STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
JUDGES: MARKEY, P.J., MURPHY, AND BOONSTRA, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GEORGE ROBERT TANNER,

Defendant-Appellee.

_____/

Supreme Court No. 146211
Court of Appeals No. 310668
Livingston County
Circuit Court Case No. 12-020466-FC

BRIEF OF AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Federal Cases

Michigan Cases

Other States Cases

Legislative History

Secondary Sources

STATEMENT OF QUESTION PRESENTED

I. **SHOULD THIS COURT RE-AFFIRM ITS HOLDING IN *PEOPLE V. BENDER*, 452 MICH. 594, 551 N.W.2D 71 (1996), THAT THE MICHIGAN CONSTITUTION BARS THE ADMISSION OF INCOMMUNICADO CUSTODIAL STATEMENTS MADE AFTER THE POLICE HAVE WITHHELD FROM A DETAINED SUSPECT INFORMATION THAT AN ATTORNEY HAS ATTEMPTED TO CONTACT HIM OR HER?**

Amici Curiae answer, "Yes."

INTERESTS OF AMICI CURIAE

The Criminal Defense Attorneys of Michigan ("CDAM") is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of: promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to and improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws,* Art 1, sec 2. CDAM was invited to file an amicus brief in this matter.

The American Civil Liberties Union of Michigan ("ACLU of Michigan") is the Michigan affiliate of the American Civil Liberties Union, a nationwide nonpartisan organization of over 500,000 members dedicated to protecting the rights guaranteed by the federal and state constitutions. The ACLU of Michigan frequently files amicus briefs on criminal justice issues in Michigan courts. See, e.g., *People v Cole*, 491 Mich 325; 817 N.W.2d 497 (2012); *People v Carp*, 298 Mich App 72; 828 N.W.2d 685 (2012). The ACLU has long been dedicated to protecting the rights of suspects in police custody, and the ACLU of Michigan participated as amicus curiae in *People v Bender*, 452 Mich. 594, 551 N.W.2d 71 (1996).

ARGUMENT

I. THIS COURT SHOULD RE-AFFIRM ITS HOLDING IN *PEOPLE V. BENDER*, 452 MICH. 594, 551 N.W.2D 71 (1996), THAT THE MICHIGAN CONSTITUTION BARS THE ADMISSION OF INCOMMUNICADO CUSTODIAL STATEMENTS MADE AFTER THE POLICE HAVE WITHHELD FROM A DETAINED SUSPECT INFORMATION THAT AN ATTORNEY HAS ATTEMPTED TO CONTACT HIM OR HER.

For over eighty years it has been settled law in this State that ours is an accusatorial rather than an inquisitorial system and that, as a result, the police may not hold a suspect incommunicado and withhold information that an attorney is attempting to contact him or her in order to obtain a confession. In three separate decisions culminating in *People v. Bender*, this Court has repeatedly explained that an incommunicado interrogation that continues after the police have refused to inform a suspect that an attorney is attempting to contact him or her violates that suspect's state constitutional rights to be free of compelled self-incrimination and to consult with counsel, as well as the suspect's due process right to fair and just treatment. *See People v. Cavanaugh*, 246 Mich. 680, 225 N.W. 501 (1929); *People v. Wright*, 441 Mich. 140, 490 N.W.2d 351 (1992); *People v. Bender*, 452 Mich. 594, 551 N.W.2d 71 (1996). A suspect's subsequent waiver of his or her rights to remain silent and to speak with an attorney cannot be knowing, intelligent, and voluntary when the police have withheld the crucial fact that an attorney has actually tried to contact the suspect. Further, police interference in the attorney-client relationship and the act of deliberately misleading suspects in order to obtain a waiver of rights is precisely the type of governmental misconduct that Michigan's expansive due process clauses prohibit. *See* Const. 1963, art. 1, § 17.

Because deliberate concealment of information about an attorney's efforts to communicate with a suspect is repugnant to many of the fundamental values of a free society embodied in the Michigan Constitution, justices on this Court have sometimes reached different

conclusions about which specific provision of the Michigan Constitution such misconduct violates.[1] Perhaps as a result, Chief Justice Brickley's opinion for the Court in *People v. Bender* suggested that the rule requiring suppression of confessions obtained after the police withhold information about an attorney's efforts to contact the suspect was a prophylactic protection of the rights contained in *both* Article 1, section 17 and Article 1, section 20. *See Bender*, 452 Mich. at 620-21, 551 N.W.2d at 82-83.

That prophylactic label has caused opponents of the *Bender* rule to argue that the holding was somehow extra-constitutional. That is simply untrue. *People v. Bender* is a constitutional decision supported by the text in Article 1, sections 17 & 20 of the Michigan Constitution, the constitutional and common law history that led to the adoption of these provisions, and this state's longstanding jurisprudence on the importance of providing access to counsel and preventing incommunicado interrogations. This Court should re-affirm its holding in *People v. Bender* and continue to stand alongside the many other state supreme courts nationwide which have held that their state constitutions bar the use of statements obtained after such police misconduct.

A. *PEOPLE V. BENDER* IS A CONSTITUTIONAL DECISION.

People v. Bender, 452 Mich. 594, 551 N.W.2d 71 (1996), is a constitutional decision grounded in the fundamental rights to counsel, to be free from compulsory self-incrimination, and to due process of law guaranteed by article 1, sections 17 and 20 in the Michigan Constitution. *See* Const. 1963, art. 1, §§ 17 & 20. In describing *Bender*, the State makes two important errors. First, it erroneously claims that there is no majority opinion in the case. *See*

[1] *See People v. Cavanaugh*, 246 Mich. 680, 225 N.W. 501 (1929) (relying on due process and right to counsel grounds); *People v. Wright*, 441 Mich. 140, 490 N.W.2d 351 (1992) (relying on the right to counsel and the privilege against self-incrimination); *People v. Bender*, 452 Mich. 594, 551 N.W.2d 71 (1996) (relying on self-incrimination and right to counsel grounds).

Br. of Plaintiff/Appellant at 6 ("*Bender* resulted in three different opinions, none of which enjoyed majority support.") In fact, Chief Justice Brickley's opinion in *Bender* was joined by Justices Levin, Cavanagh, and Mallett and is thus a majority decision with binding precedential effect.

Second, the State repeatedly (and wrongly) asserts that *Bender* "explicitly disclaimed any reliance on the Michigan Constitution." Br. of Plaintiff/Appellant at 7, 8. One need only read Chief Justice Brickley's opinion to see that the Court's holding was clearly grounded in the Michigan Constitution. In an opinion that is only three pages long, Chief Justice Brickley uses the word "constitutional" to describe the Court's basis for its holding *six different times*:

> (1) The opinion's first sentence expressly states "[t]his case rather clearly implicates both the right to counsel (Const. 1963, art. 1, § 20) and the right against self-incrimination (Const. 1963, art. 1, § 17)." *Bender*, 452 Mich. at 620, 551 N.W.2d at 82.
>
> (2) The Court then explains that it approaches its task "in the same manner as the United States Supreme Court approached the *constitutional* interpretation task in *Miranda*...." *Id.* at 620-21, 551 N.W.2d at 82-83 (emphasis added).
>
> (3) The Court proceeds to emphasize that the rights that it is interpreting – namely the Michigan Constitution's right to counsel and the right to be free from compulsory self-incrimination – "are part of the bedrock of *constitutional* civil liberties that have been zealously protected...," *Id.* at 621; 551 N.W.2d at 83 (emphasis added).
>
> (4) & (5) The Court further explains that "[g]iven the focus and protection that these particular *constitutional* provisions have received, it is difficult to accept and *constitutionally* justify a rule of law that accepts that law enforcement investigators, as part of a custodial interrogation, can conceal from suspects that counsel has been made available to them and is at their disposal. *Id.* (emphasis added).
>
> (6) The Court concludes its opinion by announcing that its holding "demonstrates that experience has taught us that the good will of state agents is often insufficient to guarantee a suspect's *constitutional* rights." 452 Mich. at 623, 551 N.W.2d at 84 (emphasis added).

As Justice Brickley later reiterated "[t]he constitutional underpinnings of *Bender* are obvious [and any suggestion] that *Bender* does not implicate a defendant's constitutional rights [is] wrong and without any viable legal support." *People v. Sexton*, 458 Mich. 43, 71, 580 N.W.2d 404, 417 (1998) (Brickley, J., dissenting).

