STATE OF MICHIGAN
IN THE SUPREME COURT
(On Leave to Appeal Granted from the Court of Appeals denial of leave, Markey, P.J., Murphy and Boonstra, J.J.,
from the Circuit Court for the County of Livingston, Reader, J.)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
-vs-
GEORGE ROBERT TANNER,
Defendant-Appellee,

Supreme Court No: 146211
Court of Appeals No.: 310688
Circuit Court No.: 12-020466-FC

______________________________________/

William J. Vailliencourt, Jr., P39115
Attorney for Plaintiff-Appellant
Livingston County Prosecuting Attorney's Office
210 S. Highlander Way
Howell, MI 48843
(517) 546-1850

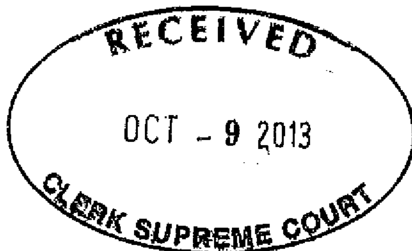
Mark A. Gatesman, P56139
Attorney for Defendant-Appellee
211 East Grand River Avenue
Howell, MI 48843
(517) 231-7003

______________________________________/

BRIEF ON APPEAL

OF DEFENDANT-APPELLEE

ORAL ARGUMENT REQUESTED



Prepared by:
Mark A. Gatesman, P56139
Counsel for Defendant-Appellee
211 East Grand River Avenue
Howell, MI 48843
(517) 231-7003

Dated: October 9, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	v
ISSUE PRESENTED	vi
STATEMENT OF MATERIAL FACTS AND PROCEEDINGS	1
SUMMARY OF ARUGMENT	5
ARGUMENT	7
DID THE CIRCUIT COURT REVERSIBLY ERR IN APPLYING LONGSTANDING MICHIGAN LAW IN DETERMINING THAT DEFENDANT'S OCTOBER 18, 2011 SHOULD BE SUPPRESSED AS UNKNOWING AND INVOLUNTARY DUE TO THE COERCIVE ACTIONS OF THE LAW ENFORCEMENT OFFICERS IN DENYING DEFENDANT ACCESS TO HIS APPOINTED COUNSEL AND AWARENESS OF HIS PRESENCE AND SHOULD *PEOPLE v BENDER* BE OVERRULED?	7
Introduction	7
Bender	8
Wright	10
Moran v Burbine is not controlling in this case	13
Review of Michigan's Jurisprudence History Utilized to Interpret the Constitution	14
The Michigan Rule	16
People v Bender	21
If Anything *Wright* Not *Bender* Should Control in this Case	23
Justice Brickley Knew a Good Bit About Law Enforcement	24
A Distinction that Should not Distinguish	25
What Overturning *Bender* Would Mean Here	25
What Happens if Bender is not Overruled Here	26

TABLE OF CONTENTS (continued)

Conclusion	27
RELIEF REQUESTED	30
PROOF OF SERVICE	31

TABLE OF AUTHORITIES

Cases	Page
Cremonte v Dept of State Police, 232 Mich App 240; 591 NW2d 261 (1999), *limited by Lewis v State,* 464 Mich 781; 629 NW2d 868 (2001)	26
Giordenello v United States, 357 US 480 (1958)	10
Halbert v Michigan, 545 US 605 (2005)	14
In re MCI Telecommunications Complaint, 460 Mich 396; 596 NW2d 164 (1999)	26
Miranda v Arizona, 384 US 436 (1966)	Passim
Moran v Burbine, 475 US 412 (1986)	Passim
People v Bender, 452 Mich 594; 551 NW2d 71 (1996)	Passim
People v Bulger, 462 Mich 495; 614 NW2d 103 (2000)	14
People v Case, 220 Mich 379; 190 NW 289 (1922)	15
People v Cavanaugh, 246 Mich 680; 255 NW 501 (1929)	Passim
People v Kamhout, 227 Mich 172; 198 NW 831 (1924)	15
People v Kirby 440 Mich 485; 487 NW2d 404 (1992)	Passim
People v Roache, 237 Mich 215; 211 NW 742 (1927)	15
People v Wolcott, 51 Mich 612, 615; 17 NW 78 (1883)	Passim
People v Wright, 441 Mich 140; 490 NW2d 351 (1992)	Passim
Sitz v Department of State Police, 443 Mich 744, 506 NW2d 209 (1993)	Passim
Sitz v Department of State Police 496 US 444 (1990)	15
Withrow v Williams, 507 US 680 (1993)	9

Constitution	Page
Const. 1963 art 1 § 11	15
Const. 1963, art 1 §17	Passim
Const. 1963 art 1 §20	Passim
United States Constitution art VI, cl 2	13

Statutes	Page
MCL 750.160	3
MCL 750.313	3

STATEMENT OF JURISDICTION

Defendant-Appellee acknowledges this Court's jurisdiction under MCR 7.301(A)(2).

ISSUE PRESENTED

DID THE CIRCUIT COURT REVERSIBLY ERR IN APPLYING LONGSTANDING MICHIGAN LAW IN DETERMINING THAT DEFENDANT'S OCTOBER 18, 2011 SHOULD BE SUPPRESSED AS UNKNOWING AND INVOLUNTARY DUE TO THE COERCIVE ACTIONS OF THE LAW ENFORCEMENT OFFICERS IN DENYING DEFENDANT ACCESS TO HIS APPOINTED COUNSEL AND AWARENESS OF HIS PRESENCE AND SHOULD *PEOPLE v BENDER* BE OVERRULED?

