STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges Karen M. Fort Hood, P.J., Patrick M. Meter, and Christopher M. Murray

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In re FORFEITURE OF BAIL BOND.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 146033

COREY DESHAWN GASTON,

Defendant,

and

YOU WALK BAIL BOND AGENCY,

Surety-Appellant.

Court of Appeals No. 305004
Third Circuit Court No. 07-020056-01-FC

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

JASON W. WILLIAMS (P-51503)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, MI 48226
(313) 224-8109

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The People accept and adopt appellant's statement of jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Does MCL 765.28(1) bar forfeiture of a surety bond when a court does not provide notice of the default within seven days of a defendant's failure to appear?

The Court of Appeals answered: No.
The People answer: No.
Defendant answers: Yes.

II.

Does MCR 6.106(I)(2) bar forfeiture of a surety bond when the court does not provide notice to the surety after the court revokes a release order?

The Court of Appeals answered: No.
The People answer: No.
Defendant answers: Yes.

III.

Is appellant's claim that MCL 500.3008 applies to surety bonds properly before the Court?

The issue was not before the Court of Appeals.
The People answer: No.
Defendant does not address the issue.

COUNTER-STATEMENT OF FACTS

In 2007, defendant Corey Deshawn Gaston abducted the ten-year-old victim from her bedroom. He pushed her out of her home through her bedroom window, and carried her to an abandoned house. 1b-4b, 16b. Defendant then led the victim to a different secluded area, removed her pajama pants and underwear, and sexually assaulted her. 4b-10b, 14b. Defendant ordered the victim to run, and she ran home and told her mother what happened. 10b-13b, 15b.

The People charged defendant with first-degree criminal sexual conduct,[1] second-degree criminal sexual conduct,[2] first-degree home invasion,[3] and kidnapping.[4] 10a.

Defendant's arraignment was on July 25, 2007,[5] and the district court remanded him to the custody of the sheriff's department the next day. 10a.

On October 11, 2007, the district court bound defendant over to circuit court as charged. 17b.

On November 6, 2007, the circuit court reduced defendant's bail to $200,000/ten percent cash or surety. 12a. Appellant You Walk Bail Bond Agency posted defendant's bond, and defendant was released from jail thereafter.[6]

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[1] MCL 750.520b(1)(a).

[2] MCL 750.520c(1)(a).

[3] MCL 750.110a.

[4] MCL 750.350.

[5] The magistrate set defendant's bail at $50,000/ten percent. 10a.

[6] Appellant's Brief on Appeal, p 1.

On November 30, 2007, the circuit court remanded the case to district court for the presentation of additional testimony. 12a. On January 4, 2008, the district court again bound defendant over to circuit court as charged. 13a.

On January 28, 2008, the People moved for reconsideration of defendant's bond and to remand defendant pending trial because testing of DNA extracted from a vaginal swab of the victim revealed that it was consistent with defendant's DNA. 18b-20b. On January 30, 2008, the circuit court granted the People's motion. 21b.

Defendant then seized on the opportunity provided by the court and You Walk Bail Bond Agency, and walked, or more likely ran, not to be heard from again. He did not appear for a predisposition conference on February 7, 2008, nor did he appear for trial scheduled for February 11, 2008. 13a. He currently is one of the United States Marshals' 15 Most Wanted.[7]

On February 11, 2008, the circuit court entered a Capias and Judgment, directing that defendant be taken into custody and remanded upon re-arrest. The order further provided "that the bond is forfeited and that judgment is entered in the amount of such bond against Principal and Surety." 22b.

On February 8, 2011, the circuit court entered a Notice of Bond Forfeiture Hearing, directing appellant to show cause why judgment should not be entered against it.

On April 8, 2011, appellant filed a motion to set aside the notice and discharge the bond based on the circuit court's failure to timely provide notice of the default. 13a.

The circuit court denied appellant's motion at hearing held on June 3, 2011, and entered judgment against appellant in the amount of $50,000. 23b-24b.

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[7] http://www.usmarshals.gov/investigations/most_wanted/index.html.