The *Bender* Court's announcement that it was issuing a "prophylactic rule" does not alter the constitutional nature of its holding. Prophylactic rules are "doctrinal rules self-consciously crafted by courts for the instrumental purpose of improving the detection of and/or otherwise safeguarding against the violation of constitutional norms." Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. Cin. L. Rev. 1, 25 (2001). Constitutional law is filled with judicially-created prophylactic rules that involve judgments about how constitutional goals can best be attained given institutional realities. Although any decision rule that broadly constrains state action in order to protect an underlying constitutional value is susceptible to the criticism that it is "prophylactic" in nature, that does not render the rule extraconstitutional or illegitimate.

Consider, for example, the equal protection doctrine's tiers of scrutiny. Because these classifications sweep broadly, there will be cases where "strict scrutiny" will overprotect a group that has been historically discriminated against. However, the Supreme Court has determined that "it is worth paying this price in order to avoid both the costs of a case-by-case approach and the risk that such an approach would lead to erroneous decisions upholding classifications based on prejudice." David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190, 205 (1988).[2] Similarly, the Supreme Court's distinction between economic and noneconomic activity under the Commerce Clause and its prohibition on content-based restrictions under the

[2] *See also* Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. Cin. L. Rev. 1, 26 (2001).

First Amendment are prophylactic protections that go beyond the "core" of those constitutional provisions.[3] No one claims that strict scrutiny, economic versus noneconomic distinctions, or content-based restrictions are extra-constitutional. Rather, these doctrines are unquestionably accepted as legitimate exercises of judicial power precisely because prophylactic rules are endemic to constitutional interpretation and essential to enforcing constitutional rights.[4]

In constitutional criminal procedure, the United States Supreme Court has been particularly upfront about its need to use prophylactic rules and about the constitutional nature of those rules. The *Miranda*[5] rules exist today, in large part, because the Court could not find a doctrinal test that could perfectly detect each instance in which the government compelled someone to be a witness against himself or herself. The case-specific voluntariness test produced more false-negatives than the Court was willing to tolerate so it adopted a more stringent, prophylactic protection in the form of the *Miranda* warnings. As the Court later clarified in *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326 (2000), the prophylactic nature of the warnings did not make them any less constitutional. *See id.* at 432, 120 S. Ct. at 2329 ("We hold that *Miranda*, being a *constitutional* decision of this Court, may not be in effect

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[3] *See* Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. Cin. L. Rev. 1, 26 (2001); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190, 198-200 (1988); *see also* Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 Mich. L. Rev. 1030 (2001) (collecting examples of numerous constitutional decisions that are prophylactic in nature but unquestionably legitimate exercises of judicial power).

[4] *See, e.g.*, Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. Cin. L. Rev. 1, 2 (2001) (noting that the adjective "prophylactic" is "both unhelpful and unfortunate," because "there is no difference in kind, or meaningful difference in degree, between ...prophylactic rules and the run-of-the-mill judicial doctrines routinely constructed by the Court that we unquestionably accept as perfectly legitimate exercises of judicial power"); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190, 190 (1988) ("'[P]rophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law. Indeed, constitutional law consists, to a significant degree, in the elaboration of doctrines that are universally accepted as legitimate, but that have the same 'prophylactic' character as the *Miranda* rule.").

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

overruled by an Act of Congress...."). Rather, the *Miranda* Court considered *both* the values reflected in the self-incrimination clause and the institutional realities about what police and courts can competently do to craft a constitutional (prophylactic) decision.

The same is true of this Court's decision in *Bender* to adopt a prophylactic rule to protect article 1, sections 17 & 20. Chief Justice Brickley explicitly invoked *Miranda* and explained that the Court was "approach[ing] the law enforcement practices that are at the core of this case in the same manner as the United States Supreme Court approached the constitutional interpretation task in *Miranda*; namely, by announcing a prophylactic rule." *Bender*, 452 Mich. at 620-21, 551 N.W.2d at 82-83. The Court then described the principles and values that animate the right to counsel, the privilege against self-incrimination, and the due process right emphasizing *inter alia* "our preference for an accusatorial rather than an inquisitorial system of criminal justice" and "our sense of fair play." *Id.* at 621, 551 N.W.2d at 83. The Court also took into account certain institutional realities including the fact that police officers are often "engaged in the competitive enterprise of ferreting out crime" and thus should not be given the discretion to decide when a suspect can or cannot see his attorney. *Id.* at 622, 551 N.W.2d at 83. Although the Court's ultimate holding was prophylactic in the sense that it took institutional realities into account when considering how to protect the underlying constitutional rights at issue, that does not distinguish *Bender* from the many other cases in which courts routinely take such realities into account when crafting doctrine. "Virtually all of constitutional law ... consists of principles that are shaped in part by institutional judgments." David A. Strauss, Miranda, *The Constitution, and Congress*, 99 Mich. L. Rev. 958, 959 (2001).

As one constitutional law scholar put it:

> [I]f the argument is that prophylactic rules are different because they rest on some institutional judgments concerning the capacity of courts to enforce constitutional

> norms, rather than merely on some "pure" interpretation of those norms, this is just wrong – such institutional judgments are precisely the stuff of which most constitutional law is made. Almost all constitutional doctrine, from Article I and the First Amendment on down, represents a judicial judgment both about the content of the constitutional norm worthy of protection *and also* about a court's institutional capacity to enforce that norm in various ways, taking into account both its own propensities and limitations and those of other relevant actors....

Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. Cin. L. Rev. 1, 25-26 (2001).[6] Thus, the State's suggestion that prophylactic rules are generally illegitimate because they go beyond what the Constitution itself requires and infringe on the legislative branch's prerogative to make the laws is belied by historical practice and by the Supreme Court's holding in *Dickerson*.

This Court's decision in *People v. Sexton*, 458 Mich. 43, 580 N.W.2d 404 (1998), does not undermine the constitutional foundations of the *Bender* rule. In *Sexton*, this Court held that the *Bender* rule would not be applied retroactively. *See id.* Throughout its opinion, the *Sexton* majority referred to the *Bender* rule as a prophylactic rule that was not constitutionally required. *See id.* at 54, 55, 60, 61, 580 N.W.2d at 409, 410, 412, 413; *see also People v. Sexton*, 461 Mich. 746, 754 n.9, 609 N.W.2d 822, 826 n.9 (2000). However, the majority clarified that it was basing this conclusion on an assumption: "In declaring that *Bender* was prophylactic in nature, we assume that the *Bender* majority employed the term 'prophylactic' as it is used in *Miranda*, that is, 'procedural safeguards' that are not themselves constitutionally based." *Sexton*, 458 Mich. at 62 n.44, 580 N.W.2d at 413 n.44. Three years after *Sexton* was decided, the Supreme Court of the United States explicitly rejected that underlying assumption and held that *Miranda* was a constitutional decision. *See Dickerson v. United States*, 530 U.S. 428, 432, 120 S. Ct.

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[6] *See also* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190, 207 (1988) (emphasizing that courts routinely create constitutional doctrine by taking into account *"both* the principles and values reflected in the relevant constitutional provisions *and* institutional realities").

2326, 2329 (2000); *see also Sexton*, 458 Mich. at 70, 580 N.W.2d at 416-17 (Brickley, J., dissenting) ("While the *Bender* rule is prophylactic in nature like *Miranda*, that fact does not detract from its constitutional underpinnings."). With its primary assumption undermined, the *Sexton* majority's dicta suggesting that *Bender* was not constitutionally required should now be discarded.[7]

B. IN ADDITION TO BEING A CONSTITUTIONAL DECISION, *PEOPLE V. BENDER* WAS RIGHTLY DECIDED, AND ITS HOLDING SHOULD BE RE-AFFIRMED.

1. Although Sections 17 & 20 of Article 1 have analogues in the federal constitution, this Court has an independent obligation to interpret the scope of these provisions.

Although most states have provisions in their state constitutions that correspond to similar provisions in the federal constitution, states have different perspectives regarding how much weight to give federal court interpretation when interpreting their own state provisions. Some state judges write as if congruence with the federal rule is the norm and any deviation from that federal norm needs to be justified by special, identifiable reasons. *See* Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 Ind. L. Rev. 635, 648-51 (1987) (summarizing this approach and collecting cases). Under this relational or supplemental approach to interpretation, the federal interpretation of an analogous provision is presumptively correct and the burden is on the proponent of a different interpretation to justify any deviation. *See id.* Other judges believe that state constitutional provisions should not be interpreted in relation to their federal counterparts. *See id.* at 647-48. Under this autonomy approach to interpretation, the federal court interpretation is not presumed

[7] Although it was necessary to the *Sexton* Court's holding to decide that *Bender* was not a *federal* constitutional decision and therefore that the Court was not bound to apply *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708 (1987), to determine its retroactive effect, the Court's suggestion that *Bender* was not required by the *state* constitution was merely dicta. As a result, this Court is not required to consider *stare decisis* principles when declining to rely on that now-repudiated dicta.

correct; rather, state courts have "an independent duty to construe [the] state constitution in a manner that is consistent with that document's history, its text, and the value that its framers intended to protect." *State v. Miller*, 29 Conn. App. 207, 224, 614 A.2d 1229, 1236 (1992). Autonomy theorists recognize that sometimes there will be overlap between the federal and state interpretations but that is coincidental rather than a byproduct of deference to federal court interpretation.

