitutional guarantee of effective assistance of counsel applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. U.S.C.A. Const.Amend. 6.

100 Cases that cite this headnote

[11] **Criminal Law**  
🔑Appeal

Defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. U.S.C.A. Const.Amend. 6.

51 Cases that cite this headnote

[12] **Criminal Law**  
🔑Sentencing in General  
**Criminal Law**  
🔑Death Penalty

A right to effective assistance of counsel exists during sentencing in both noncapital and capital cases. U.S.C.A. Const.Amend. 6.

78 Cases that cite this headnote

[13] **Criminal Law**  
🔑Sentencing in General

Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in prejudice, under the prejudice prong of the *Strickland* test for ineffective assistance of counsel, because any amount of additional jail time has Sixth Amendment significance. U.S.C.A. Const.Amend. 6.

180 Cases that cite this headnote

[14] **Criminal Law**  
🔑Plea

Even if the trial itself is free from constitutional flaw, the defendant who, based on the deficient performance of counsel, goes to trial instead of taking a more favorable plea may be prejudiced, as element of ineffective assistance of counsel, from either a conviction on more serious counts or the imposition of a more severe sentence. U.S.C.A. Const.Amend. 6.

114 Cases that cite this headnote

[15] **Criminal Law**  
🔑Presentation of witnesses

A defendant cannot show prejudice, under the prejudice prong of the *Strickland* test for ineffective assistance of counsel, based on counsel's refusal to present perjured testimony, even if such testimony might have affected the outcome of the case. U.S.C.A. Const.Amend. 6.

15 Cases that cite this headnote

[16] **Criminal Law**  
🔑Plea

If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it, and if that right is denied, prejudice can be shown, under the prejudice prong of the *Strickland* test for ineffective assistance of counsel, if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence. U.S.C.A. Const.Amend. 6.

413 Cases that cite this headnote

[17] **Criminal Law**  
🔑Right to plead guilty; mental competence

Defendants have no right to be offered a plea,

nor a federal right that the judge accept it.

🔑 Remedies

161 Cases that cite this headnote

Sixth Amendment remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests, and thus, a remedy must neutralize the taint of a constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution. U.S.C.A. Const.Amend. 6.

[18] **Constitutional Law**

🔑 Constitutional Rights in General

When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.

70 Cases that cite this headnote

[19] **Criminal Law**

🔑 Standard of Effective Assistance in General

The benchmark for judging any claim of ineffective assistance of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. U.S.C.A. Const.Amend. 6.

58 Cases that cite this headnote

[22] **Criminal Law**

🔑 Plea

When determining the remedy for ineffective assistance of counsel relating to defendant's rejection of a plea offer, if the sole advantage a defendant would have received under the plea is a lesser sentence, which is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial, the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea, and if the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between. U.S.C.A. Const.Amend. 6.

332 Cases that cite this headnote

[20] **Criminal Law**

🔑 Adequacy of Representation

The constitutional rights of criminal defendants are granted to the innocent and the guilty alike, and consequently, the guarantee of effective assistance of counsel does not belong solely to the innocent or attach only to matters affecting the determination of actual guilt. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[23] **Criminal Law**

🔑 Plea

For purposes of determining the remedy for ineffective assistance of counsel relating to defendant's rejection of a plea offer, if an offer was for a guilty plea to a count or counts less

[21] **Criminal Law**

serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal, and once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed. U.S.C.A. Const.Amend. 6.

160 Cases that cite this headnote

[24] **Criminal Law**

🔑Plea

A court, in determining the remedy for ineffective assistance of counsel relating to defendant's rejection of a plea offer, may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. U.S.C.A. Const.Amend. 6.

28 Cases that cite this headnote

[25] **Criminal Law**

🔑Plea

In determining the remedy for ineffective assistance of counsel relating to defendant's rejection of a plea offer, the precise positions the defendant and the prosecution prior to the rejection of the plea offer can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial. U.S.C.A. Const.Amend. 6.

57 Cases that cite this headnote

[26] **Habeas Corpus**

🔑Federal or constitutional questions

A decision is "contrary to clearly established law," for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA), under which a federal court may not grant a petition for a writ of habeas corpus unless the state court's adjudication on the merits was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases.

📄 28 U.S.C.A. § 2254(d)(1).

281 Cases that cite this headnote

[27] **Criminal Law**

🔑Plea

An inquiry into whether the rejection of a plea is knowing and voluntary is not the correct means by which to address a claim of ineffective assistance of counsel, relating to a plea. U.S.C.A. Const.Amend. 6.

35 Cases that cite this headnote

[28] **Criminal Law**

🔑Plea

Defendant was prejudiced, as element of ineffective assistance of counsel, by counsel's deficient performance in advising defendant to reject a plea offer from the State and go to trial because counsel allegedly believed that defendant's intent to murder, for purposes of charge under Michigan law of assault with intent to murder, could not be established since the victim had been shot below the waist; but for counsel's deficient performance, there was a reasonable probability that defendant and the trial court would have accepted the guilty plea, and as a result of not accepting the plea offer and being convicted at trial, defendant received a minimum sentence three and one-half times greater than he would have received under the plea. U.S.C.A. Const.Amend. 6.

1127 Cases that cite this headnote

[29] **Criminal Law**  
🔑Plea

Proper remedy for counsel's ineffective assistance in advising defendant to reject a plea offer from the State and go to trial because counsel allegedly believed that defendant's intent to murder, for purposes of charge under Michigan law of assault with intent to murder, could not be established since the victim had been shot below the waist, was to order the State to reoffer the plea agreement, and then, presuming defendant accepted the offer, the state trial court could exercise its discretion in determining whether to vacate the convictions and resentence defendant pursuant to the plea agreement, to vacate only some of the convictions and resentence defendant accordingly, or to leave the convictions and sentence from trial undisturbed. U.S.C.A. Const.Amend. 6; MCR 6.302(C)(3).