The Circuit Court answered this question: No.

The Court of Appeals answered this question: No.

Plaintiff-Appellant answers this question: Yes.

Defendant-Appellee answers this question: No.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Defendant was arrested for the Murder of Christopher Townsend on the October 16, 2011. Upon arrest Defendant was taken to the Michigan State Police station, Brighton Post. On October 17, 2011 at the Brighton Post, Detective Furlong read Defendant his Miranda warnings and he immediately invoked his right not to speak without an attorney present. [1] Defendant also asked the police if they could provide him a lawyer[2] Despite Defendant's invocation not to speak, Detective Smith continued to question Defendant urging that it was a mistake not to talk to them.[3] Later, Defendant was transported to the Livingston County Jail. On October 18, 2011 at the Livingston County Jail, while being interviewed by a mental health worker, Defendant indicated that he wanted to "get something off his chest."[4] The mental health worker relayed the message that Defendant wanted to get something off his chest to jail administrator Cremonte. Cremonte met with Defendant in an attempt to clarify what Defendant had told the mental health worker. According to Cremonte, immediately upon speaking with Defendant, he asked "can you get me an attorney?"[5] Cremonte answer "no, but I can get the investigating officer's that are handling your case."[6]

Cremonte contacted Detectives Furlong and Smith and indicated that Defendant wanted to speak to them. Cremonte also spoke with the elected Livingston County

---

[1] 50 a
[2] 62a-63a, 8b
[3] 9-10b
[4] 23a
[5] 31a, 35a
[6] 31a

Prosecutor David Morse in response to Defendant asking if Cremonte could get him an attorney.[7]

In response to Defendant's request, prosecutor Morse contacted Livingston County Circuit Court Administration and requested that an attorney be appointed for Defendant.[8] Attorney Marcus Wilcox was contacted by Livingston County Circuit Court Administration and was appointed to represent Defendant. Attorney Wilcox was instructed by prosecutor Morse that he was Defendant's attorney for the purpose of interrogation and he was to go to the Livingston County Jail to represent Defendant.[9]

On October 18, 2011, attorney Wilcox and Detectives Furlong and Smith arrived at the jail simultaneously.[10] Cremonte greeted Detectives Furlong, Smith and Attorney Wilcox in the jail lobby. Cremonte, Det. Furlong and Smith were aware that attorney Wilcox was counsel for Defendant.[11] Despite the fact that Wilcox was at the jail to represent Defendant, Cremonte instructed Wilcox to be seated and told him they would be with him in a few minutes.[12]

Once in the jail, Defendant was brought into an interview room with Detectives Furlong and Smith. Failing to inform Defendant of the presence of Attorney Wilcox at the jail for the purpose of representing him, Detective Furlong read Defendant his

---

[7] 35a
[8] 84a
[9] 84a
[10] 85a-86a
[11] 41a-42a, 66a, 68a, 12b
[12] 42a, 88a

Miranda warnings, which Defendant waived.[13] While Defendant was being read his Miranda warnings, Cremonte received a prearranged signal from by Det. Furlong, indicating that Defendant did not want an attorney. [14] Upon being given this signal, but prior to Defendant waving his Miranda warning, Cremonte proceeded to the Jail lobby and told attorney Wilcox that "he could leave; Defendant did not want an attorney."[15] At no time during or subsequent to October 18, 2011 interrogation, was defendant told he had counsel at the holding facility immediately available to represent him. [16]

Defendant was subsequently charged with Open Murder and Mutilation of a Dead Body, for killing of Christopher Townsend.[17] Defense counsel filed a Motion to suppress Defendant's confession.[18] The matter was set for evidentiary hearing and following the hearing the Trial Court granted Defendant's Motion to Suppress based on *People v Bender*, noting; Defendant in fact had a lawyer appointed to represent him and the police armed with the knowledge of the presence of the attorney on Defendant's

---

[13] 74a

[14] 35a—37a, 55a,

[15] 36a

[16] 74a, 43a, 11-14b

[17] Contrary to MCL 750.313 and 750.160

[18] Defendant understands he will stand trial in this case in spite of the suppression of his statement and regardless of ruling of this court because of the following admissible evidence of his guilt: Testimony at Defendant January 26, 2012 Preliminary exam of the following individuals: Rochell Bryant, Defendant's girlfriend, and Robert Gazdecki testified that Defendant admitted to killing victim Townsend. Defendant's uncle Phillip Tanner testified at preliminary exam that Defendant borrowed bleach to clean out the vehicle that victim was in and reported to police that he believed that Defendant had killed someone and burned the body on his property. Kenneth Monroe, Kelly Bolling and Tyler Palice saw Victim Christopher Townsend in vehicle with Defendant and Co Defendant immediately before he disappeared. Co Defendant Stafford plead guilty to second degree murder and provided a factual basis detailing how Defendant killed Christopher Townsend.

behalf and the fact that Defendant expressed he might be interested in an attorney, but he was not told that one was waiting for him prior his Miranda waiver.[19]

[19] 105a-112a

SUMMARY OF ARGUMENT

At the outset, this case is poorly positioned as a vehicle to reconsider *Bender*. *Bender* involved a situation where counsel, unrequested by Defendant, but retained by family, endeavored to reach Defendant. *People v Wright,* which underlies *Bender,* is more applicable here but this case actually exceeds both of those situations, as here the Defendant asserted his right to silence and requested an attorney not once but twice, both initially and immediately before making the statement which is at issue herein. The assertion of the Defendant himself of his desire for counsel distinguishes this case from both *Bender* and *Wright* and takes this case out of the prophylactic range of those cases into an actual and direct intrusion on Defendant's own and already asserted *Miranda* rights and right to counsel.