In advocating that this Court should overrule *Bender*, the state starts from the premise that *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135 (1986), provides the presumptively correct interpretation of the scope of Article 1, sections 17 & 20 of the Michigan Constitution. *See* Br. of Plaintiff/Appellant at 8 (arguing that *Bender* "contradicts the federal constitution as construed by *Moran*"). That starting point incorrectly assumes that this Court has adopted a relational or supplemental approach to state constitutional interpretation. The error is understandable in light of some of this Court's language in *People v. Nash*, 418 Mich. 196, 341 N.W.2d 439 (1983). At first blush, the compelling reason test this Court adopted in *Nash* seems to suggest that federal interpretation is presumptively correct and that any deviation from that should be justified by a compelling reason. *See id.* at 214, 341 N.W.2d at 446. However, this Court subsequently made it clear in *Sitz v. Department of State Police*, 443 Mich. 744, 506 N.W.2d 209 (1993), that the compelling reason test "should not be understood as establishing a conclusive presumption artificially linking state constitutional interpretation to federal law." *Id.* at 758, 506 N.W.2d at 216. Rather, "what is required of this Court is a searching examination to discover what law 'the people have made.'" *Id.* at 759, 506 N.W.2d at 216. Because "the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Id.* at

762, 506 N.W.2d at 217. Lest there be any doubt, the *Sitz* Court clarified that it was adopting an autonomy approach to state interpretation when it noted that

> [State] courts must undertake an independent determination of the merits of each claim based solely on principles of state constitutional law. If the state court begins its analysis with the view that the federal practice [predominates,] the state court is allowing a federal governmental body – the United States Supreme Court – to define, at least in part, rights guaranteed by the state constitution.

Id. at 761 n.12, 506 N.W.2d at 217.

As described below, an independent review of the "law that the people [of Michigan] have made" reveals that *Bender* was correctly decided and should be affirmed.

2. The *Bender* rule is supported by the language of Article 1, sections 17 & 20, the constitutional and common law history that led to the adoption of these provisions, matters of peculiar state and local interest, this state's longstanding jurisprudence on the importance of providing access to counsel and preventing incommunicado interrogations, and the persuasive authority from sister state courts.

In *Sitz*, this Court provided guidance regarding some of the factors that it would find relevant when performing its independent duty to interpret the scope of a state constitutional provision. These include the textual language of the state constitutional provision and how it fits into the structure of the state constitution (including ways in which the language and structure might differ from a federal counterpart), the constitutional and common law history that led to the provision's adoption, the state law that pre-dated the provision, and "matters of peculiar state or local interest." *Sitz*, 443 Mich. at 763 n.14, 506 N.W.2d at 218 n.14. Each of these factors supports the *Bender* holding.

a. Text, History, and State Law Leading Up to the 1963 Constitution

Two provisions of the Michigan Constitution containing three different criminal procedure rights are at issue in this case. Article 1, § 20 guarantees the right "to have the assistance of counsel for [one's] defense," which was first incorporated into the state constitution

in 1835 and re-enacted in substantially unchanged form in 1850, 1908, and 1963. The two other rights -- the privilege against self-incrimination and the right to due process of law – were first incorporated into the state constitution in 1850. Initially, these provisions were similar to their federal counterparts, providing that "[n]o person shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law." Const. 1850, Art. 6, § 32. However, when the Michigan Constitution was redrafted in 1963, the provisions were moved to Article 1, § 17 and a new sentence was added to the text providing that "[t]he right of all individuals, firms, corporations, and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed." Const. 1963, Art. 1, § 17. A review of the history between 1908 and 1963, Michigan case law, and the Constitutional Convention debates in 1961 reveals that this additional language (in combination with the right to counsel and the privilege against self-incrimination) was intended to broaden Michigan citizens' rights beyond the guarantees in the Federal Bill of Rights in order to combat unfair interrogation practices including *inter alia* the practice of holding suspects incommunicado and preventing them from consulting with counsel.

The heyday of what came to be known in American culture as the "third degree" – the infliction of physical pain or mental suffering to obtain information about a crime – was the first third of the twentieth century. *See* Richard A. Leo, *Police Interrogation and American Justice* 69 (2008). In 1929, President Herbert Hoover established the Wickersham Commission – officially called the National Commission on Law Observance and Enforcement –and charged it with identifying the causes of criminal activity and making policy recommendations. The Wickersham Commission Report, published in 1931, detailed the widespread use of the third degree by police agencies. The most common form of coercive interrogation described in the

Wickersham Report was prolonged incommunicado interrogation during which the police isolated suspects and kept them from their friends, family, and especially from their attorneys. *See id.* at 51.

Five years after publication of the Wickersham Report, the Supreme Court began using the Due Process Clause of the Fourteenth Amendment to preclude confessions obtained through the use of third degree tactics from being used against suspects in state court. *See Brown v. Mississippi*, 297 U.S. 278, 56 S. Ct. 461 (1936). In *Ward v. Texas*, 316 U.S. 547, 62 S. Ct. 1139 (1942), and *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S. Ct. 921 (1944), the Supreme Court condemned the specific practice of holding suspects incommunicado for extended periods of time in order to extract confessions. The *Ashcraft* Court described the police as "set[ting] themselves up as a quasi judicial tribunal" that tried and convicted the defendant without a judge, a jury, or the basic demands of fair process. *Id.*, 322 U.S. at 154 n.10, 64 S. Ct. at 926 n.10 (quoting with approval from Ashcraft's motion for a new trial); *see also Ward*, 316 U.S. at 555, 62 S. Ct. at 1143 ("This Court has set aside convictions based upon confessions extorted from ignorant persons who have been ... unlawfully held incommunicado without advice of friends or counsel."). In a series of cases in the 1940s, 50s, and early 60s, the Supreme Court explained that confessions obtained through the use of such tactics "offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system." *Rogers v. Richmond*, 365 U.S. 534, 541, 81 S. Ct. 735 (1961).[8]

Like the United States Supreme Court, this Court was also interpreting its own Constitution during this time period in ways designed to prohibit incommunicado interrogation.

[8] *See also Blackburn v. Alabama*, 361 U.S. 199, 80 S. Ct. 274 (1960); *Spano v. New York*, 360 U.S. 315, 79 S. Ct. 1202 (1959); *Harris v. South Carolina*, 338 U.S. 68, 69 S. Ct. 1354 (1949); *Turner v. Pennsylvania*, 338 U.S. 62, 69 S. Ct. 1352 (1949); *Watts v. Indiana*, 338 U.S. 49, 69 S. Ct. 1347 (1949).

In *People v. Cavanaugh*, 246 Mich. 680, 225 N.W. 501 (1929), the defendant was arrested and held incommunicado. When an attorney hired by the defendant's father came to the jail, the police denied the attorney access to his client and refused to tell the defendant that his attorney was there. This Court reversed the defendant's conviction, holding that the police violated the Michigan Constitution when they denied the attorney access "to see and advise the accused." *Id.* at 688, 225 N.W. at 503. More specifically, this Court emphasized that "[h]olding an accused incommunicable to parents and counsel is a subtle and insidious method of intimidating and cowing, tends to render the prisoner plastic to police assertiveness and demands, and is a trial of mental endurance under unlawful pressure." *Id.* at 686, 225 N.W. at 503. This Court further explained that

> a confession, extorted by mental disquietude, induced by unlawfully holding an accused incommunicable, is condemned by every principle of fairness, has all the evils of the old-time letter de cachet, is forbidden by the constitutional guaranty of due process of law, and inhibited by the right of an accused to have the assistance of counsel.

Id.

Despite federal and state court attempts to reign in unfair investigative practices, incommunicado interrogations continued and the courts were unable to stop the practice with a case-by-case approach. *See* Yale Kamisar et al., *Modern Criminal Procedure* 549-54 (13th ed. 2013) (documenting this problem and explaining how it paved the way for *Miranda*). If anything, unfair investigative practices only worsened during the McCarthy era, when the legislative and executive branches engaged in arbitrary, inquisitorial practices designed to find and remove Communist sympathizers from governmental positions.