125 Cases that cite this headnote

**\*\*1380 Syllabus\***

Respondent was charged under Michigan law with assault with intent to murder and three other offenses. The prosecution offered to dismiss two of the charges and to recommend a 51-to-85-month sentence on the other two, in exchange for a guilty plea. In a communication with the court, respondent admitted his guilt and expressed a willingness to accept the offer. But he rejected the offer, allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. At trial, respondent was convicted on all counts and received a mandatory minimum 185-to-360-month sentence. In a subsequent hearing, the state trial court rejected respondent's claim that his attorney's advice to reject the plea constituted ineffective assistance. The Michigan Court of Appeals affirmed, rejecting the ineffective-assistance claim on the ground that respondent knowingly and intelligently turned down the plea offer and chose to go to trial. Respondent renewed his claim in

federal habeas. Finding that the state appellate court had unreasonably applied the constitutional effective-assistance standards laid out in  *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and  *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203, the District Court granted a conditional writ and ordered specific performance of the original plea offer. The Sixth Circuit affirmed. Applying *Strickland*, it found that counsel had provided deficient performance by advising respondent of an incorrect legal rule, and that respondent suffered prejudice because he lost the opportunity to take the more favorable sentence offered in the plea.

*Held* :

1. Where counsel's ineffective advice led to an offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed. Pp. 1383 – 1388.

(a) Because the parties agree that counsel's performance was deficient, the only question is how to apply  *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial. Pp. 1383 – 1384.

(b) In that context, the *Strickland* prejudice test requires a defendant to show a reasonable possibility that the outcome of the plea process would have been different with competent advice. The Sixth Circuit and other federal appellate courts have agreed with the *Strickland* prejudice test for rejected pleas adopted here by this Court. Petitioner and the Solicitor General propose a narrow view—that *Strickland* prejudice cannot arise from plea bargaining if the defendant is later convicted at a fair trial—but their reasoning is unpersuasive. First, they claim that the Sixth Amendment's sole purpose is to protect the right to a fair trial, but the Amendment actually requires effective assistance at critical stages of a **\*\*1381** criminal proceeding, including pretrial stages. This is consistent with the right to effective assistance on appeal, see, e.g.,  *Halbert v. Michigan*, 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552, and the right to counsel during sentencing, see, e.g.,  *Glover v. United States*, 531 U.S. 198, 203–204, 121 S.Ct. 696, 148 L.Ed.2d 604. This Court has not followed a rigid rule that an otherwise

fair trial remedies errors not occurring at trial, but has instead inquired whether the trial cured the particular error at issue. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598. Second, this Court has previously rejected petitioner's argument that *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180, modified *Strickland* and does so again here. *Fretwell* and *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123, demonstrate that "it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice,' " *Williams v. Taylor*, 529 U.S. 362, 391–392, 120 S.Ct. 1495, 146 L.Ed.2d 389, where defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law. Here, however, respondent seeks relief from counsel's failure to meet a valid legal standard. Third, petitioner seeks to preserve the conviction by arguing that the Sixth Amendment's purpose is to ensure a conviction's reliability, but this argument fails to comprehend the full scope of the Sixth Amendment and is refuted by precedent. Here, the question is the fairness or reliability not of the trial but of the processes that preceded it, which caused respondent to lose benefits he would have received but for counsel's ineffective assistance. Furthermore, a reliable trial may not foreclose relief when counsel has failed to assert rights that may have altered the outcome. See *Kimmelman v. Morrison*, 477 U.S. 365, 379, 106 S.Ct. 2574, 91 L.Ed.2d 305. Petitioner's position that a fair trial wipes clean ineffective assistance during plea bargaining also ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. See *Missouri v. Frye*, —U.S. —, 132 S.Ct. 1399, — L.Ed.2d —. Pp. 1384 – 1388.

2. Where a defendant shows ineffective assistance has caused the rejection of a plea leading to a more severe sentence at trial, the remedy must "neutralize the taint" of a constitutional violation, *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 66 L.Ed.2d 564, but must not grant a windfall to the defendant or needlessly squander the resources the State properly invested in the criminal prosecution, see *United States v. Mechanik*, 475 U.S. 66, 72, 106 S.Ct. 938, 89 L.Ed.2d 50. If the sole advantage is that the defendant would have received a lesser sentence under the plea, the court should have an evidentiary hearing to determine whether the defendant would have accepted the plea. If so, the court may exercise discretion in determining whether the defendant should receive the term offered in the plea, the sentence received at trial, or something in between. However, resentencing based on the conviction at trial may not

suffice, e.g., where the offered guilty plea was for less serious counts than the ones for which a defendant was convicted after trial, or where a mandatory sentence confines a judge's sentencing discretion. In these circumstances, the proper remedy may be to require the prosecution to reoffer the plea. The judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea, or leave the conviction undisturbed. In either situation, a court must weigh various factors. Here, it suffices to give two relevant considerations. First, a court may take account of a defendant's earlier **\*\*1382** expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to disregard any information concerning the crime discovered after the plea offer was made. Petitioner argues that implementing a remedy will open the floodgates to litigation by defendants seeking to unsettle their convictions, but in the 30 years that courts have recognized such claims, there has been no indication that the system is overwhelmed or that defendants are receiving windfalls as a result of strategically timed *Strickland* claims. In addition, the prosecution and trial courts may adopt measures to help ensure against meritless claims. See *Frye, ante*, at —, 132 S.Ct. 1399. Pp. 1388 – 1390.

3. This case arises under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), but because the Michigan Court of Appeals' analysis of respondent's ineffective-assistance-of-counsel claim was contrary to clearly established federal law, AEDPA presents no bar to relief. Respondent has satisfied *Strickland*'s two-part test. The parties concede the fact of deficient performance. And respondent has shown that but for that performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, he received a minimum sentence 3½ times greater than he would have received under the plea. As a remedy, the District Court ordered specific performance of the plea agreement, but the correct remedy is to order the State to reoffer the plea. If respondent accepts the offer, the state trial court can exercise its discretion in determining whether to vacate respondent's convictions and resentence pursuant to the plea agreement, to vacate only some of the convictions and resentence accordingly, or to leave the conviction and sentence resulting from the trial undisturbed. Pp. 1390 – 1391.

 376 Fed.Appx. 563, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in

which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which ROBERTS, C.J., joined as to all but Part IV. ALITO, J., filed a dissenting opinion.

### Attorneys and Law Firms

John J. Bursch, Solicitor General, for Petitioner.

William M. Jay, for the United States, as amicus curiae, by special leave of the Court, supporting the Petitioner.

Valerie R. Newman, Detroit, MI, appointed by this Court, for the Respondent.

Bill Schuette, Attorney General, John J. Bursch, Michigan Solicitor General, Counsel of Record, Lansing, MI, B. Eric Restuccia, Michigan Deputy Solicitor General, Joel D. McGormley, Appellate Division Chief, for Petitioner.