Additionally, *Bender* and *Wright* represent the settled jurisprudence of Michigan and are consistent with nearly a century, or more, of Michigan jurisprudence which looks, unlike its federal counterpart, primarily toward preventing coerciveness in waiver of silence and counsel situations. Exactly nothing has changed in Michigan law since the arrival of *Bender* and the arguments proffered here are the same arguments which were offered to this Court and rejected in *Bender*. While the United States Supreme Court is arguably moving away from prophylactic rules, the entire teaching of this Court in *Bender* is that Michigan looks to different underpinnings in addressing these sorts of questions than does federal law, making any arguable federal trend inapplicable to this question (and, pointedly, no such trend seems existent federally on this particular

question either, as the federal doctrine of *Moran v Burbine* remains unchanged today from what this Court reviewed in *Bender*).

Should this Court be inclined to again answer the *Bender* question it will find Michigan law to be unchanged from what it was when last this question was visited on, and arriving at a different conclusion would require not just discarding *Bender* but also around a century or so of Michigan law (an opinion of Justice Cooley, which was an underpinning of *Wright,* might have to be overruled to accomplish that result). The more this case is examined, however, the more it becomes apparent that the situation here is actually one far more egregious than what *Bender* endeavored to prevent and certainly not something that should be approved of by this, or any, Court.

ARGUMENT

DID THE CIRCUIT COURT REVERSIBLY ERR IN APPLYING LONGSTANDING MICHIGAN LAW IN DETERMINING THAT DEFENDANT'S OCTOBER 18, 2011 SHOULD BE SUPPRESSED AS UNKNOWING AND INVOLUNTARY DUE TO THE COERCIVE ACTIONS OF THE LAW ENFORCEMENT OFFICERS IN DENYING DEFENDANT ACCESS TO HIS APPOINTED COUNSEL AND AWARENESS OF HIS PRESENCE AND SHOULD *PEOPLE v BENDER* BE OVERRULED?

The Circuit Court answered this question: No.

The Court of Appeals answered this question: No.

Plaintiff-Appellant answers this question: Yes.

Defendant-Appellee answers this question: No.

Introduction

The Appellant's main point in both its application and eventual brief to this Court is that this case should require a re-visiting of *People v Bender,* 452 Mich 594; 551 NW2d 71 (1996). While it is obvious that this question has the Court's attention, this Court wisely granted leave rather than taking this issue on the application. With the closer examination of the record that is invariably present in calendar cases, particularly one such as this where the Court of Appeals decision was a simple denial of leave, the first issue to be considered is the suitability, or really lack thereof, of this matter as a vehicle for the arrival of any *Bender* question. *Bender's* rule speaks to a very different situation

than that which is seen here, namely a situation where an attorney arrives unsolicited. Here the Defendant himself requested the appointment of an attorney, twice. While the detectives initially, and appropriately, halted the interrogation, the Defendant was never informed that an attorney had been both appointed for him and had actually arrived, even though he asked for counsel again just before making the statement at issue. This creates a far different situation, and creates far different questions, than what was seen in *Bender.*

The paramount question here seems to be not so much a *Bender* question but rather something of a *People v Wright*, 441 Mich 140; 490 NW2d 351 (1992), one, whether law enforcement may, once an attorney has been requested and appointed for a Defendant and arrived to perform that role, isolate the Defendant from the attorney, and fail to inform him of counsel's presence, for an indefinite period of time, and whether, if the Defendant tires of waiting and elects to reinstitute conversations with law enforcement, without knowledge that counsel is present nearby, such acts will be considered voluntary.

Bender

Though the underlying facts of *Bender* are by now familiar it is worth noting them in regards to their contrast to the instant matter. The *Bender* defendant was arrested at about 4:30 am. *Id.* at 599. His parents retained an attorney who called the police station around 9:00 a.m., requesting to speak with the defendant. *Id.* at 600. After being rebuffed with a procedural excuse she called back an hour later and still did

not speak to an officer until sometime between 11:00 and 11:30 am. *Id.* In the meantime, and undisputedly after her first call, the defendant was interrogated and gave a statement after waiving *Miranda* warnings. *Id.* It was undisputed that the *Bender* defendant did not request an attorney or assert either his right to silence or counsel. *Id.*

Justice Cavanagh's opinion, signed by two other Justices, indicated a full awareness of *Moran v Burbine,* 475 US 412 (1986), and, despite this, after visiting the approaches of other states which have addressed this question, found a more expansive rule necessary, finding its basis in *People v Wright,* 441 Mich 140; 490 NW2d 351 (1992), a case the trial court had also relied on. *Id.* at 611-614.