It was with these background principles in mind that the drafters of Michigan's 1963 Constitution guaranteed defendants the right to have the assistance of counsel, the right to be free

from compulsory self-incrimination, and the right "to fair and just treatment in the course of legislative and executive investigations." Const. 1963, Art. 1, §§ 17 & 20; *see also People v. Kirby*, 440 Mich. 485, 492, 487 N.W.2d 404, 407 (1992) ("[I]t must be presumed that a constitutional provision has been framed and adopted mindful of prior and existing law and with reference to [it].").

In the official Convention Comment to the revised Article 1, § 17, the drafters explained, harkening back to the Supreme Court's language in *Ashcraft*, that the second clause "recognizes the extent to which [legislative and executive] investigations have tended to assume a quasi-judicial character." 2 Official Record, Constitutional Convention 1961, p 3364. As Harold Norris, the proponent of the additional language in § 17, explained on the floor:

> It is the purpose of this additional language to facilitate the important and valuable function of legislative and executive investigations by protecting the right of all persons to fair and just treatment in the course of such investigations. It is through procedural rules that the individual is protected against arbitrary governmental action. The quintessence of liberty is the protection of the individual against arbitrary application of the collective powers of the state. It is submitted that there is a need for such fair and just treatment and, when fair and just treatment is accorded to all persons, there is a greater disposition to assist such legislative and executive investigations in the discharge of their lawful duties. ... Investigators have assumed a right to ridicule, expose, demean, deprecate, and intimidate witnesses with impunity.... But each branch – the courts, the legislature, and the executive – should have a duty to protect and promote fair and just procedures in investigations. .... It is the precise purpose of a bill of rights to foresee and forestall arbitrary, unfair and unjust conduct of government against all persons.

1 Official Record, Constitutional Convention 1961, pp. 545-47.[9]

[9] *See also id.* at 550 (comments by Mr. Ostrow in support of amendment) ("Everybody is entitled to fair and just treatment, no matter what business they have with government. It's a rule of ordinary decent human conduct and there is no reason why people in government shouldn't be ordinary decent human beings. ... People are entitled to ordinary decent, fair and just treatment. And this was intended – at least on my part – to cover the whole gamut of both the legislative and executive departments.").

Police interrogation is the quintessential form of executive investigation and Article 1, § 17 guarantees individuals not only a privilege against self-incrimination during executive investigations but also the right to "fair and just treatment" in the course of executive investigations. The predominant example of unfair executive investigation tactics in the first part of the twentieth century was the practice of holding suspects incommunicado and isolating them from friends, family, and especially attorneys in order to secure confessions from them.[10] As this Court stated, "a confession, extorted by mental disquietude, induced by unlawfully holding an accused incommunicable, is condemned by every principle of fairness." *Cavanaugh*, 246 Mich. at 686, 225 N.W. at 503.[11] Similarly, Justice Stevens has explained that

> due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections .... [P]olice interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits .... Just as the government cannot conceal from a suspect material and exculpatory evidence, so too the government cannot conceal from a suspect the material fact of his attorney's communication.

Moran v. Burbine, 475 U.S. at 467, 106 S. Ct. at 1165 (Stevens, J., dissenting).[12]

By explicitly extending the right to "fair and just treatment in the course of [executive] investigations" to its citizens, Michigan was clearly intending to provide greater protection than the federal Constitution. The language that Michigan added to its self-incrimination and due process clauses is language that it borrowed from Article I, § 7 of the Alaska Constitution of

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[10] The predominant example of unfair legislative investigations was the McCarthy-era hearings, and Article 1, § 17 was certainly also intended to abolish that unfairness.

[11] *See also Bender*, 452 Mich. at 610, 551 N.W.2d at 78 ("[I]f a defendant is entitled to the benefit of an attorney's assistance and presence during custodial interrogation and this right is guarded, certainly fundamental fairness requires that immediately available assistance and presence not be denied by police authorities." (quoting *People v. McCauley*, 163 Ill.2d 414, 444, 645 N.E.2d 923, 938 (1994))).

[12] *See also People v. McCauley*, 163 Ill.2d 414, 444-45, 645 N.E.2d 923, 939 (Ill. 1995); *Haliburton v. State*, 514 So.2d 1088, 1090 (Fla. 1987); *Malinski v. State*, 794 N.E.2d 1071, 1079 (Ind. 2003).

1956. *See* 1 Official Record, Constitutional Convention 1961, p. 545. The Convention debates in Alaska make it clear that the

> members of Alaska's constitutional convention were acutely aware of the limits of the federal constitution in protecting individuals against ... abuse. If anything, the constitutional debate and the ultimate inclusion of the provision in article I, § 7 bear witness to the convention's concern that protections against compulsory self-incrimination under the federal constitution might be inadequate. ... *See* 2 Proceedings of the Alaska Constitutional Convention (PACC) 1446-1469 (January 7, 1956).

State v. Gonzalez, 825 P.2d 920, 930 n.6 (Alaska App. 1992).[13]

Thus, the textual language of Const. 1963, art. 1, § 17; the history that led to the adoption of art. 1, §§ 17 & 20 in 1963; and the state and federal law that pre-dated the Constitutional Convention in 1961 all suggest that the Michigan Constitution was intended to provide more robust protections to individuals who were subjected to police interrogations than the Federal Constitution. More specifically, the additional language incorporated into Const. 1963, art. 1, § 17 was aimed at preventing legislative and executive officers from engaging in "arbitrary, unfair and unjust" investigative practices. *See* 1 Official Record, Constitutional Convention 1961, p. 547.

This Court's holding in *Bender* was similarly aimed at preventing the arbitrary, unjust, and unfair police practice of cajoling a suspect into waiving his rights to counsel and to silence by withholding information that a lawyer who has been retained to help him is presently

[13] This Court has only had limited opportunity to opine on the meaning of the second sentence in Art. 1, section 17. In the context of a civil case involving the compelled production of corporate and partnership documents, this Court noted that the language added to Article 1, Section 17 did not extend the privilege against self-incrimination to individuals who were officers of a corporation and were responsible for maintaining corporate documents. *See Paramount Pictures Corp. v. Miskinis*, 344 N.W.2d 788, 799 (Mich. 1984). The Court made clear that the amendment applied only to "fair and just treatment in *legislative* and *executive* investigations," and thus did not apply to the production of documents in a civil action. *Id.* However, this Court had never had occasion to consider how the amendment affects criminal defendants' rights. The issue was flagged by the dissent in *Bender* but not discussed openly in the majority opinion. *See Bender*, 452 Mich. at 629 n.6, 551 N.W.2d at 86 n.6.

available to speak with him. Thus, contrary to the State's assertion, there is a strong foundation in the language, historical context, and jurisprudence of this Court to support the *Bender* rule. *See* Br. of Plaintiff/Appellant at 9 (arguing that there is "no foundation in the language, historical context, or jurisprudence of this Court" for the *Bender* rule); *see id.* at 14 (same).

As this Court noted in *Bender*, "police deception of a suspect through omission of information regarding attorney communications greatly exacerbates the inherent problems of incommunicado interrogation." *Bender*, 452 Mich. at 617 n.23, 551 N.W.2d at 81 n.23 (quoting *Moran v. Burbine*, 475 U.S. 412, 452, 106 S. Ct. 1135, 1157 (1986) (Stevens, J., dissenting)). Holding a suspect incommunicado is objectionable, in part, because it is arbitrarily done at the mere will and unregulated pleasure of a police officer. It allows the police to "manipulate the interrogation process," *People v. Wright*, 441 Mich. 140, 156 n.2, 490 N.W.2d 351, 358 n.2 (1992) (Cavanagh, J., concurring), and effectively communicate to the suspect that he must either waive his rights to remain silent and to counsel or wait in police custody indefinitely, not knowing when or if counsel will ever arrive to aid him. As Justice Brickley noted in *Wright*, "[s]een in this light, a waiver is not the product of a free and deliberate choice. Rather it derives from a cruel Hobson's choice imposed as a result of the conscious exclusion of friendly contact with others." *Id.* at 169-70, 490 N.W.2d at 364.[14] For this reason, this Court correctly held in *Bender* that police officers who are "engaged in the often competitive enterprise of ferreting out crime" should not be given "the discretion to decide when a suspect can and cannot see an attorney who has been retained for a suspect's benefit." *Bender*, 452 Mich. at 622, 551 N.W.2d

[14] *See also Bender*, 452 Mich. at 614, 551 N.W.2d at 80 (emphasizing that a defendant does not make a knowing and intelligent waiver of his rights to remain silent and to counsel when the police fail to inform him that counsel is presently available and attempting to contact him).

at 83. Rather, the *Bender* rule is necessary to "insure[] that our system of criminal justice remains accusatorial and not inquisitorial in nature." *Id.* at 623, 551 N.W.2d at 84.