Jeffrey T. Green, Karen S. Smith, Brian A. Fox, Sidley Austin LLP, Washington, DC, Sarah O'Rourke Schrup, Chicago, IL, Valerie R. Newman, Jacqueline J. McCann, State Appellate Defender Office, Detroit, MI, for Respondent Anthony Cooper.

### Opinion

Justice KENNEDY delivered the opinion of the Court.

\*160 In this case, as in  *Missouri v. Frye*, — U.S. —, 132 S.Ct. 1399, —L.Ed.2d — (2012), also decided today, a criminal \*\*1383 defendant seeks a remedy when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome. In *Frye*, defense counsel did not inform the defendant of the plea offer; and after the offer lapsed the defendant still pleaded guilty, but on more severe terms. Here, the favorable plea offer was reported to the client but, on advice of counsel, was rejected. In *Frye* there was a later guilty plea. Here, after the plea offer had been rejected, there was a full and fair trial before a jury. After a guilty verdict, the defendant received a sentence harsher than that offered in the rejected plea bargain. The instant case comes to the Court with the concession that counsel's advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment, applicable to the States through the Fourteenth Amendment.

### I

On the evening of March 25, 2003, respondent pointed a gun toward Kali Mundy's head and fired. From the record, it is unclear why respondent did this, and at trial it was suggested \*161 that he might have acted either in self-defense or in defense of another person. In any event the shot missed and Mundy fled. Respondent followed in pursuit, firing repeatedly. Mundy was shot in her buttock, hip, and abdomen but survived the assault.

Respondent was charged under Michigan law with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender. On two occasions, the prosecution offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two, in exchange for a guilty plea. In a communication with the court respondent admitted guilt and expressed a willingness to accept the offer. Respondent, however, later rejected the offer on both occasions, allegedly after his attorney convinced him that the prosecution would be unable to establish his intent to murder Mundy because she had been shot below the waist. On the first day of trial the prosecution offered a significantly less favorable plea deal, which respondent again rejected. After trial, respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment.

In a so-called *Ginther* hearing before the state trial court, see  *People v. Ginther*, 390 Mich. 436, 212 N.W.2d 922 (1973), respondent argued his attorney's advice to reject the plea constituted ineffective assistance. The trial judge rejected the claim, and the Michigan Court of Appeals affirmed.  *People v. Cooper*, No. 250583, 2005 WL 599740 (Mar. 15, 2005) (*per curiam*), App. to Pet. for Cert. 44a. The Michigan Court of Appeals rejected the claim of ineffective assistance of counsel on the ground that respondent knowingly and intelligently rejected two plea offers and chose to go to trial. The Michigan Supreme Court denied respondent's application for leave to file an appeal. *People v. Cooper*, 474 Mich. 905, 705 N.W.2d 118 (2005) (table).

\*162 Respondent then filed a petition for federal habeas relief under  28 U.S.C. § 2254, renewing his ineffective-assistance-of-counsel claim. After finding, as

required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), that the Michigan Court of Appeals had unreasonably applied the constitutional standards for effective assistance of counsel laid out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and **\*\*1384** *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the District Court granted a conditional writ. *Cooper v. Lafler*, No. 06–11068, 2009 WL 817712, \*10 (E.D.Mich., Mar. 26, 2009), App. to Pet. for Cert. 41a–42a. To remedy the violation, the District Court ordered “specific performance of [respondent’s] original plea agreement, for a minimum sentence in the range of fifty-one to eighty-five months.” *Id.*, at \*9, App. to Pet. for Cert. 41a.

The United States Court of Appeals for the Sixth Circuit affirmed, 376 Fed.Appx. 563 (2010), finding “[e]ven full deference under AEDPA cannot salvage the state court’s decision,” *id.*, at 569. Applying *Strickland*, the Court of Appeals found that respondent’s attorney had provided deficient performance by informing respondent of “an incorrect legal rule,” 376 Fed.Appx., at 570–571, and that respondent suffered prejudice because he “lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him.” *Id.*, at 573. This Court granted certiorari. 562 U.S. —, 131 S.Ct. 856, 178 L.Ed.2d 622 (2011).

II

A

[1] [2] [3] [4] Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. *Frye, ante*, at 1386 – 1387, 132 S.Ct. 1399; see also *Padilla v. Kentucky*, 559 U.S. —, —, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010); *Hill, supra*, at 57, 106 S.Ct. 366. During plea negotiations defendants are “entitled to the effective assistance of competent counsel.” *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). In *Hill*, the Court held “the two-part *Strickland v. Washington*

**\*163** test applies to challenges to guilty pleas based on ineffective assistance of counsel.” 474 U.S., at 58, 106 S.Ct. 366. The performance prong of *Strickland* requires a defendant to show “ ‘that counsel’s representation fell below an objective standard of reasonableness.’ ” 474 U.S., at 57, 106 S.Ct. 366 (quoting *Strickland*, 466 U.S., at 688, 104 S.Ct. 2052). In this case all parties agree the performance of respondent’s counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. In light of this concession, it is unnecessary for this Court to explore the issue.

The question for this Court is how to apply *Strickland*’s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.

B

[5] [6] To establish *Strickland* prejudice a defendant must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694, 104 S.Ct. 2052. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. See *Frye, ante*, at 1388 – 1389, 132 S.Ct. 1399 (noting that *Strickland*’s inquiry, as applied to advice with respect to plea bargains, turns on “whether ‘the result of the proceeding would have been different’ ” (quoting *Strickland, supra*, at 694, 104 S.Ct. 2052)); see also *Hill*, 474 U.S., at 59, 106 S.Ct. 366 (“The ... ‘prejudice,’ requirement ... focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process”). In *Hill*, when evaluating the petitioner’s claim that ineffective assistance led to the improvident acceptance of a guilty plea, the Court required the petitioner to show “that there is a reasonable probability that, but for counsel’s errors, **\*\*1385** [the defendant] would not have pleaded guilty and would have insisted on going to trial.” *Ibid.*