Chief Justice Brickley's opinion, signed by all the signatories to Justice Cavanagh's opinion as well as the Chief Justice, was the only opinion to garner a majority of votes and this is widely accepted as displaying the actual rule of *Bender.* Chief Justice Brickley, in additional to the authorities looked to by Justice Cavanagh, found the U.S. Supreme Court's decision of *Withrow v Williams,* 507 US 680 (1993), instructive as to the importance of protecting the right against compelled self-incrimination. *Bender* at 621 (opinion of Brickley, C.J.). In particular, the Chief Justice (whose career, it should be noted, involved working as an FBI agent, chief assistant prosecutor and U.S. Attorney, apparently with nary a day of work on the other side of the aisle) stated that "I agree that we invite much mischief if we afford police officers "engaged in the often competitive enterprise of ferreting out crime" the discretion to decide when a suspect

can and cannot see an attorney who has been retained for his benefit." *Bender* at 622 (opinion of Brickley, C.J.) *quoting Giordenello v United States,* 357 US 480, 486 (1958).

While basing its rule on "our most closely guarded legal traditions," Chief Justice Brickley's opinion also noted that "experience has taught us that the good will of state agents is often insufficient to guarantee a suspect's constitutional rights." *Bender* at 623 (opinion of Brickley, C.J.). Before turning to exactly how a couple of state agents in this case inadvertently proved the wisdom of this observation it is first useful to turn briefly to *Wright*, which everyone in the majority agreed was the underlying Michigan basis of *Bender*.

Wright

The question in *Wright* differed from *Bender* as in *Wright* this Court addressed "whether a criminal defendant can voluntarily waive his Fifth Amendment rights without the knowledge that his attorney is trying to contact him," as well as "whether not providing a defendant with food, water, or the opportunity or place to sleep while he awaits questioning renders his statements involuntary." *Wright* at 142.

The *Wright* defendant was arrested at 5:00 a.m. and thereafter officers repeatedly endeavored to question him. In the early morning hours, when first Mirandized, the defendant stated he did not have an attorney and was told one would be provided for him. *Id.* at 144-145. Though the officers did not advise the defendant as to when this would occur, and apparently made no effort to attend to having counsel appointed, the defendant's family had already retained counsel for him and counsel had

repeatedly been endeavoring to contact him, included coming to the police headquarters and speaking directly to a sergeant while seeking access to his client. *Id.* Counsel was told by this sergeant, relying information from another sergeant who was repeatedly endeavoring to interrogate the defendant, that the defendant had been informed of his rights and did not want an attorney. *Id.* at 145. Only after the defendant finally made and signed a statement did the sergeants inform him that counsel was present in the building. *Id.*

Chief Justice Mallett's opinion, joined by Justice Levin, noted that "although the United States Supreme Court has held that a defendant's knowledge of his attorney's presence is irrelevant to the voluntariness of a waiver, we disagree." *Id.* at 148. Justice Cavanagh's opinion very specifically found this holding "entirely supportable" and agreed with it, but would have gone farther still, relying on Const 1963, art 1, §20., finding that "the police deception in this case threatens the adversarial system by allowing the police to manipulate the interrogation process." *Wright* at 156, n 2 (opinion of Cavanagh, J.).

Justice Brickley's concurrence in *Wright* thus again forms the limiting and defining factor of this Court's holding. Therein Justice Brickley noted that "despite many superficial similarities, Michigan jurisprudence differs from federal jurisprudence in its requirements for a valid waiver of rights. Under federal law, a waiver must be voluntary, knowing and intelligent. . . . No single element predominates. However, Michigan jurisprudence governing the validity of waivers during interrogation focuses

primarily on the coerciveness of conditions surrounding the waiver; statements made under coercive conditions are suppressed." *Wright* at 166 (opinion of Brickley, J.)[internal citations omitted.]

Justice Brickely noted Michigan's historical disdain for efforts to hold a defendant incommunicado in order to extract a confession, citing a litany of cases including *People v Cavanaugh,* 246 Mich 680; 255 NW 501 (1929) where police ignored a defendant's requests to speak with his family, priest and attorney and "actively interfered with his counsel's attempts to see him." *Wright* at 168 (opinion of Brickley, J). Drawing a direct line of such cases all the way back to Justice Cooley (*People v Wolcott,* 51 Mich 612, 615; 17 NW 78 (1883)), Justice Brickley noted that "incommunicado interrogation affects the voluntariness of a waiver because it suggests that cooperation will be advantageous whether or not the statements are true." *Wright* at 169 (opinion of Brickley, J.). As Justice Brickely noted "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 169-170 (opinion of Brickley, J.).

Finally, Justice Brickley noted that the lead sergeant's statement to defense counsel that the defendant had not requested an attorney, which was in fact less than

accurate, required defense counsel to depart to seek judicial intervention, time the sergeant eventually used to extract a statement from the *Wright* defendant. *Id.* at 171 (opinion of Brickley, J.). While the long period of incommunicado detention was clearly alarming to Justice Brickley and, indeed, every Justice in the majority, it is clear that each author in the *Wright* majority found the police officers' actions upon the arrival of counsel to be not just improper but sufficient to undermine the reliability of any thereafter asserted waiver.