b. Matters of Peculiar State or Local Interest

There are peculiar state interests in Michigan that warrant a different level of protection with regard to the rights to counsel, to be free from compulsive self-incrimination, and to due process in these circumstances. Although the language in the right to counsel and privilege against self-incrimination provisions of the Michigan Constitution is similar to that in the federal provisions, the people of Michigan explicitly expanded the constitutional regulation of executive investigative practices through the 1963 amendment to Art. 1, § 17. The Michigan right to be treated fairly in executive investigations is unique and is further explained by Michigan's constitutional common law before the 1963 adoption of the constitution. In *People v. Cavanaugh*, 246 Mich. 680, 225 N.W. 501 (1929), this Court prohibited the police practice of refusing to tell suspects that an attorney was present at the stationhouse to assist them and described that practice as "condemned by every principle of fairness." *Id.* at 686, 225 N.W. at 503. The constitutional drafters, acting with knowledge of that precedent, prohibited the unfair treatment of individuals in executive investigations. Const. 1963, art. 1, § 17. The text, history, and case law indicate that Michigan has a particular interest in ensuring that the executive branch acts fairly and justly in its dealing with Michigan citizens. The *Bender* rule is one important part of guaranteeing that fundamental fairness.

c. This Court's Longstanding Jurisprudence

In addition to the textual language, constitutional and common law history, state law leading up to 1963, and the peculiar state interests reflected by the history and laws, this Court's longstanding jurisprudence emphasizing the importance of providing access to counsel and

preventing incommunicado interrogations supports the *Bender* holding. Since 1963, this Court has repeatedly and consistently reinforced its *Cavanaugh* holding.

In *People v. Wright*, 441 Mich. 140, 490 N.W.2d 351 (Mich. 1992), a majority of this Court held that the police violate a defendant's constitutional rights when they hold him incommunicado and refuse to tell him of his attorney's attempts to speak with him. More specifically, four justices agreed that the waiver of a defendant's rights is not knowingly, intelligently, and voluntarily made under such circumstances. *See id.* at 153, 490 N.W.2d at 356 (Mallett, J. joined by Levin, J.) ("Mr. Wright did not make a knowing, voluntary, and intelligent waiver of his rights when the police, before he made a statement, refused to inform him that retained counsel tried or was currently trying to contact him. Without this knowledge, Mr. Wright could not make a truly voluntary waiver of his essential rights."); *id.* at 161 n.5, 490 N.W.2d at 360 n.5 (Cavanagh, C.J., concurring) ("[A] waiver ... cannot be valid when the police merely inform the suspect, in generalized terms, that he has the right to lawyer if he wishes. Rather, the waiver can only be valid if the suspect is timely and accurately informed of his attorney's immediate availability and attempts to contact him, and *then* knowingly, intelligently, and voluntarily waives [his] right[s]." (emphasis in original)); *id.* at 169-70, 490 N.W.2d at 364 (Brickley, J. concurring) (noting that a waiver obtained after the police fail to inform the defendant that counsel is available immediately "is not the product of a free and deliberate choice"). As Justice Brickley noted:

> Many cases recognize that incommunicado interrogation – the practice of consciously isolating a suspect from all friendly contact with outsiders to coerce a waiver of the right to remain silent – can undermine a person's will and make him highly susceptible to police assertiveness. ...
>
> Continued isolation only increases the defendant's incentive to speak with the police and to comply with their demands. Failing to inform the defendant that retained counsel is available immediately leaves a suspect with two unpalatable

> options: waive the right to remain silent or wait in police custody, not knowing how long it might be before counsel arrives. Seen in this light, a waiver is not the product of a free and deliberate choice. Rather it derives from a cruel Hobson's choice imposed as a result of the conscious exclusion of friendly contact with others. ...

Id. at 168-70, 490 N.W.2d at 363-64.

Four years later, this Court again reiterated that the police violate a suspect's constitutional rights to counsel and to be free of compulsory self-incrimination when they obtain a waiver from that suspect after refusing to inform him that his attorney is immediately available to speak with him. *See People v. Bender*, 452 Mich. 594, 551 N.W.2d 71 (1996). Writing for a majority of the Court, Chief Justice Brickley noted

> it is difficult to accept and constitutionally justify a rule of law that accepts that law enforcement investigators, as part of a custodial interrogation, can conceal from suspects that counsel has been made available to them and is at their disposal. If it is deemed to be important that the accused be informed that he is entitled to counsel, it is certainly important that he be informed that he has counsel.

Id. at 621, 551 N.W.2d at 83.

Reading the *Miranda* warnings to a suspect is misleading when the police are aware that an attorney is trying to see the suspect and refuse to inform him or her of that fact. After all, as part of the *Miranda* warnings, the police are required to tell suspects that they have the right to counsel and that an attorney will be provided for them if they cannot afford one. To say that while at the same time withholding information that an attorney is actually trying to see the suspect *at that very moment*, is a form of outright deception. Such "[d]eliberate subterfuge by the police to prevent counsel from contacting a suspect is reprehensible and unconstitutional." *Wright*, 441 Mich. at 155, 490 N.W.2d at 357.[15] As Justice Cavanagh explained in *Bender*:

[15] *See also Haliburton v. State*, 514 So.2d 1088 (Fla. 1987) ("[A]ny 'distinction between deception accomplished by means of an omission of a critically important fact and deception by means of a

> [T]he presence and availability of [an] attorney is critical information that qualitatively affects the exercise by a suspect of the right to consult with counsel. When that information is withheld, the suspect's waiver of the right to counsel and to remain silent is more abstract than real, becoming, in effect, a waiver of a theoretical right that is uninformed by the material knowledge that retained counsel, present and available to assist the suspect in the full exercise of his or her rights, is just outside the door.

Bender, 452 Mich. at 612 n.16, 551 N.W.2d at 79 n.16 (quoting *State v. Reed*, 133 N.J. 237, 274, 627 A.2d 630 (1993)).[16]

The State would have you believe that, because there were multiple opinions supporting this Court's decisions in *Wright* and *Bender*, the decisions are somehow "unclear." Br. for Plaintiff/Appellant at 6, 14. The State then uses this alleged lack of clarity to argue that there is no foundational principle upon which this Court can or should rely when thinking about cases in which the police deceive suspects by refusing to tell them that counsel is immediately available. *See id.* This argument is misguided. The fact that police behavior is prohibited by three different state constitutional guarantees and that there is a difference of opinion among the justices about which one predominates is not a reason to find that the underlying practice is constitutional. If anything, it demonstrates just how central the prohibition against deceiving criminal suspects about the presence of counsel is to our justice system. Misleading a suspect into waiving his rights by intentionally withholding information that his attorney is trying to contact him violates tenets so fundamental to our adversarial justice system that it may be said to violate a defendant's right to counsel, his right to be free from compulsory self-incrimination, *and* his right to fundamental fairness under the due process clause of the Michigan Constitution.

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misleading statement, is simply untenable.'" (quoting *Moran v. Burbine*, 475 U.S. 412, 453, 106 S. Ct. 1135, 1158 (1986) (Stevens, J., dissenting))).

[16] *See also State v. Roache*, 148 N.H. 45, 51, 803 A.2d 572, 578 (2002) (same); *Bryan v. State*, 571 A.2d 170, 176 (Del. 1990) ("[A] purported waiver can never satisfy a totality of the circumstances analysis when police do not even inform a suspect that his attorney seeks to render legal advice.").

See People v. Cavanaugh, 246 Mich. 680, 225 N.W. 501 (1929) (relying on due process and right to counsel grounds); *People v. Wright*, 441 Mich. 140, 490 N.W.2d 351 (Mich. 1992) (relying on the right to counsel and the privilege against self-incrimination); *People v. Bender*, 452 Mich. 594, 551 N.W.2d 71 (1996) (relying on self-incrimination and right to counsel grounds).

The intertwined nature of these three rights in the context of confession law – particularly the law surrounding incommunicado interrogations – may explain why courts (and justices) across the nation have relied on each of the three different rights to justify *Bender*-like rules. It also may explain why Chief Justice Brickley wrote his opinion for the Court in *Bender* by indicating that the police practice at issue implicated multiple constitutional rights.