[7] In contrast to *Hill*, here the ineffective advice led not to an offer’s acceptance but to its rejection. Having to stand **\*164** trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show

that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Here, the Court of Appeals for the Sixth Circuit agreed with that test for *Strickland* prejudice in the context of a rejected plea bargain. This is consistent with the test adopted and applied by other appellate courts without demonstrated difficulties or systemic disruptions. See 376 Fed.Appx., at 571–573; see also, *e.g.*, *United States v. Rodriguez Rodriguez*, 929 F.2d 747, 753, n. 1 (C.A.1 1991) (*per curiam*); *United States v. Gordon*, 156 F.3d 376, 380–381 (C.A.2 1998) (*per curiam*); *United States v. Day*, 969 F.2d 39, 43–45 (C.A.3 1992); *Beckham v. Wainwright*, 639 F.2d 262, 267 (C.A.5 1981); *Julian v. Bartley*, 495 F.3d 487, 498–500 (C.A.7 2007); *Wanatee v. Ault*, 259 F.3d 700, 703–704 (C.A.8 2001); *Nunes v. Mueller*, 350 F.3d 1045, 1052–1053 (C.A.9 2003); *Williams v. Jones*, 571 F.3d 1086, 1094–1095 (C.A.10 2009) (*per curiam*); *United States v. Gaviria*, 116 F.3d 1498, 1512–1514 (C.A.D.C.1997) (*per curiam*).

Petitioner and the Solicitor General propose a different, far more narrow, view of the Sixth Amendment. They contend there can be no finding of *Strickland* prejudice arising from plea bargaining if the defendant is later convicted at a fair trial. The three reasons petitioner and the Solicitor General offer for their approach are unpersuasive.

[8] [9] [10] [11] [12] [13] First, petitioner and the Solicitor General claim that the sole purpose of the Sixth Amendment is to protect the right to a fair trial. Errors before trial, they argue, are not cognizable under the Sixth Amendment unless they affect the fairness \*165 of the trial itself. See Brief for Petitioner 12–21; Brief for United States as *Amicus Curiae* 10–12. The Sixth Amendment, however, is not so narrow in its reach. Cf. *Frye, ante*, at 1388, 132 S.Ct. 1399 (holding that a defendant can show prejudice under *Strickland* even absent a showing that the deficient performance precluded him from going to trial). The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though “counsel’s absence [in these

stages] may derogate from the accused’s right to a fair trial.” *United States v. Wade*, 388 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. See, *e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see \*1386 *Glover v. United States*, 531 U.S. 198, 203–204, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001); *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), and capital cases, see *Wiggins v. Smith*, 539 U.S. 510, 538, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Even though sentencing does not concern the defendant’s guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because “any amount of [additional] jail time has Sixth Amendment significance.” *Glover, supra*, at 203, 121 S.Ct. 696.

The Court, moreover, has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue. Thus, in *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), the deliberate exclusion of all African-Americans from a grand jury was prejudicial because a defendant \*166 may have been tried on charges that would not have been brought at all by a properly constituted grand jury. *Id.*, at 263, 106 S.Ct. 617; see *Ballard v. United States*, 329 U.S. 187, 195, 67 S.Ct. 261, 91 L.Ed. 181 (1946) (dismissing an indictment returned by a grand jury from which women were excluded); see also *Stirone v. United States*, 361 U.S. 212, 218–219, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) (reversing a defendant’s conviction because the jury may have based its verdict on acts not charged in the indictment). By contrast, in *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), the complained-of error was a violation of a grand jury rule meant to ensure probable cause existed to believe a defendant was guilty. A subsequent trial, resulting in a verdict of guilt, cured this error. See *id.*, at 72–73, 106 S.Ct. 938.

[14] In the instant case respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea negotiation process. Respondent received a more severe sentence at trial, one 3 ½ times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.

Second, petitioner claims this Court refined *Strickland*'s prejudice analysis in *Fretwell* to add an additional requirement that the defendant show that ineffective assistance of counsel led to his being denied a substantive or procedural right. Brief for Petitioner 12–13. The Court has rejected the argument that *Fretwell* modified *Strickland* before and does so again now. See *Williams v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (“The Virginia Supreme Court erred in holding that our decision in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), modified or in some way supplanted the rule set down in *Strickland*”); see also *Glover, supra*, at 203, 121 S.Ct. 696 (“The Court explained last Term \*167 [in *Williams*] that our holding in *Lockhart* does not supplant the *Strickland* analysis”).

[15] *Fretwell* could not show *Strickland* prejudice resulting from his attorney's failure to object to the use of a sentencing factor the Eighth Circuit had erroneously (and temporarily) found to be impermissible. *Fretwell*, 506 U.S., at 373, 113 S.Ct. 838. Because the objection upon which his ineffective-assistance-of-counsel claim was premised was meritless, *Fretwell* could not demonstrate an error entitling him to relief. The case presented the “unusual circumstance where the defendant attempts to demonstrate prejudice \*1387 based on considerations that, as a matter of law, ought not inform the inquiry.” *Ibid.* (O'Connor, J., concurring). See also *ibid.* (recognizing “[t]he determinative question—whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different—remains unchanged” (internal quotation marks and citation omitted)). It is for this same reason a defendant cannot show prejudice based on counsel's refusal to present perjured testimony, even if such testimony might have affected the outcome of the case. See *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) (holding first that counsel's refusal to present perjured testimony breached

no professional duty and second that it cannot establish prejudice under *Strickland*).

[16] Both *Fretwell* and *Nix* are instructive in that they demonstrate “there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate ‘prejudice.’ ” *Williams, supra*, at 391–392, 120 S.Ct. 1495, because defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law. Here, however, the injured client seeks relief from counsel's failure to meet a valid legal standard, not from counsel's refusal to violate it. He maintains that, absent ineffective counsel, he would have accepted a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice. The favorable \*168 sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel. See Bibas, *Regulating the Plea–Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L.Rev. 1117, 1138 (2011) (“The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain”); see also *Frye, ante*, at 1386 – 1387, 132 S.Ct. 1399. If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

[17] [18] It is, of course, true that defendants have “no right to be offered a plea ... nor a federal right that the judge accept it.” *Frye, ante*, at 1388 – 1389, 132 S.Ct. 1399. In the circumstances here, that is beside the point. If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise. Much the same reasoning guides cases that find criminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all. See *Evitts*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821; see also *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). As in those cases, “[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.” *Evitts, supra*, at 401, 105 S.Ct. 830.