Moran v Burbine is not controlling in this case

The Supremacy Clause of the United States Constitution art VI, cl 2, provides that the Constitution and the Laws of the United States which shall be in made in pursuance thereof; ...but the Supreme law of the land; and the Judges in every state shall be bound thereby anything in the Constitution or of the laws of any state to the contrary notwithstanding. The Supremacy Clause of the United States Constitution dictates that where there is a conflict of competing rights under the federal and state Constitutions, the federal law prevails. In *Moran*, the United States Supreme Court held that a waiver of Miranda is valid despite police failure to inform the suspect of an attorney's attempt to contact him, does not confer a right upon citizen.[20] To the contrary, it curtails the expansion of *Miranda* protections created in *Miranda v Arizona*. Consequently, the Supremacy Clause, Art VI cl 2, does not prevent a state from providing more protection

[20] *Moran v. Burbine*, 475 US 412; 106 S Ct 1135; L Ed 2d 955 (1986)

than what some would call the federal floor announced in the *Moran* holding.[21] Indeed, both the *Bender* and *Wright* majorities plainly recognized the existence of *Moran* but nonetheless found Michigan's jurisprudence had historically taken a different analytical path (looking toward coerciveness) which lead to a different specific result. The case now before this Court is not at all a situation, as does sometime occur, where Michigan has interpreted a state constitutional mandate similar to a co-existing federal one and then learned, upon issuance of an opinion of the United States Supreme Court, that federal law holds differently.[22] This is a situation where Michigan law has *always* been more expansive than federal law in its limitations on actions that can induce coerciveness into an interrogation and undermine the voluntariness of a defendant's waiver by such a route.[23]

Review of Michigan's Jurisprudence History Utilized to Interpret the Constitution

Wright and *Bender* are hardly unique in taking into account Michigan's historic views as to constitutional provisions that are "superficially similar" to federal provisions but have historically been treated more expansively in this state. When this Court was asked, in *Sitz v Department of State Police*, 443 Mich 744, 506 NW2d 209 (1993), following a

---

[21] *Moran* at 428

[22] See, e.g., *People v Bulger,* 462 Mich 495; 614 NW2d 103 (2000) and *Halbert v Michigan,* 545 US 605 (2005).

[23] Justice Brickley's citation to Justice Cooley's opinion in *People v Wolcott,* 51 Mich 612; 17 NW 18 (1883) was typically apt for a jurist known for his keen attention to Michigan's history. The facts of *Wolcott,* involving a series of individuals (none the lead detective) being rotated through the defendant's holding cell throughout the night to convince him to confess, is not something apt to run afoul of federal law then or now, but in Michigan "no reliance can be placed upon admission of guilt so obtained." *Wolcott* at 615.

United States Supreme Court decision[24] that the Fourth Amendment was not violated by the use of roadside sobriety check points, to consider the question under Michigan law, this Court, employing a historical review of Michigan precedence found that Const 1963 art 1 § 11, though grammatically similar to its federal counterpart, provides more protection than the Fourth Amendment.[25] While permissible under federal law, in Michigan, the suspicious-less stopping of vehicles at sobriety check points violated Const. 1963 art 1 § 11.[26] A historical review of nearly a century of Michigan automobile search and seizure law revealed that reasonable suspicion was a pre requisite to justify an automobile search. Roadside sobriety check points were deemed to be an unreasonable search that violates art 1 §11 Cont. 1963, because they lacked the necessary Michigan common law requirements of reasonable suspicion.

Much as this Court did in *Wright* and *Bender,* the *Sitz* Court reached its decision based on the nearly century of case law defining reasonable suspicion is needed to justify an automobile search. Past decisions, including those in *People v Case*, 220 Mich 379; 190 NW 289 (1922) ; *People v Kamhout*, 227 Mich 172; 198 NW 831 (1924) and *People v Roache*, 237 Mich 215; 211 NW 742 (1927), laid the groundwork for this Court's decision in *Sitz* and a similar pattern obviously was present in the controlling opinions of both *Wright* and *Bender* which, far being unaware of the holding and import of *Moran* instead sought to answer the question it posed but to do so under Michigan, as opposed

[24] *Sitz v Department of State Police* 496 US 444 (1990)
[25] Const. 1963 art. 1 § 11, *Sitz v Department of State Police,* 443 Mich 744, 506 NW2d 209 (1993).
[26] *Sitz,* 443 Mich 744.

to federal law, which, as Justice Brickley noted in *Wright,* have traditionally elected to take different routes towards the same end of insuring that waivers of constitutional rights are voluntary.