Custodial interrogation creates an inherently compulsive environment, and the privilege against self-incrimination requires the police to take affirmative steps to dispel that inherent compulsion and prevent a suspect from being forced by the compulsion to incriminate himself. *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). These affirmative steps include the reading of the *Miranda* warnings, which require police to inform a suspect of his right to an attorney and his right to have an attorney appointed for him if he cannot afford one. *Id.* Notifying a suspect of his right to counsel plays a crucial role in dissipating the compulsion inherent in custodial interrogation and guards against the abridgment of a suspect's right against self-incrimination. *See, e.g.*, *State v. Reed*, 133 N.J. 237, 257, 627 A.2d 630, 640 (1993). As a result, when the police mislead a suspect by failing to inform him that his attorney is ready, able, and willing to represent him, that deception compromises his right to counsel. It also compromises the suspect's ability to make a knowing, intelligent, and voluntary waiver of his right to counsel and his right to remain silent. Such deception, and the resulting practice of

holding a suspect incommunicado, increases the inherent coercion of the police-dominated environment and puts psychological pressure on the suspect to confess. That pressure can overbear the will of the suspect and result in an involuntary waiver of the rights to counsel and to silence which violates fundamental tenets of due process. Finally, the police tactic of isolating a suspect and deceiving him into thinking that no attorney is presently able to help him violates principles of fundamental fairness and fair dealing guaranteed by the due process clause.

As this discussion demonstrates, state judges across the country have adopted different rationales to support *Bender*-like rules because the police practice of holding suspects incommunicado and deceiving them about the presence of an attorney in order to trick them into waiving their rights is so repugnant to constitutional values that it violates many of the rights guaranteed by state constitutions.

d. Persuasive Authority from Sister Courts

Michigan is one of many states that has taken the Supreme Court up on its invitation in *Moran v. Burbine*, 475 U.S. 412, 428, 106 S. Ct. 1135, 1144 (1986), to be more protective of defendants' rights in the interrogation context. *See, e.g., State v. Stoddard*, 206 Conn. 157, 537 A.2d 446 (1988); *Bryan v. State*, 571 A.2d 170 (Del. 1990); *Haliburton v. State*, 514 So.2d 1088 (Fla. 1987); *People v. McCauley*, 163 Ill.2d 414, 645 N.E.2d 923 (Ill. 1995); *Malinski v. State*, 794 N.E.2d 1071 (Ind. 2003); *West v. Commonwealth*, 887 S.W.2d 338 (Ky. 1994); *State v. Matthews*, 408 So.2d 1274 (La. 1982); *Commonwealth v. Mavredakis*, 430 Mass. 848, 725 N.E.2d 169 (2000); *State v. Roache*, 148 N.H. 45, 803 A.2d 572 (2002); *State v. Reed*, 133 N.J. 237, 627 A.2d 630 (1993); *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628 (N.Y. 1963); *Dennis v. State*, 990 P.2d 277 (Okl.1999); *State v. Joslin*, 332 Or. 373, 29 P.3d 1112 (2001).

Although this Court is obviously not bound to follow the decisions issued by other state high courts, the pattern is certainly persuasive authority supporting this Court's decisions in *Cavanaugh*, *Wright*, and *Bender*. Given that one part of the constitutional inquiry under Article 1, § 17 of the Michigan Constitution is whether the police practice of withholding information about the present availability of counsel violates principles of fundamental fairness, the large number of sister states that have found the practice repugnant under their own state constitutions is relevant and supports this Court's decision in *Bender*.

C. EVEN WERE THIS COURT TO BELIEVE THAT *BENDER* WAS WRONGLY DECIDED, *STARE DECISIS* PRINCIPLES SUPPORT RETAINING THE *BENDER* RULE.

This Court has clearly and repeatedly explained that "[t]he application of stare decisis is generally the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *People v. Petit*, 466 Mich. 624, 633, 648 N.W.2d 193, 198 (2002) (citations and internal quotation marks omitted). Thus, before overruling a decision, this Court must be convinced "not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it." *Id.* at 634, 648 N.W.2d at 199.

More specifically, this Court applies a multifactored test to determine whether to overrule a precedent:

> "[T]he mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." Rather, "[c]ourts should also review whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision."

People v. Breidenbach, 489 Mich. 1, 15-16, 798 N.W.2d 738, 747 (2011) (quoting *Robinson v. Detroit*, 462 Mich. 439, 464-65, 613 N.W.2d 307 (2000)). Analysis along all of these dimensions supports retaining the *Bender* rule.

1. The *Bender* rule is easy to apply and does not defy practical workability.

Requiring the police to notify a suspect whenever an attorney is presently available to assist him before they ask the suspect to waive *Miranda* rights is a simple, straightforward, and easy directive for the police to follow. The State's description of the *Bender* rule as "unclear" and raising a host of unanswerable and complicated questions[17] is belied both by logic and by experience.

There is little difficulty in administering a rule that merely requires the police to monitor one external event – whether the suspect's attorney is attempting to speak with his client. *See, e.g., State v. Stoddard*, 206 Conn. 157, 171, 537 A.2d 446, 454 (1988).[18] As the New Jersey Supreme Court noted when it rejected a similar argument,

> [the] attempt to problematize the rule we announce today by posing questions about its operation in hypothetical situations, is a technique that could be

[17] *See* Br. of Plaintiff/Appellant at 18.

[18] Contrary to the State's assertion, the *Bender* rule does not require the police to "supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak." Br. of Plaintiff/Appellant at 12. As sister supreme courts have recognized, "[t]here is a valid distinction to be made between failure to provide generally useful information and 'affirmative police interference in a communication between an attorney and a suspect [when the information withheld by the police] bears directly on the right to counsel that police are asking the suspect to waive." *People v. McCauley*, 163 Ill.2d 414, 433, 645 N.E.2d 923, 933 (Ill. 1995) (brackets in original); *see also State v. Roache*, 148 N.H. 45, 51-52, 803 A.2d 572, 578-79 (2002) ("[W]e believe that withholding information that an attorney is available or present to assist a suspect during an interrogation is qualitatively different from withholding other kinds of information which might affect the defendant's decisionmaking, but which are not a part of the *Miranda* warnings, such as knowledge of the quantity of the evidence and whether the police have other suspects. Withholding knowledge that an attorney is available to render assistance is not simply a failure to provide useful information, but is an 'affirmative police interference in a communication between an attorney and a suspect. Moreover, the "information" intercepted by the police bears directly on the right to counsel that police are asking the suspect to waive.'" (quoting *Moran v. Burbine*, 475 U.S. 412, 456 n.42, 106 S. Ct. 1135, 1160 n.42 (1986) (Stevens, J., dissenting))).

> deployed against any number of the well operating legal rules this Court and the United States Supreme Court have established. ... Virtually any rule is susceptible to a parade of hypothetical inquiries. The relevant question is whether the rule will, in actual practice, be readily and efficiently followed. We are convinced that the rule we announce today is justified both by the ease and the practicality with which it can be implemented.

State v. Reed, 133 N.J. 237, 265-66, 627 A.2d 630, 645 (1993).

In support of its argument that the *Bender* rule is unclear, the State attempts to contrast the "unclear" rule announced in *Bender* with the "bright-line" rule announced in *Miranda*. *See* Br. of Plaintiff/Appellant at 18. However, one could create a similar "parade of hypothetical inquiries" about the applicability of *Miranda*'s so-called bright-line rule. For example, the Supreme Court has found it necessary to address a host of questions in the wake of *Miranda* including determinations surrounding when someone is in custody,[19] when the police are interrogating a person,[20] what evidence is testimonial evidence subject to the privilege,[21] the adequacy of warnings that are slightly different in wording than the *Miranda* warnings,[22] the necessary language that a suspect must use to invoke *Miranda* rights,[23] the requirements for demonstrating a valid waiver of the *Miranda* rights,[24] etc. The list goes on and on. The fact that

[19] *See, e.g., Howes v. Fields*, 132 S. Ct. 1181 (2012); *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138 (1984); *Beckwith v. United States*, 425 U.S. 341, 96 S. Ct. 1612 (1976).

[20] *See, e.g., Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682 (1980).

[21] *See, e.g., Hiibel v. Sixth Judicial Court*, 542 U.S. 177, 124 S. Ct. 2451 (2004); *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S. Ct. 2638 (1990).

[22] *See, e.g., Florida v. Powell*, 559 U.S. 50, 130 S. Ct. 1195 (2010); *Duckworth v. Eagan*, 492 U.S. 195, 109 S. Ct. 2875 (1989).

[23] *See, e.g., Salinas v. Texas*, 133 S. Ct. 2174 (2013); *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250 (2010); *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350 (1994); *Fare v. Michael C.*, 442 U.S. 707, 99 S. Ct. 2560 (1979).

[24] *See, e.g., Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250 (2010); *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755 (1979).

subsequent legal questions will arise regarding the boundaries of a rule does not demonstrate that the rule is somehow unworkable.