[19] Third, petitioner seeks to preserve the conviction obtained by the State by arguing that the purpose of the Sixth Amendment is to ensure “the reliability of [a] conviction following trial.” Brief for Petitioner 13. This argument, too, fails to comprehend the full scope of the Sixth Amendment’s protections; and it is refuted \*\*1388 by precedent. *Strickland* recognized \*169 “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” 466 U.S., at 686, 104 S.Ct. 2052. The goal of a just result is not divorced from the reliability of a conviction, see *United States v. Cronin*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); but here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel’s ineffective assistance.

[20] There are instances, furthermore, where a reliable trial does not foreclose relief when counsel has failed to assert rights that may have altered the outcome. In *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), the Court held that an attorney’s failure to timely move to suppress evidence during trial could be grounds for federal habeas relief. The Court rejected the suggestion that the “failure to make a timely request for the exclusion of illegally seized evidence” could not be the basis for a Sixth Amendment violation because the evidence “is ‘typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.’ ” *Id.*, at 379, 106 S.Ct. 2574 (quoting *Stone v. Powell*, 428 U.S. 465, 490, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)). “The constitutional rights of criminal defendants,” the Court observed, “are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.” 477 U.S., at 380, 106 S.Ct. 2574. The same logic applies here. The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney’s deficient performance during plea bargaining.

In the end, petitioner’s three arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That \*170 position ignores the reality that criminal justice today is for the most part a system of pleas, not a system

of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See *Frye, ante*, at 1386, 132 S.Ct. 1399. As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences. *Ibid.* (“[I]t is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process”).

### C

Even if a defendant shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence, there is the question of what constitutes an appropriate remedy. That question must now be addressed.

[21] Sixth Amendment remedies should be “tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.” *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). Thus, a remedy must “neutralize the taint” of a constitutional violation, *id.*, at 365, 101 S.Ct. 665, while at the same time not grant a windfall to the defendant or needlessly squander the considerable \*\*1389 resources the State properly invested in the criminal prosecution. See *Mechanik*, 475 U.S., at 72, 106 S.Ct. 938 (“The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences”).

[22] The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a \*171 lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel’s errors he would have accepted the plea. If the showing is made, the court may exercise discretion in

determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.

[23] In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. See, e.g., *Williams*, 571 F.3d, at 1088; *Riggs v. Fairman*, 399 F.3d 1179, 1181 (C.A.9 2005). In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.

In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion. At this point, however, it suffices to note two considerations that are of relevance.

[24] [25] First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here \*172 to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.

Petitioner argues that implementing a remedy here will open the floodgates to litigation by defendants seeking to unsettle their convictions. See Brief for Petitioner 20. Petitioner's concern is misplaced. Courts have recognized claims of this sort for over 30 years, see *supra*, at 1384 – 1385, and yet there is no indication that \*\*1390 the system is overwhelmed by these types of suits or that defendants are receiving windfalls as a result of strategically timed *Strickland* claims. See also *Padilla*, 559 U.S., at —, 130 S.Ct. at 1484–1485 (“We confronted a similar ‘floodgates’ concern in *Hill*,” but a

“flood did not follow in that decision's wake”). In addition, the “prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction.” *Frye, ante*, at 1408 – 1409, 132 S.Ct. 1399. See also *ibid.* (listing procedures currently used by various States). This, too, will help ensure against meritless claims.

### III

[26] The standards for ineffective assistance of counsel when a defendant rejects a plea offer and goes to trial must now be applied to this case. Respondent brings a federal collateral challenge to a state-court conviction. Under AEDPA, a federal court may not grant a petition for a writ of habeas corpus unless the state court's adjudication on the merits was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme \*173 Court of the United States.” 28 U.S.C. § 2254(d)(1). A decision is contrary to clearly established law if the state court “applies a rule that contradicts the governing law set forth in [Supreme Court] cases.” *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (opinion for the Court by O'Connor, J.). The Court of Appeals for the Sixth Circuit could not determine whether the Michigan Court of Appeals addressed respondent's ineffective-assistance-of-counsel claim or, if it did, “what the court decided, or even whether the correct legal rule was identified.” 376 Fed.Appx., at 568–569.

[27] The state court's decision may not be quite so opaque as the Court of Appeals for the Sixth Circuit thought, yet the federal court was correct to note that AEDPA does not present a bar to granting respondent relief. That is because the Michigan Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. Rather than applying *Strickland*, the state court simply found that respondent's rejection of the plea was knowing and voluntary. *Cooper*, 2005 WL 599740, \*1, App. to Pet. for Cert. 45a. An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel. See *Hill*, 474 U.S., at 57–59, 106 S.Ct. at 370 (applying *Strickland* to assess a claim of ineffective assistance of

counsel arising out of the plea negotiation process). After stating the incorrect standard, moreover, the state court then made an irrelevant observation about counsel's performance at trial and mischaracterized respondent's claim as a complaint that his attorney did not obtain a more favorable plea bargain. By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law. And in that circumstance the federal courts in this habeas action can determine the principles necessary to grant relief. See  *Panetti v. Quarterman*, 551 U.S. 930, 948, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007).

\*174 Respondent has satisfied  *Strickland*'s two-part test. Regarding performance, perhaps it could be accepted that it is unclear whether respondent's counsel believed respondent could not be convicted for assault with intent to murder as a matter of law because the shots hit Mundy below the waist, or whether he simply \*\*1391 thought this would be a persuasive argument to make to the jury to show lack of specific intent. And, as the Court of Appeals for the Sixth Circuit suggested, an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance. Here, however, the fact of deficient performance has been conceded by all parties. The case comes to us on that assumption, so there is no need to address this question.

[28] As to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. See  376 Fed.Appx., at 571–572. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3½ times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied.

[29] As a remedy, the District Court ordered specific performance of the original plea agreement. The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. See Mich. Ct. Rule 6.302(C)(3) (2011) (“If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may ... reject the agreement”). Today's decision \*175

leaves open to the trial court how best to exercise that discretion in all the circumstances of the case.

The judgment of the Court of Appeals for the Sixth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Justice SCALIA, with whom Justice THOMAS joins, and with whom THE CHIEF JUSTICE joins as to all but Part IV, dissenting.

*“If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.”* *Ante*, at 1387.

*“The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question.... Bargaining is, by its nature, defined to a substantial degree by personal style.... This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects....”*

 *Missouri v. Frye*, *ante*, at 1408, 132 S.Ct. 1399.