The Michigan Rule

Under Michigan's Constitution, a suspect's waiver of the right to remain silent and right to counsel is not knowing and intelligent if police do not inform suspect of counsel's representation. For at least 80 years Michigan jurisprudence has held that a custodial suspect is entitled to the knowledge of an attorney's attempts to see and advise their client.[50] Further law enforcement is held accountable to the extent that the attorney or the suspect informs them of the representation. In order for a waiver of *Miranda* to be knowing and intelligent a suspect must be informed of counsel's attempt to contact said suspect for the purpose of representation.[51]

Appellant argues that *Bender* is wrongly decided and should be overruled. A review of the historical precedence of Michigan case law reveals that for nearly a century, confessions gathered in circumstances similar to that in *Bender* have been interpreted by this Court to be unknowing and involuntary under Michigan's Constitution.[52]

While it is a bit tedious to simply revisit what this Court did in *Wright* and *Bender,* it is also necessary for a very simple reason – *Michigan's historical precedent has not*

---

[50] *People v Cavanaugh,* 246 Mich 680, 225 NW2d 501 (1929)
[51] *People v Wright,* 441 Mich 140; 490 NW2d 351 (1992)
[52] *People v Cavanaugh,* 246 Mich 680, 225 NW2d 501 (1929); *People v Wright,* 441 Mich 140; 490 NW2d (1992); *People v Bender,* 452 Mich 594 551 NW2d 71 (1996)

changed since then.[53] As *Sitz, Wright* and *Bender* all demonstrate, what matters in this case is not what federal jurisprudence holds under a similar federal constitutional principle, or what the current trends in Michigan law are, but rather what has historically been applied by this Court in addressing such constitutional rights, and their impingement or purported waiver, under Michigan law.

This Court first addressed the issue of police interference with access by an attorney to a client in 1929 in *People v Cavanaugh*. In *Cavanaugh*, suspect Joseph Cavanaugh in custody and accused of rape, confessed to police and was subsequently charged with rape. During the interrogation Defendant's family requested to see or speak to defendant, were denied.[54] The Defendant's family retained counsel for the purpose of representing the suspect. [55] Counsel's requests to see his client were denied. Upon counsel's assertion to police that he would obtain a writ of habeas corpus, he was permitted to see his suspect.[56]

This Court found that Defendant was held incommunicable. "...an accused may be apprehended and held in safe custody to answer an accusation in court, but the custodian of his person possesses no inquisitorial power or right to hold him

---

[53] Indeed, other than the natural progression of Justices through this Court that is certain to occur after a couple of intervening decades, very little has changed at all in regards to the law on this issue, federally or in Michigan since this Court took up *Bender*. The People are still citing *Moran* in support of their position. The defense is still citing *Wright* and *Cavanaugh, et al,* though obviously now with the benefit of Justice Brickley's opinion in *Bender*. While it could probably be said that there is, on the United States Supreme Court, something of an increasing hostility toward prophylactic rules in general, this Court has not, until now, had occasion to cónsider such questions and nothing in the historical approach of Michigan toward this issue appears to have actually changed in the interim.

[54] *People v Cavanaugh*, 246 Mich 680, 225 NW 501 (1929) at 684

[55] Id at 688

[56] Id at 687

incommunicable while endeavoring to exact a confession."[57] In reversing the conviction, the *Cavanaugh* Court concluded that a ".....confession, extorted by mental disquietude, induced by unlawfully holding an accused incommunicable, is condemned by every principle of fairness.... is forbidden constitutional guarantee of due process of law, and inhibited by the right of an accused to have the assistance of counsel."[58] *The Cavanaugh* Court succinctly declared that police may not keep counsel from an accused during an interrogation process.

The *Cavanaugh* Court, although not explicitly referencing the specific constitutional provision, found that denying an accused access to his attorney was forbidden by due process of law, and "to have the right to the assistance of counsel". [59] This Court reasoned that holding a suspect from family and counsel during the interrogation phase of a criminal investigation creates a situation where the suspect is vulnerable to influence and demands of police creating unlawful pressure upon the accused.[60] While announcing the rule in *Cavanaugh* the Court stated, "[i]n this State, a parent my not be denied the right to see and have conversation with a child in jail..... Neither may police, having custody of one accused of a crime, deny an attorney, employed by or in behalf of a prisoner, the right to see and advise the accused." [61]

---

[57] Id at 686
[58] Id at 686
[59] Id at 686
[60] Id at 686
[61] Id at 688

In *People v Wright,* Defendant Rodney Wright was arrested for the shooting of Clifford Harrell.[62] The defendant was given his Miranda warnings, which he waived, but he was not immediately interrogated.[63] Instead police focused on their investigation with a search of the *Wright d*efendant's home. The defendant was then questioned by police after the shooting victim died. During the interrogation the police attempted to get the defendant to confess to avoid the charge of first degree murder.[64] At this time, the *Wright* defendant denied any culpability in the murder. Police confronted the *Wright* defendant a second time but were interrupted by a phone call by the defendant's uncle. The defendant was made aware that his uncle called and was told he could speak to his uncle as soon as he made a statement.[65] The *Wright* defendant then confessed to the crime and signed a written statement[66]

Prior to the *Wright* defendant confessing to the murder, his family had hired an attorney to represent him. The attorney appeared at the jail and the officer interrogating the defendant was made aware of the of attorney presence.[67] Only after the defendant had confessed and signed a statement, did police inform the defendant of appearance of counsel on his behalf at the holding facility. The *Wright* defendant's motion to suppress his confession was denied and he was convicted of second-degree murder. The defendant appealed and this Court reversed the conviction finding that

---

[62] *People v Wright*, 441 Mich 140, 143; 490 NW2d 351 (1992).
[63] Id at 143
[64] Id at 144
[65] Id at 144
[66] Id at 144
[67] Id at 145

police must inform a suspect of retained counsel's in-person efforts to contact him and the officer's deliberate attempts to prevent counsel from contacting a suspect renders suspects confession involuntary.[68]

The *Wright* Court based its decision on the right to have assistance of counsel for his defense and due process afforded under Const. 1963, art 1 §17, noting these provisions of Michigan's Constitution include a suspect's right to be informed of counsel's in person efforts to contact said suspect.[69] A police decision to withhold from the defendant the knowledge that an attorney is present at the holding facility to represent him, renders his waiver of *Miranda* invalid, as not knowing and intelligent.