Nor are the questions that the *Bender* rule raises particularly difficult to answer. *See State v. Stoddard*, 206 Conn. 157, 171-73, 537 A.2d 446, 454-55 (1988) (discussing a similar set of questions that were raised in Connecticut and concluding that they were not "insoluble questions"). In fact, experience in Michigan and around the country demonstrates that courts have not been entangled in an unworkable legal morass arising from the adoption of *Bender*-like rules. As the New Hampshire Supreme Court noted when it rejected a similar State argument:

> We are not persuaded by the State's argument that our holding will lead to many practical problems in law enforcement. Before *Moran* was decided, a number of state courts had held that failure to inform a suspect that an attorney is actually available and seeking to provide assistance rendered any subsequent waiver of the suspect's *Miranda* rights invalid, and, as Justice Stevens noted in his dissent, the *Moran* majority did not point to any specific evidence from those jurisdictions that it had unduly complicated law enforcement. *See Moran*, 475 U.S. at 460, 106 S. Ct. 1135. Furthermore, since *Moran* was decided in 1986, a number of state supreme courts have held that their constitutions afford greater protection than does *Moran*. The State has pointed to no evidence from those jurisdictions suggesting that the police have been hindered in their efforts to uphold the law.

State v. Roache, 148 N.H. 45, 52, 803 A.2d 572, 579 (2002). As was true in *Roache*, the State in this case has pointed to no evidence from any jurisdiction suggesting that the police function has been inhibited by the *Bender* rule.

In fact, overruling *Bender* is what would lead to practically unworkable and difficult to administer rules. This Court has repeatedly stated that the costs to the judicial system are relevant when determining whether to retain a precedent. *See, e.g., People v. Breidenbach*, 489 Mich. 1, 16, 798 N.W.2d 738, 747 (2011). Before overruling a precedent, it must be clear that "less injury will result from overruling than from following it." *People v. Petit*, 466 Mich. 624, 634, 648 N.W.2d 193 (2002). Here, more injury will result from overruling *Bender* and more

costs will be imposed on the judicial system if the rule is abolished. The *Bender* rule is easy for courts to administer and provides clear guidance to police officers regarding how to conduct themselves. If it is overruled, in every case in which the police denied an attorney access to his client, the defendant will later raise a due process argument that the resulting confession was involuntarily obtained. This will entangle the courts in case-specific and fact-intensive voluntariness inquiries that revolve around the state of mind of the suspect and subjective intent of the officers involved.

Both the United States Supreme Court and this Court have contemplated this possibility. In *Moran*, the majority specifically noted, "[w]e do not question that on facts more egregious than those presented here police deception might rise to the level of a due process violation...." *Moran v. Burbine*, 475 U.S. 412, 432, 106 S. Ct. 1135, 1147 (1986). Similarly, even the dissenting justices in *Wright* recognized that

> [a] different question would be presented if it were found as a fact that defendant made an equivocal request for counsel which was responded to by deceitful misrepresentation of his options. Where the police are aware that an attorney is present to represent a client, the failure to respond to an equivocal request for counsel with the knowledge of counsel's presence may be found to be the kind of "police exploitation" which in combination with other circumstances would render a statement involuntary.

People v. Wright, 441 Mich. 140, 176 n.6, 490 N.W.2d 351, 367 n.6 (Mich. 1992) (Riley, J., dissenting).

One need look no further than the facts of the instant case to see how resource-intensive and practically difficult these due process questions will be to answer. The State describes the police in this case as acting in good faith whereas the defendant describes them as failing to honor the defendant's request for counsel and using prearranged hand signals to communicate with other officers and tell them to send the defendant's attorney away. *Compare* Br. of

Plaintiff/Appellant at 18 *with* Br. of Defendant/Appellee at 3, 26. According to the State, the Defendant reinitiated contact with the police and waived his rights. Br. of Plaintiff/Appellant at 5. The defendant, however, suggests that on the very day of the interrogation, he again asked for an attorney. Br. of Defendant/Appellee at 1, 28. These factually-complicated and resource-intensive inquiries are what motivated the Supreme Court to move away from open-ended voluntariness inquiries and toward the bright-line *Miranda* rule. Similar concerns should motivate this Court to affirm the bright-line, easily administerable rule in *Bender* rather than opt for case-by-case voluntariness inquiries. *Cf. Moran v. Burbine*, 475 U.S. 412, 462 n.48, 105 S. Ct. 1135, 1162 n.48 (1986) (Stevens, J., dissenting) ("[I]t is surely easier to administer a rule that applies to an external event, such as an attorney's telephone call or a visit to the police station, than a rule that requires an evaluation of the state of mind of a person undergoing custodial interrogation.")

2. Reliance interests support re-affirming *Bender*.

When analyzing the reliance interests that support a precedent, this Court asks "whether the previous decision has become so embedded, so accepted, and so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *People v. Breidenbach*, 489 Mich. 1, 16, 798 N.W.2d 738, 747 (2011). Since 1932, it has been clear in this State that the police may not hold someone incommunicado, refuse to permit his lawyer to see him, and deceive him into thinking that no lawyer is currently available to him in order to pressure him to waive his rights. Three different published opinions written by this Court spanning sixty-seven years have held that police must inform a suspect that an attorney is presently available and waiting to speak with him in order to "insure that our system of criminal justice remains accusatorial and not inquisitorial in nature." *People v. Bender*, 452 Mich. 594, 623, 551 N.W.2d 71, 84 (1996); *see also People v. Wright*, 441 Mich.

140, 490 N.W.2d 351 (Mich. 1992); *People v. Cavanaugh*, 246 Mich. 680, 225 N.W. 501 (1929). The right to access to an attorney and to be free from incommunicado interrogation is so embedded in our justice system that to remove it would undermine our fundamental principles of fairness and compromise the accusatorial nature of our criminal justice system.

The State fundamentally misunderstands the relevant reliance interests in this case. The question is not whether a suspect being interrogated would rely on *Bender* to determine whether to ask for a lawyer. *See* Br. of Plaintiff/Appellant at 17. Rather, the question is whether the defendants can and should expect on the police to treat them fairly and not hold them incommunicado in order to extract confessions from them. As the Supreme Court noted in *Miranda* and this Court noted in *Bender*, "[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means ... would bring terrible retribution." *Miranda v. Arizona*, 384 U.S. 436, 479-80, 86 S. Ct. 1602, 1630-31 (1966); *People v. Bender*, 452 Mich. 594, 616 n.19, 551 N.W.2d 71, 80 n.19 (1996).[25]

This Court has noted that the degree to which overruling a precedent would "work a hardship on the criminal justice system or affect the manner in which determinations of guilt are fairly and efficiently made" is relevant to the reliance inquiry. *People v. Breidenbach*, 489 Mich. 1, 16, 798 N.W.2d 738, 747 (2011). Overruling *Bender* would work a hardship on the criminal justice system, because of the pressure that will be brought to bear on police who know that a suspect's attorney is attempting to see him. It is only a matter of time before the suspect will learn of the attorney's presence. As a result, "enormous pressure builds upon the police to secure statements from those suspects before they either exercise their right to an attorney or somehow

[25] *See also State v. Reed*, 133 N.J. 237, 269, 627 A.2d 630, 647 (1993) (emphasizing that failing to inform suspects when their counsel is presently available to them "does not promote public esteem for the law").

learn of their attorneys' presence." *People v. McCauley*, 163 Ill.2d 414, 424, 645 N.E.2d 923, 929 (Ill. 1995). This pressure increases "the temptation ... to pressure the suspect into a confession before the attorney gains access to the suspect." *State v. Reed*, 133 N.J. 237, 257, 627 A.2d 630, 640 (1993); *see also Moran v. Burbine*, 475 U.S. 412, 451, 106 S. Ct. 1135, 1156-57 (1986) ("[H]istory has taught us that the danger of overreaching during incommunicado interrogation is so real." (Stevens, J., dissenting)); *United States v. Carignan*, 342 U.S. 36, 46, 72 S. Ct. 97, 102 (1951) (Douglas, J., concurring) ("What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country – the free as well as the despotic, the modern as well as the ancient.").

The inherently coercive nature of incommunicado interrogations not only undermines the accusatorial values at the core of our criminal justice system; it also compromises the panoply of procedural rights that we have erected to ensure that determinations of guilt are fair and accurate. As the United States Supreme Court recognized in *Ashcraft*, when the police hold someone incommunicado and trick him into waiving his rights, they are "set[ting] themselves up as a quasi judicial tribunal" that tries and convicts the defendant without a judge, a jury, or the basic demands of fair process. *Ashcraft v. Tennessee*, 322 U.S. 143, 154 n.10, 64 S. Ct. 921, 926 n. 10 (1944) (quoting with approval from Ashcraft's motion for a new trial). Because overruling *Bender* would work a hardship on the criminal justice system and undermine the manner in which determinations of guilt are fairly made, reliance interests support retaining the *Bender* rule.