With those words from this and the companion case, the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law. The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by this Court in pursuit of perfect justice. See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L.Rev. 929 (1965). The Court now moves to bring perfection to the alternative in which prosecutors and \*\*1392 defendants have sought relief. Today's opinions deal with only two aspects of counsel's plea-bargaining inadequacy, and leave \*176 other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process. And it would be foolish to think that “constitutional” rules governing *counsel*'s behavior will not be followed by rules governing the *prosecution*'s behavior in the plea-bargaining process that the Court today announces “*is the criminal justice system,*”  *Frye*, *ante*, at 1407, 132 S.Ct. 1399 (quoting

approvingly from Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992) (hereinafter Scott)). Is it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from “the criminal justice system”?

Anthony Cooper received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. The Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney’s allegedly incompetent advice regarding a plea offer *caused* him to receive a full and fair trial. That conclusion is foreclosed by our precedents. Even if it were not foreclosed, the constitutional right to effective plea-bargainers that it establishes is at least a new rule of law, which does not undermine the Michigan Court of Appeals’ decision and therefore cannot serve as the basis for habeas relief. And the remedy the Court announces—namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all—is unheard-of and quite absurd for violation of a constitutional right. I respectfully dissent.

## I

This case and its companion, *Missouri v. Frye*, — U.S. —, 132 S.Ct. 1399, — L.Ed.2d —, raise relatively straightforward questions about the scope of the right to effective assistance of counsel. Our case law \*177 originally derived that right from the Due Process Clause, and its guarantee of a fair trial, see *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), but the seminal case of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), located the right within the Sixth Amendment. As the Court notes, *ante*, at 1394, the right to counsel does not begin at trial. It extends to “any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” *United States v. Wade*, 388 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Applying that principle, we held that the “entry of a guilty plea, whether to a misdemeanor or a felony

charge, ranks as a ‘critical stage’ at which the right to counsel adheres.” *Iowa v. Tovar*, 541 U.S. 77, 81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004); see also *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). And it follows from this that *acceptance* of a plea offer is a critical stage. That, and nothing more, is the point of the Court’s observation in *Padilla v. Kentucky*, 559 U.S. —, —, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010), that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” The defendant in *Padilla* had accepted the plea bargain and pleaded guilty, abandoning his right to a fair trial; he was entitled to advice of competent counsel before he did \*\*1393 so. The Court has never held that the rule articulated in *Padilla*, *Tovar*, and *Hill* extends to all aspects of plea negotiations, requiring not just advice of competent counsel before the defendant accepts a plea bargain and pleads guilty, but also the advice of competent counsel before the defendant rejects a plea bargain and stands on his constitutional right to a fair trial. The latter is a vast departure from our past cases, protecting not just the constitutionally prescribed right to a fair adjudication of guilt and punishment, but a judicially invented right to effective plea bargaining.

It is also apparent from *Strickland* that bad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense. *Strickland* explained that “[i]n \*178 giving meaning to the requirement [of effective assistance], ... we must take its purpose—to ensure a fair trial—as the guide.” 466 U.S., at 686, 104 S.Ct. 2052. Since “the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial,” *United States v. Cronin*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the “benchmark” inquiry in evaluating any claim of ineffective assistance is whether counsel’s performance “so undermined the proper functioning of the adversarial process” that it failed to produce a reliably “just result.” *Strickland*, 466 U.S., at 686, 104 S.Ct. 2052. That is what *Strickland*’s requirement of “prejudice” consists of: Because the right to effective assistance has as its purpose the assurance of a fair trial, the right is not infringed unless counsel’s mistakes call into question the basic justice of a defendant’s conviction or sentence. That has been, until today, entirely clear. A defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*, at 687, 104 S.Ct. 2052. See also *Gonzalez-Lopez*, *supra*, at 147, 126 S.Ct. 2557.

Impairment of fair trial is how we distinguish between unfortunate attorney error and error of constitutional significance.<sup>1</sup>

**\*\*1394 \*179** To be sure, *Strickland* stated a rule of thumb for measuring prejudice which, applied blindly and out of context, could support the Court’s holding today: “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S., at 694, 104 S.Ct. 2052. *Strickland* itself cautioned, however, that its test was not to be applied in a mechanical fashion, and that courts were not to divert their “ultimate focus” from “the fundamental fairness of the proceeding whose result is being challenged.” *Id.*, at 696, 104 S.Ct. 2052. And until today we have followed that course.

In *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), the deficient performance at issue was the failure of counsel for a defendant who had been sentenced to death to make an objection that would have produced a sentence of life imprisonment instead. The objection was fully supported by then-extant Circuit law, so that the sentencing court would have been compelled to sustain it, producing a life sentence that principles of double jeopardy would likely make final. See *id.*, at 383–385, 113 S.Ct. 838 (STEVENS, J., dissenting); *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). By the time *Fretwell*’s claim came before us, however, the Circuit law had been overruled in light of one of our cases. We determined that a prejudice analysis “focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable,” would be defective. *Fretwell*, 506 U.S., at 369, 113 S.Ct. 838. Because counsel’s error did not **\*180** “deprive the defendant of any substantive or procedural right to which the law entitles him,” the defendant’s sentencing proceeding was fair and its result was reliable, even though counsel’s error may have affected its outcome. *Id.*, at 372, 113 S.Ct. 838. In *Williams v. Taylor*, 529 U.S. 362, 391–393, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), we explained that even though *Fretwell* did not mechanically apply an outcome-based test for prejudice, its reasoning was perfectly consistent with *Strickland*. “*Fretwell*’s counsel had not deprived him of any substantive or procedural right to which the law entitled him.” 529 U.S. at 392, 120 S.Ct. 1495.<sup>2</sup>

Those precedents leave no doubt about the answer to the question presented here. **\*\*1395** As the Court itself

observes, a criminal defendant has no right to a plea bargain. *Ante*, at 1395 – 1396. “[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.” *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). Counsel’s mistakes in this case thus did not “deprive the defendant of **\*181** a substantive or procedural right to which the law entitles him,” *Williams, supra*, at 393, 120 S.Ct. 1495. Far from being “beside the point,” *ante*, at 1406, that is critical to correct application of our precedents. Like *Fretwell*, this case “concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry,” 506 U.S., at 373, 113 S.Ct. 838 (O’Connor, J., concurring); he claims “that he might have been denied ‘a right the law simply does not recognize,’ ” *id.*, at 375, 113 S.Ct. 838 (same). *Strickland, Fretwell*, and *Williams* all instruct that the pure outcome-based test on which the Court relies is an erroneous measure of cognizable prejudice. In ignoring *Strickland*’s “ultimate focus ... on the fundamental fairness of the proceeding whose result is being challenged,” 466 U.S., at 696, 104 S.Ct. 2052, the Court has lost the forest for the trees, leading it to accept what we have previously rejected, the “novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.” *Weatherford, supra*, at 561, 97 S.Ct. 837.