The Court of Appeals affirmed in an unpublished per curiam opinion issued on September 13, 2012.[8] The Court followed *In re Forfeiture of Bail Bond*[9] and held that the circuit court's failure to provide notice of the default within seven days of defendant's failure to appear, as required by MCL 765.28, did not prevent the court from entering judgment on the forfeited bond.[10] The Court rejected appellant's argument that the 2004 amendment of MCL 765.28, which eliminated the requirement of a motion before a court notified the surety, undermined *In re Forfeiture*.[11] The Court then concluded that the delay between a defendant's default and the notice did not provide relief under MCR 6.106(I)(2), the court rule governing forfeiture of a bond.[12]

On February 8, 2013, this Court granted appellant's application for leave to appeal. The Court directed the parties to address "(1) whether a court's failure to comply with the 7-day notice provision of MCL 765.28 bars forfeiture of a bail bond posted by a surety; and (2) whether *In re Forfeiture of Bail Bond*, 276 Mich App 482 (2007), holding that the 7-day notice provision is directory rather than mandatory, was correctly decided."[13]

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[8] *In re Forfeiture of Bail Bond*, unpublished per curiam opinion of the Court of Appeals, issued September 13, 2012 (Docket No. 305004).

[9] *In re Forfeiture of Bail Bond,* 276 Mich App 482; 740 NW2d 734 (2007).

[10] *In re Forfeiture of Bail Bond*, unpublished per curiam opinion of the Court of Appeals, issued September 13, 2012 (Docket No. 305004), slip op pp 2-4.

[11] *Id.* at 3.

[12] *Id.* at 4-5.

[13] *In re Forfeiture of Bail Bond,* __ Mich __; __ NW2d __; 2013 WL 1859124 (2013).

ARGUMENT

I.

Absent actual prejudice, discharge of a surety bond is not the appropriate sanction for a court's failure to comply with the requirement of MCL 765.28(1) that the court provide the surety with notice of the default within seven days of a defendant's failure to appear.

Standard of Review

The Court reviews issues of statutory interpretation de novo.[14]

Discussion

By its plain language, MCL 765.28(1) does not bar forfeiture of a surety bond when a court fails to provide the surety with notice of the default within seven days of a defendant's failure to appear. The statute provides:

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

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[14] *People v Likine,* 492 Mich 367, 387; 823 NW2d 50 (2012).

In *In re Forfeiture of Bail Bond*,[15] the Court of Appeals declined to construe the 7-day notice provision as creating a bar to further proceedings and entry of judgment where the court provided the notice after expiration of the period. The Court reasoned that while the term "shall" normally carries a mandatory connotation, it does not have that meaning in the context of a statute that creates a time limit for the performance of an official duty. The Court adhered to the rule of statutory construction that, absent statutory language expressly denying performance after a specified time, courts construe the statutory language as being directory. Applying that rule, the Court concluded that the failure to provide notice within seven days did not bar a court from entering judgment because MCL 765.28(1) does not expressly preclude that action.[16]

In re Forfeiture comports with the rules of statutory construction, which this Court follows when interpreting a statute.[17] The Court's goal is to discern and give effect to the intent of the Legislature,[18] and the Court is guided by the rules of statutory construction in making that determination.[19] Pertinent to this case is the general rule that "'if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory.'"[20]

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[15] *In re Forfeiture*, 276 Mich App 482.

[16] *Id.* at 494-495.

[17] *People v Jackson*, 487 Mich 783, 790; 790 NW2d 340 (2010).

[18] *Id.*

[19] *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994).

[20] *People v Smith*, 200 Mich App 237, 242; 504 NW2d 21 (1993), quoting 3 Sutherland, Statutory Construction (5th ed.), § 57.19, pp 47-48.

That rule, properly understood, concerns the appropriate sanction, if any, for noncompliance with a statutory directive, not whether a term such as "shall" creates a mandatory duty. In *Brock v Pierce County,*[21] the United States Supreme Court considered whether an act providing that the Secretary of Labor "shall" issue a final determination as to the misuse of funds by a grant recipient within 120 days after receiving a complaint precluded the Secretary from recovering those funds after the period had expired. The Court held that it did not. The Court explained: "We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act."[22] Finding no indication that Congress intended to remove the Secretary's enforcement powers if he failed to issue a final determination within 120 days, the Court concluded that the requirement, standing alone, did not divest the Secretary of jurisdiction to act after the period expired.[23]

The Court again adhered to those principles in *United States v James Daniel Good Real Property.*[24] In that case, the government filed an *in rem* action seeking to forfeit a house and land over four years after drugs were found there during the execution of a search warrant. Where

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[21] *Brock v Pierce Co,* 476 US 253; 106 S Ct 1834; 90 L Ed 2d 248 (1986).