In Justice Cavanagh's concurring opinion in *Wright*, he utilized the historic interpretation of the Constitution when applying the right to counsel as guaranteed under Const. 1963 art 1 § 17, and *quoting People v Kirby,* "this Court must recognize the law as it existed in Michigan at the time the Const. 1963 art 1 §20 was adopted. "[I]t must be presume that a constitutional provision has been framed an adopted mindful of prior and existing law and with reference to them"[70] The opinion went on to emphasize; it has been unlawful for police to deny an attorney access to his client prior to the adoption of Michigan Constitution of 1963.[71] The opinion focused on the language in the holding of *Cavanaugh,* finding that "[i]n this State," was a clear

---

[68] Id 154
[69] Id at 154
[70] *Wright* at 156 quoting *People v Kirby* 440 Mich 485, 492; 487 NW2d 404 (1992)
[71] Id at 157

indication that the ruling was referring to rights embedded in the Michigan Constitution rather than the Federal Constitution.[72]

In *Wright* the Court reaffirmed the ruling in *Cavanaugh*, that in Michigan, a waiver of *Miranda* is not knowing and intelligent if police fail to inform a suspect that an attorney, who is present at the holding facility for the purpose of representing him or her.[73] In Michigan, the waiver of *Miranda* in this scenario requires more than the federal standard to be knowing and voluntary. Interpretation of the Michigan Constitution 1963 must acknowledge the law as it existed in at the time that Const. 1963 art. 1 §20 and §17 were adopted.[74] The history of this Court's jurisprudence demonstrates that in the context of rights conferred in Const. 1963 art. 1 § 17, § 20 (due process), assistance of counsel), then Const. 1908 art 2 §16 and § 19 (provide more protection to our citizens that the Federal Constitution.[75] This Court's ruling is *Sitz*, and *Kirby*, provide the historical precedence for interpretation of Michigan's Constitution more broadly than the federal Constitution.[76]

People v Bender

In *People v Bender*, Defendant Jamieson Bender and Scott Zeigler were arrested in connection of theft of bicycles and a sink stolen from a home under construction.

---

[72] Id at 158
[73] Id at 154
[74] *Wright* at 156, Justice Cavanagh's concurrence relying on *People v Kirby*, 440 Mich 485, 492; 487 NW2d 404 (1992), *citing* Const. 1908 art 2 § 16 and art 2 § 19.
[75] *See People v Wright*, 441 Mich 140; 490 NW2d 351 (1992), *People* v Cavanaugh, 246 Mich 680; 225 NW2d 501 (1929)
[76] See *Sitz v Department of State Police*, 443 Mich 744; 506 NW2d 209 (1993), *People v Kirby*, 440 Mich 485; 487 NW2d 404 (1992)

Parents of both suspects arranged legal representation for their children. Zeigler's mother appeared at the police station and attempted to inform her son that counsel had been retained for him. Jamieson's Bender's mother retained an attorney for Bender. Bender's attorney contacted police and requested Bender be informed that he had counsel. Police never informed either suspect that they had counsel. Both Zeigler and Bender waived *Miranda* and confessed to the thefts. The rule in *Bender* provides that a suspect's waiver of the right to remain silent and the right to counsel is not knowing and intelligent if police fail to inform said suspect when counsel has been retained to represent him or her.[77] This Court in *Bender*, just as in *Wright* ruled the holding was grounded in the historical interpretation of the Michigan Constitution, specifically the right to counsel and the right to remain silent Const. 1963 art. 1§17. [78]

The *Bender* Court expanded the holding *of Wright* and ruled that a request of counsel to see a suspect need not be made by counsel in person at the holding facility. Police must inform a suspect of counsel's attempts to see a suspect via phone or messenger in order for a subsequent waiver of *Miranda* to be knowing and voluntary.[79] The Court went on to explain, ... "In Michigan more is required before a trial court can make finding of a knowing and intelligent waiver." "We believe that in order for a defendant to fully comprehend the nature of the right being abandoned and the

---

[77] *Bender* at 604
[78] Id at 604
[79] *Bender* at 614

consequences of his decision to abandon it, he must first be informed, that an attorney has been retained to represent him."[80]

If Anything *Wright* Not *Bender* Should Control in this Case

The instant case is distinguished from *Bender* in two critical ways: Defendant initially invoked his Fifth Amendment privilege on October 16, 2011 and arguably he did so a second time on October 18, 2011.[81] Secondly, on October 18, 2011, Defendant's attorney appeared at the jail for the purpose of representation, prior to waiver of Miranda. In *Bender* the suspect did not request counsel, nor did she appear at the holding facility. In *Wright,* however, the suspect appears to have requested appointment of counsel and, thereafter, counsel did actually appear.