## II

Novelty alone is the second, independent reason why the Court’s decision is wrong. This case arises on federal habeas, and hence is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Since, as the Court acknowledges, the Michigan Court of Appeals adjudicated Cooper’s ineffective-assistance claim on the merits, AEDPA bars federal courts from granting habeas relief unless that court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). Yet the Court concludes that § 2254(d)(1) does not bar relief here, because “[b]y failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim

respondent raised, the state court’s adjudication was contrary to clearly established federal law.” *Ante*, at 1390. That is not so.

\*182 The relevant portion of the Michigan Court of Appeals decision reads as follows:

“To establish ineffective assistance, the defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation so prejudiced the defendant that he was deprived of a fair trial. With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel’s errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable.

“Defendant challenges the trial court’s finding after a *Ginther* hearing that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant’s contentions that defense counsel’s \*\*1396 representation was ineffective because he rejected a defense based on [a] claim of self-defense and because he did not obtain a more favorable plea bargain for defendant.” *People v. Cooper*, No. 250583 (Mar. 15, 2005), App. to Pet. for Cert. 45a, 2005 WL 599740, [at] \*1 (*per curiam*) (footnote and citations omitted).

The first paragraph above, far from ignoring *Strickland*, recites its standard with a good deal more accuracy than the Court’s opinion. The second paragraph, which is presumably an application of the standard recited in the first, says that “defendant knowingly and intelligently rejected two plea offers and chose to go to trial.” This can be regarded \*183 as a denial that there was anything “fundamentally unfair” about Cooper’s conviction and sentence, so that no *Strickland* prejudice had been shown. On the other hand, the entire second paragraph can be regarded as a contention that Cooper’s claims of inadequate representation were unsupported by the record. The state court’s analysis was admittedly not a model of clarity, but federal habeas corpus is a “guard against extreme malfunctions in the state criminal justice systems,” not a license to penalize a state court for its opinion-writing technique. *Harrington v. Richter*, 562 U.S. —, —, 131 S.Ct. 770, 786, 178 L.Ed.2d 624

(2011) (internal quotation marks omitted). The Court’s readiness to find error in the Michigan court’s opinion is “inconsistent with the presumption that state courts know and follow the law,” *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (*per curiam*), a presumption borne out here by the state court’s recitation of the correct legal standard.

Since it is ambiguous whether the state court’s holding was based on a lack of prejudice or rather the court’s factual determination that there had been no deficient performance, to provide relief under AEDPA this Court must conclude that *both* holdings would have been unreasonable applications of clearly established law. See *Premo v. Moore*, 562 U.S. —, —, 131 S.Ct. 733, 740–741, 178 L.Ed.2d 649 (2011). The first is impossible of doing, since this Court has never held that a defendant in Cooper’s position can establish *Strickland* prejudice. The Sixth Circuit thus violated AEDPA in granting habeas relief, and the Court now does the same.

### III

It is impossible to conclude discussion of today’s extraordinary opinion without commenting upon the remedy it provides for the unconstitutional conviction. It is a remedy unheard-of in American jurisprudence—and, I would be willing to bet, in the jurisprudence of any other country.

The Court requires Michigan to “reoffer the plea agreement” that was rejected because of bad advice from counsel. *Ante*, at 1391. That would indeed be a powerful remedy—but \*184 for the fact that Cooper’s acceptance of that reoffered agreement is not conclusive. Astoundingly, “the state trial court can then *exercise its discretion* in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, *or to leave the convictions and sentence from trial undisturbed.*” *Ibid.* (emphasis added).

Why, one might ask, require a “reoffer” of the plea agreement, and its acceptance by the defendant? If the district court finds (as a necessary element, supposedly, of *Strickland* prejudice) that Cooper *would have accepted* the original offer, and would thereby have avoided trial and conviction, why not skip the reoffer-and-reacceptance

minuet and simply leave it to the **\*\*1397** discretion of the state trial court what the remedy shall be? The answer, of course, is camouflage. Trial courts, after all, *regularly* accept or reject plea agreements, so there seems to be nothing extraordinary about their accepting or rejecting the new one mandated by today's decision. But the acceptance or rejection of a plea agreement that has no status whatever under the United States Constitution is worlds apart from what this is: "discretionary" specification of a remedy for an unconstitutional criminal conviction.

To be sure, the Court asserts that there are "factors" which bear upon (and presumably limit) exercise of this discretion—factors that it is not prepared to specify in full, much less assign some determinative weight. "Principles elaborated over time in decisions of state and federal courts, and in statutes and rules" will (in the Court's rosy view) sort all that out. *Ante*, at 1389. I find it extraordinary that "statutes and rules" can specify the remedy for a criminal defendant's unconstitutional conviction. Or that the remedy for an unconstitutional conviction should *ever* be subject *at all* to a trial judge's discretion. Or, finally, that the remedy could *ever* include no remedy at all.

**\*185** I suspect that the Court's squeamishness in fashioning a remedy, and the incoherence of what it comes up with, is attributable to its realization, deep down, that there is no real constitutional violation here anyway. The defendant has been fairly tried, lawfully convicted, and properly sentenced, and *any* "remedy" provided for this will do nothing but undo the just results of a fair adversarial process.

#### IV

In many—perhaps most—countries of the world, American-style plea bargaining is forbidden in cases as serious as this one, even for the purpose of obtaining testimony that enables conviction of a greater malefactor, much less for the purpose of sparing the expense of trial. See, *e.g.*, *World Plea Bargaining* 344, 363–366 (S. Thaman ed. 2010). In Europe, many countries adhere to what they aptly call the "legality principle" by requiring prosecutors to charge all prosecutable offenses, which is typically incompatible with the practice of charge-bargaining. See, *e.g.*, *id.*, at xxii; Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78

Mich. L.Rev. 204, 210–211 (1979) (describing the "Legalitätsprinzip," or rule of compulsory prosecution, in Germany). Such a system reflects an admirable belief that the law is the law, and those who break it should pay the penalty provided.