[22] *Id.* at 260 (footnote omitted).

[23] *Id.* at 266.

[24] *United States v James Daniel Good Real Property,* 510 US 43; 114 S Ct 492; 126 L Ed 2d 490 (1993).

customs laws required an agent to report the seizure to a customs officer immediately, the officer to report to the United States Attorney promptly, and the Attorney General to cause the proper proceedings to be commenced forthwith, the respondent argued that forfeiture was barred. In considering the argument, the Court summarized its prior decisions as holding that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."[25] Applying that rule, the Court concluded that dismissal was not an appropriate sanction for a violation of the statutory provisions.[26]

Brock and *James Daniel Good Real Property* demonstrate that the question before this Court is not whether the word "shall" imposes a mandatory duty, which generally it does,[27] but whether the failure to comply with that duty bars further action by the circuit court and entry of judgment against a surety. That distinction–between a duty imposed by a statute and the appropriate sanction for noncompliance–is one that the United States Supreme Court recognizes and this Court should as well. In *United States v Montalvo-Murillo*,[28] the Court explained that "[t]here is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent." *Montalvo-Murillo* concerned the provision of the Bail Reform

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[25] *Id.* at 64.

[26] *Id.* at 64-65.

[27] *Stand Up for Democracy v Secretary of State,* 492 Mich 588, 601; 822 NW2d 159 (2012); *Burton v Reed City Hosp Corp,* 471 Mich 745, 752; 691 NW2d 424 (2005).

[28] *United States v Montalvo-Murillo,* 495 US 711, 717; 110 S Ct 2072; 109 L Ed 2d 720 (1990).

Act that a detention hearing "shall be held immediately" upon the defendant's first appearance. The Court concluded that while the duty was mandatory, the applicable sanction for breach was not the loss of power to act.[29] Thirteen years later, the Court reinforced the distinction between duty and sanction in *Barnhart v Peabody Coal Co*[30] when it explained that to argue that a time for specific action was "'mandatory,' imperative,' or a deadline,'" "misses the point." The real question is "what the consequences of tardiness should be."[31] The Supreme Court recently clarified that the answer to that question turns on the purposes that the time limit is designed to serve, which courts are to discern from the statutory language and the relevant context.[32]

The language of MCL 765.28(1), examined in context, does not reflect a legislative intent to bar forfeiture of a surety bond as a sanction for all violations of the 7-day notice provision. This Court should not assume that the Legislature intended to preclude further proceedings by the government when the statute is silent on that issue,[33] particularly where the Legislature has declared that the Code of Criminal Procedure, which includes MCL 765.28, is remedial in character and must be "liberally construed to effectuate the intents and purposes thereof."[34] The Legislature has demonstrated that it will clearly state its intent to bar further proceedings when it desires that outcome. One example is the statute requiring the disposition of untried charges

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[29] *Id.* at 718.

[30] *Barnhart v Peabody Coal Co,* 537 US 149; 123 S Ct 748; 154 L Ed 2d 653 (2003).

[31] *Id.* at 157.

[32] *Dolan v United States,* __ US __; 130 S Ct 2533, 2538; 177 L Ed 2d 108 (2010).

[33] *Montalvo-Murillo,* 495 US at 717.

[34] MCL 760.2.

against an inmate within 180 days after the prosecutor receives proper notice of the inmate's incarceration. MCL 780.133 expressly states that a court loses "jurisdiction" when the 180-day rule is violated and must enter an order of "dismissal."[35] With respect to MCL 765.28, the Legislature could have included a similar bar, but did not.[36]

Another statutory provision applicable to surety bonds, MCL 765.27, also evinces a legislative intent that defective notice does not bar recovery. The statute provides:

> No action brought upon any recognizance entered into in any criminal prosecution, either to appear and answer, or to testify in any court, shall be barred or defeated nor shall judgment thereon be arrested, by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, nor by reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court the party or witness was bound to appear, and that the court or a magistrate before whom it was taken was authorized by law to require and take such recognizance.