3. The *Bender* rule is as justified and necessary today as when it was adopted.

The last part of the Court's inquiry asks "whether intermediate changes in the law or facts no longer justify the ... decision." *People v. Breidenbach*, 489 Mich. 1, 17, 798 N.W.2d 738,

748 (2011). If anything, intervening factual and legal developments suggest an even greater need for the *Bender* rule.

Factually, police departments around the state continue to deny attorneys access to their clients and fail to inform suspects of their attorneys' presence despite the clear mandate in *Bender*. *See, e.g.*, *People v. Leversee*, 622 N.W.2d 325 (Mich. App. 2000); *People v. Young*, 565 N.W.2d 5 (Mich. App. 1997). In fact, recent investigative reporting reveals that there is a *per se* practice of excluding attorneys in some areas. *See, e.g.*, Jameson Cook, *Defense: Toss Todd Pink's Statement*, THE MACOMB DAILY (Dec. 16, 2010) (quoting Clinton Township Police Captain Richard Maierle as saying that the township police station "does not accommodate attorneys meeting with suspects"). Thus, there is clearly still a need for clear guidance from this Court about the police obligation to inform suspects about their counsels' attempts to communicate with them.

Legally, the State argues that *Miranda* adequately protects the right to counsel so the *Bender* rule is unnecessary. *See* Br. of Plaintiff/Appellant at 11. However, *Miranda* pre-dated this Court's decision in *Bender* and this Court explicitly rejected the argument that *Miranda*'s protections were enough. *Miranda* is therefore not an intermediate change in the law that post-dates this Court's decision and someone undercuts the need for it.

In fact, since this Court decided *Bender* in 1996, the United States Supreme Court has cut back on suspects' rights to counsel and rights to be free from compulsory self-incrimination thus demonstrating that there is even *more* of a need for *Bender* today.[26] As one scholar recognized,

[26] *See, e.g.*, *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213 (2010) (holding that a break in custody ends the presumption of involuntariness established in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880 (1981)); *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250 (2010) (holding that suspects must explicitly invoke the right to silence and that the mere readings of the warnings followed by a voluntary statement will often be sufficient to infer a valid waiver of rights); *Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404 (1986) and

since *Miranda* was decided, "the Supreme Court has effectively encouraged police practices that have gutted *Miranda*'s safeguards .... The best evidence now shows that, as a protective device, *Miranda* is largely dead." Charles D. Weisselberg, *Mourning* Miranda, 96 Calif. L. Rev. 1521, 1592 (2008). Without robust *Miranda* safeguards to protect the privilege against self-incrimination and the right to counsel, state courts must craft independent rules to give meaning to their own state rights rather than relying on the federal precedent interpreting analogous federal provisions.

The State contends that the Supreme Court's decision in *Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079 (2009), demonstrates that the *Bender* rule is unjustified. *See* Br. of Plaintiff/Appellant at 12 (arguing that, in *Montejo*, "the Court found that there is no reason to retain a policy driven prophylactic rule where that policy – protection of the right to counsel – is adequately being served by other means"). First, it is important to emphasize that *Montejo* dealt with an entirely distinct factual scenario. In *Montejo*, the Court held that the *Miranda* warnings were adequate to inform a suspect of his rights *when his attorney was not presently attempting to communicate with him.* As a number of sister courts have recognized:

> To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second.

State v. Stoddard, 206 Conn. 157, 168, 537 A.2d 446, 453 (1988); *People v. McCauley*, 163 Ill.2d 414, 445, 645 N.E.2d 923, 939 (Ill. 1995); *Commonwealth v. Mavredakis*, 430 Mass. 848, 859-60, 725 N.E.2d 169, 178-79 (2000); *Dennis v. State*, 990 P.2d 277, 283 (Okl.1999); *State v. Matthews*, 408 So.2d 1274, 1278 (La. 1982). Moreover, unlike in *Montejo*, there are no "other

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permitting police to approach a represented suspect after his Sixth Amendment rights have attached and ask him to waive); *United States v. Patane*, 542 U.S. 630, 124 S. Ct. 2620 (2004) (holding that the physical fruits of a *Miranda* violation are admissible).

means" that adequately protect a suspect's right to be free from incommunicado interrogation and ensure that he is not deceived into waiving his rights. The inability of the voluntariness test to adequately protect suspects' rights to be free from compulsory self-incrimination is what led the Supreme Court to adopt the *Miranda* requirements. *See* Yale Kamisar et al., *Modern Criminal Procedure* 549-54 (13th ed. 2013).

Finally, the State argues that this Court should overrule *Bender*, because "[t]he remedy called for by the rule is a per se one that is drastic and without exception." *See* Br. of Plaintiff/Appellant at 19. The per se rule of exclusion is not drastic; it aligns with the remedy that many other state courts have adopted and is also in line with the suppression remedy that the Supreme Court adopted in *Miranda*. The State's argument may be motivated by its belief that exclusion "deprives the jury of powerful evidence that should be made fully available to the jury in its pursuit of truth." Br. of Plaintiff/Appellant at 18. However, as Justice Stevens explained in his *Moran* dissent, this alleged "cost"

> amounts to nothing more than an acknowledgment that the law enforcement interest in obtaining convictions suffers whenever a suspect exercises the rights that are afforded by our system of criminal justice. In other words, it is the fear that an individual may exercise his rights that tips the scales of justice [under this argument]. The principle that ours is an accusatorial, not an inquisitorial system, however, has repeatedly led the Court to reject that fear as a valid reason for inhibiting the invocation of rights.

Moran v. Burbine, 475 U.S. 412, 459, 106 S. Ct. 1135, 1161 (1986) (Stevens, J., dissenting).[27]

Moreover, contrary to the State's assertion, it is not clear that there will be no exceptions to the *Bender* rule. It is possible to imagine limited exceptions to *Bender*. For example, should there be an imminent threat to public safety, this Court could quite defensibly hold that the

[27] *See also State v. Haynes*, 288 Or. 59, 75, 602 P.2d 272, 280 (1979) ("[T]here is no room for speculation [about] what defendant might or might not have chosen to do after he had th[e] opportunity [to meet with counsel]."); *People v. McCauley*, 163 Ill.2d 414, 445, 645 N.E.2d 923, 939 (Ill. 1995) (same); *State v. Reed*, 133 N.J. 237, 264, 627 A.2d 630, 644 (1993) (same).

Quarles public safety exception permits police to ask safety-related questions before informing a suspect that his attorney is present. *See New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626 (1984). It will be up to this Court and the lower courts to devise exceptions should the need for them arise. That is simply a matter of shaping the contours of the *Bender* rule and not a reason for overruling it.[28]

[28] The State appears to argue for a good faith exception to the *Bender* rule, noting that "[e]ven federal constitutional violations are subject to a good faith exception or a separate determination as to whether exclusion serves a deterrence rationale." *See* Br. of Plaintiff/Appellant at 11. However, not surprisingly, the State is unable to cite a single Supreme Court case in which that Court considered the good faith of the police when addressing violations of the privilege against self-incrimination. Rather, the State relies on two Fourth Amendment precedents to argue for a good faith exception. *See id.* (citing *People v. Goldston*, 470 Mich. 523, 682 N.W.2d 479 (2004) and *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695 (2009)). The comparison however fundamentally misunderstands important differences between these two rights.

Because a Fourth Amendment violation happens at the time of the illegal search or seizure, the exclusionary rule in the Fourth Amendment context is designed to send a message to the police in an attempt to deter future violations. *See Hudson v. Michigan*, 547 U.S. 586, 126 S. Ct. 2159 (2006). For this reason, the good or bad faith of the officer is directly relevant in determining how much deterrence is appropriate. *See United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984). In contrast, a violation of the privilege against self-incrimination happens when the statement is admitted into evidence at trial. *See Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994 (2003). As a result, the exclusionary rule in the self-incrimination clause context is used to prevent the actual violation of the right at issue. It is not used to deter bad police action. It is the fact of compulsion that necessitates exclusion of the confession; the good or bad faith of the officer is irrelevant.

Moreover, engrafting a good faith exception onto the *Bender* rule would only serve to muddy its otherwise clear contours. As the record in this case demonstrates, whether the officers acted in good or bad faith is often quite difficult to discern. Perhaps for these reasons, the Supreme Court has never seen fit to engraft a good faith exception on the *Miranda* requirements. This Court should similarly decline to take up the State's invitation to create a good faith exception.

CONCLUSION

For all of the above reasons, Amici Curiae, the Criminal Defense Attorneys of Michigan and the American Civil Liberties Union Fund of Michigan, respectfully request that this Court re-affirm the rule announced in *People v. Bender*, 452 Mich. 594, 551 N.W.2d 171 (1996).

Respectfully Submitted,

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