In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt. See, *e.g.*, **\*186** Alschuler, *Plea Bargaining and its History*, 79 Colum. L.Rev. 1, 38 (1979).

Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. It is no longer a somewhat embarrassing adjunct to our criminal justice system; rather, as the Court announces in the companion case to this one, " 'it is the criminal justice system.' "  *Frye,Iante*, at 1407, 132 S.Ct. 1399 (quoting approvingly from Scott 1912). Thus, even **\*\*1398** though there is no doubt that the respondent here is guilty of the offense with which he was charged; even though he has received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and (in Michigan as in most States<sup>3</sup>) the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid because he was deprived of his *constitutional entitlement* to plea-bargain.

I am less saddened by the outcome of this case than I am by what it says about this Court's attitude toward criminal justice. The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his *constitutional rights* have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.

\* \* \*

Today's decision upends decades of our cases, violates a federal statute, and opens a whole new boutique of

constitutional jurisprudence (“plea-bargaining law”) without even \*187 specifying the remedies the boutique offers. The result in the present case is the undoing of an adjudicatory process that worked *exactly* as it is supposed to. Released felon Anthony Cooper, who shot repeatedly and gravely injured a woman named Kali Mundy, was tried and convicted for his crimes by a jury of his peers, and given a punishment that Michigan’s elected representatives have deemed appropriate. Nothing about that result is unfair or unconstitutional. To the contrary, it is wonderfully just, and infinitely superior to the trial-by-bargain that today’s opinion affords constitutional status. I respectfully dissent.

Justice ALITO, dissenting.

For the reasons set out in Parts I and II of Justice SCALIA’s dissent, the Court’s holding in this case misapplies our ineffective-assistance-of-counsel case law and violates the requirements of the Antiterrorism and Effective Death Penalty Act of 1996. Respondent received a trial that was free of any identified constitutional error, and, as a result, there is no basis for concluding that respondent suffered prejudice and certainly not for granting habeas relief.

The weakness in the Court’s analysis is highlighted by its opaque discussion of the remedy that is appropriate when a plea offer is rejected due to defective legal representation. If a defendant’s Sixth Amendment rights are violated when deficient legal advice about a favorable plea offer causes the opportunity for that bargain to be

lost, the only logical remedy is to give the defendant the benefit of the favorable deal. But such a remedy would cause serious injustice in many instances, as I believe the Court tacitly recognizes. The Court therefore eschews the only logical remedy and relies on the lower courts to exercise sound discretion in determining what is to be done.

Time will tell how this works out. The Court, for its part, finds it unnecessary to define “the boundaries of proper discretion” in today’s opinion. *Ante*, at 1389. In my view, requiring \*188 the prosecution to renew \*\*1399 an old plea offer would represent an abuse of discretion in at least two circumstances: first, when important new information about a defendant’s culpability comes to light after the offer is rejected, and, second, when the rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources.

The lower court judges who must implement today’s holding may—and I hope, will—do so in a way that mitigates its potential to produce unjust results. But I would not depend on these judges to come to the rescue. The Court’s interpretation of the Sixth Amendment right to counsel is unsound, and I therefore respectfully dissent.

#### All Citations

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#### Footnotes

\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See  *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

<sup>1</sup> Rather than addressing the constitutional origins of the *right to effective counsel*, the Court responds to the broader claim (raised by no one) that “the sole purpose of the *Sixth Amendment* is to protect the right to a fair trial.”  *Ante*, at 1385 (emphasis added). Cf. Brief for United States as *Amicus Curiae* 10–12 (arguing that the “purpose of the *Sixth Amendment right to counsel* is to secure a fair trial” (emphasis added)); Brief for Petitioner 12–21 (same). To destroy that straw man, the Court cites cases in which violations of rights *other* than the right to effective counsel—and, perplexingly, even rights found outside the *Sixth Amendment* and the Constitution entirely—were not cured by a subsequent trial.  *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (violation of equal protection in grand jury selection);  *Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946) (violation of statutory scheme providing that women serve on juries);  *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) (violation of Fifth Amendment right to indictment by grand jury). Unlike the right to effective counsel, no

showing of prejudice is required to make violations of the rights at issue in *Vasquez*, *Ballard*, and *Stirone* complete. See *Vasquez*, *supra*, at 263–264, 106 S.Ct. 617 (“[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review”); *Ballard*, *supra*, at 195, 67 S.Ct. 261 (“[R]eversible error does not depend on a showing of prejudice in an individual case”); *Stirone*, *supra*, at 217, 80 S.Ct. 270 (“Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error”). Those cases are thus irrelevant to the question presented here, which is whether a defendant can establish *prejudice* under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), while conceding the fairness of his conviction, sentence, and appeal.

<sup>2</sup> *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), cited by the Court, *ante*, at 1396 – 1397, does not contradict this principle. That case, which predated *Fretwell* and *Williams*, considered whether our holding that Fourth Amendment claims fully litigated in state court cannot be raised in federal habeas “should be extended to Sixth Amendment claims of ineffective assistance of counsel where the principal allegation and manifestation of inadequate representation is counsel’s failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment.” 477 U.S., at 368, 106 S.Ct. 2574. Our negative answer to that question had nothing to do with the issue here. The parties in *Kimmelman* had not raised the question “whether the admission of illegally seized but reliable evidence can ever constitute ‘prejudice’ under *Strickland*”—a question similar to the one presented here—and the Court therefore did not address it. *Id.*, at 391, 106 S.Ct. 2574 (Powell, J., concurring in judgment); see also *id.*, at 380, 106 S.Ct. 2574. *Kimmelman* made clear, however, how the answer to that question is to be determined: “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution *that the trial was rendered unfair and the verdict rendered suspect*,” *id.*, at 374, 106 S.Ct. 2574 (emphasis added). “Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial ... will be granted the writ,” *id.*, at 382, 106 S.Ct. 2574 (emphasis added). In short, *Kimmelman*’s only relevance is to prove the Court’s opinion wrong.

<sup>3</sup> See *People v. Cooks*, 446 Mich. 503, 510, 521 N.W.2d 275, 278 (1994); 6 W. LaFave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* § 22.1(e) (3d ed. 2007 and Supp. 2011–2012).