The above provision is intertwined with MCL 765.28 because MCL 765.28(1) permits a court to give notice only *after* the default is entered on the record. By providing that the lack of a precondition to notifying a surety does not bar judgment, the Legislature has signaled that notice need not be in strict conformance with the statute. The same should be true here in applying MCL 765.28(1).

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[35] MCL 780.133 (when action is not commenced within the time limitation, "no court of this state shall any longer have jurisdiction thereof . . . . and the court shall enter an order dismissing the same with prejudice").

[36] Compare La Code Crim Proc Ann art 349.3(C); NC Gen Stat § 15A-544.4; Cal Penal Code § 1305(b). Another example of a statute containing language that evinces a legislative intent to bar recovery if notice is not provided timely is MCL 691.1404, the statute involved in *Rowland v Washtenaw Co Road Comm*, 477 Mich 197; 731 NW2d 41 (2007). The statute provides that "*[a]s a condition to any recovery for injuries sustained by reason of any defective highway*, the injured person, within 120 days from the time the injury occurred, . . . , shall serve a notice on the governmental agency . . . ." MCL 691.1404(1) (emphasis added).

Nor would construing MCL 765.28(1) as essentially creating a 7-day statute of limitations for forfeiture of a surety bond further the purpose of the provisions of the Code of Criminal Procedure governing bail.[37] A defendant generally is entitled to bail,[38] and the Legislature has allowed for the posting of a surety bond in furtherance of that right.[39] The purpose of bond is to assure the appearance of the defendant by creating a financial incentive to attend all court proceedings.[40] Allowing a bail company to escape liability on a bond due to a court's failure to provide the statutory notice does not further that purpose because it eliminates the financial penalty arising from a defendant's failure to appear.

Construing the statute as appellant advocates would defeat the important governmental interest of securing the presence of defendants for criminal proceedings. Rather than adopting that approach, the Court should balance the government's interest against that of sureties when determining the proper sanction, if any, for noncompliance with the notice requirement. Requiring a surety to demonstrate actual prejudice strikes the appropriate balance, and is

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[37] Appellant's proposed construction of the statute also would create a conflict with MCL 600.5807, which establishes the 6-year statute of limitations applicable to actions for recovery on a surety bond. *People v Woodall,* 85 Mich App 514, 515; 271 NW2d 298 (1978). The Court endeavors to avoid conflicts when construing statutes, and the People's construction of MCL 765.28(1), not appellant's, reconciles MCL 765.28(1) and MCL 600.5807. See *People v Bewersdorf,* 438 Mich 55, 68; 475 NW2d 231 (1991) (1991) (statutes that may appear to conflict are to be read together and reconciled, if possible).

[38] Const 1963, art 1, § 15; MCL 765.6(1).

[39] MCL 765.6(2).

[40] See *In re Forfeiture of Bail Bond,* 209 Mich App 540, 544; 531 NW2d 806 (1995) (the purpose of a bond is to assure the appearance of a defendant); *People v Edmond,* 81 Mich App 743, 747-748; 266 NW2d 640 (1978) ("money bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his presence is required").

consistent with the general rule that a judgment in a criminal case should not be set aside for an error in procedure unless the error resulted in a miscarriage of justice.[41]

In the context of MCL 765.28, the purpose of the notice requirement–alerting a surety that a defendant has failed to appear–is served whether the notice comes from the court or by other means. That a court has not provided the notice within seven days does not prejudice a surety if the surety has actual knowledge of the failure to appear from another source within a reasonable period of time or other factors demonstrate that early notice would not have increased the likelihood that the surety would have apprehended the defendant. Only if a surety actually is prejudiced by the court's failure to provide the notice within seven days should entry of judgment be barred.

In this case, appellant argues in general terms that the lack of timely notice prejudices a surety instead of demonstrating actual prejudice from the delayed notice. Given that failure, the Court should affirm the decision of the Court of Appeals because the court reached the correct result in affirming the judgment of the circuit court. In the event that the Court does not affirm, it should at most remand this case to the circuit court for a hearing and decision on the issue of whether the lack of timely notice actually prejudiced appellant.

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[41] MCL 769.26.

II.

MCR 6.106(I)(2) does not bar forfeiture of a surety bond when the court fails to provide notice to the surety after the court revokes a release order.

Standard of Review

The Court reviews the interpretation of a court rule de novo.[42]

Discussion

Only if a surety demonstrates prejudice does the lack of timely notice under MCR 6.106(I)(2) bar forfeiture of a surety bond. The court rule provides:

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

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[42] *People v Lee,* 489 Mich 289, 290; 803 NW2d 165 (2011).

> (c) The 10 percent bail deposit made under subrule (E)(1)(a)(ii)[B] must be applied to the costs and, if any remains, to the balance of the judgment. The amount applied to the judgment must be transferred to the county treasury for a circuit court case, to the treasuries of the governments contributing to the district control unit for a district court case, or to the treasury of the appropriate municipal government for a municipal court case. The balance of the judgment may be enforced and collected as a judgment entered in a civil case.

Through the use of the word "may," the court rule grants the circuit court discretion whether to issue an arrest warrant or order forfeiture under MCR 6.106(I)(2).[43] By the rule's plain terms, forfeiture is not automatic on revocation of the release order. The court can choose how to proceed, and only if "forfeiture of bail or bond has been ordered" must the court provide notice of the revocation to a surety that has posted bond.[44]

In this case, the circuit court apparently did not notify appellant when it entered the Capias and Judgment in 2008, but did provide notice to appellant before it ordered forfeiture of the bond in 2011. Yet that defect does not automatically entitle appellant to relief. In *People v Williams*,[45] the Court reiterated that "error is not grounds for disturbing a judgment 'unless refusal to take this action appears to the court inconsistent with substantial justice.'" Rules of automatic reversal are disfavored, and generally a party must demonstrate prejudice from the

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[43] *People v Watkins*, 491 Mich 450, 483-484; 818 NW2d 296 (2012).

[44] MCR 6.106(I)(2)(a).

[45] *People v Williams,* 483 Mich 226, 243; 769 NW2d 605 (2009), quoting MCR 2.613(A). MCR 1.105 further directs that the court rules "are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties."

error.[46] Absent a showing of prejudice, therefore, the failure to provide notice in accordance with MCR 6.106(I)(2) does not bar entry of judgment on a surety bond.

In this case, as noted, appellant did not demonstrate actual prejudice below. The Court therefore should affirm the decision of the Court of Appeals because the court reached the correct result in affirming the judgment of the circuit court. In the event that the Court does not affirm, it should at most remand this case to the circuit court for a hearing and decision on the issue of whether the lack of timely notice actually prejudiced appellant.

[46] *People v Belanger,* 454 Mich 572, 575-576; 563 NW2d 665 (1997).

III.

Appellant's claim that MCL 500.3008 applies to surety bonds is not properly before the Court because appellant did not raise the claim in the Court of Appeals.

Standard of Review

Appellant's claim that MCL 500.3008 applies to surety bonds is barred because appellant did not raise the claim in the Court of Appeals. A party may not raise an issue on appeal to this Court that was not presented in the Court of Appeals.[47] Review is foreclosed under those circumstances because there is no "decision by the Court of Appeals" to review.[48]

Discussion

This issue is not properly before the Court, but even if it were, it has no merit. MCL 500.3008 applies to "liability insurance policies," which MCL 500.3004 explains are policies "against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or against loss or damage to property caused by draft animals or by any vehicle drawn, propelled or operated by any motive power, and for which loss or damage the person insured is liable." Thus, under the clear statutory language, a surety bond is not a liability insurance policy and MCL 500.3008 does not apply.

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[47] *People v Holloway,* 387 Mich 772 (1972); see *Booth Newspapers, Inc v University of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993).

[48] MCR 7.301(A)(2); MCR 7.302(B)(5).

RELIEF

WHEREFORE, the People request that this Court affirm the decision of the Court of Appeals.

Respectfully Submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

JASON W. WILLIAMS (P-51503)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-8109

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