It is undisputed that on October 18, 2011, prior to Defendant confessing, he did in fact have counsel, who appeared at the holding facility for the purpose of representing Defendant. It is also undisputed that Defendant made a request for counsel on both October 16, 2011 and on October 18, 2011 , when he asked if police could "get him an attorney. "[82] Defendant never received the Constitutional benefit of his invocation of counsel. Further on October 18, 2011 when Defendant had counsel at the jail prepared to represent him, police withheld this information from Defendant *even though he had just before then asked Cremonte to get him an attorney.*

---

[80] *Bender* at 613

[81] Prior to finally speaking to the detectives it is undisputed that Defendant asked Cremonte to get him an attorney. 33a, 35a. Cremonte, of course, despite this, specifically told Attorney Wilcox to wait in the lobby, did not inform Defendant of his arrival, and instead worked out a signal system so Furlong could discreetly tell him when to send Attorney Wilcox away. 33a-37a.

[82] 33a, 35a.

Defendant's Miranda waiver is not knowing and voluntary due to police failure to inform that the counsel he had repeatedly requested was immediately available to advise him.[83]

Justice Brickley Knew a Good Bit About Law Enforcement

Long before he made his mark on this Court (and State) Justice Brickley led a distinguished career as both a field law enforcement officer and state and federal prosecutor. His statements in *Wright* and *Bender* regarding the limits of reliance on state officers' good will to insure constitutional propriety were hardly the cynicism of a commentator on the sidelines (or defense attorney too used to opposing state officers). They were simply realistic, representing a long-developed understanding that the demands placed on law enforcement officers, and those officers' all too common own cynicism about the legal system, can tend to create situations where law enforcement becomes more of a competitive and envelope pushing contest than a by the rules affair. Nowhere was this proven more true than in the events occurring when Attorney Wilcox and Detectives Furlong and Smith all arrived at the jail. 85a-86a. Everyone knew that Attorney Wilcox had been appointed to represent the suspect and that the county's own elected prosecutor had himself taken action to cause this appointment to happen. *Id.* Everyone likewise knew that the Defendant had invoked his right to remain silent and to counsel, and had just before they arrived requested an attorney but nonetheless Cremonte only allowed the law enforcement officers into the jail and the detectives just had to take one more

[83] *People v Wright*, 441 Mich 140; 490 NW2d 351 (1992)

crack at breaking the suspect before informing him that the counsel he (and even the prosecutor) had previously requested was in fact present. This was entirely premeditated, as demonstrated by the "prearranged signal" (35a-37a, 55a) that Furlong set up with Cremonte to let him know to get rid of the attorney. Even as Justice Brickely wrote of the competitive nature of law enforcement activities he probably could not have comprehended a situation where law enforcement officers, in conniving to undermine a Defendant's already present assertion of his rights to silence and counsel, would come up with signals similar to those found on a baseball diamond.

A Distinction that Should not Distinguish

Finally it must be noted that both *Wright* and *Bender* dealt with situations involving retained counsel. Here, of course, Defendant's counsel was appointed. That should not matter at all, of course, though it is possible to read the Prosecution's arguments as suggesting it might. While the circumstances here are unusual, they seemed to have arisen largely because the former elected prosecutor in Livingston County, upon hearing that a suspect in a homicide case had asserted his rights to silence and counsel, and was being held incommunicado in the jail, endeavored to correct a situation that Michigan law has long held should not happen.[84] If it should not happen to a moneyed Defendant, of course, it cannot happen to an indigent one either.

What Overturning *Bender* Would Mean Here

While *Bender* does not appear to squarely apply here on the facts of this case, the question obviously has the Court's attention. It is important thus to note that overturning *Bender* would

[84] In this respect, the Livingston County Prosecutor's office did exactly what anyone and everyone should expect and hope of it. The Prosecution acted proactively to follow the law and remedy a situation where law enforcement officers at least possibly were not. Now, alas, on further reflection, the same office, albeit a different elected Prosecutor, has decided instead to seek a change in the law.

permit not just the intentional nondisclosure of counsel's calling (*Bender*) or even arrival in the lobby (*Wright*) but also allow the police and jail administrators to turn back the clock to literally the pre-Justice Cooley era of *Wolcott.* When presented with a defendant asserting his rights to silence, the detectives and jail administrators could simply do nothing, hold him incommunicado and take as many runs as time would permit at getting him to reinitiate contact. Even in 1883, the detectives were smart enough not to try that themselves and the timely arrival of a social worker here, with some sudden concern for Defendant's mental health, suggests that a detective smart enough to work out hand signs ahead of time just might be smart enough to provide a suspect with ample opportunities to "reinitiate" contact.

It is also worth noting the "Mirandizing" of Defendant during the final interview. It is undisputed that right before Detective Furlong read Defendant his *Miranda* rights once again, the Defendant undisputedly had asked Cremonte (who, besides being a jail administrator is himself a retired MSP detective with extensive legal experience[85]) for an attorney.[86] When the detective mentioned that if the defendant could not afford an attorney one would be provided for him, of course, he conveniently neglected to mention that one actually already *had* been provided for him. While misstatements and flat out lies in interrogation have long been accepted as legitimate tools in the detective's toolbox, allowing that rule to go so far as to the advice of constitutional rights would be quite an extension indeed.

What Happens if Bender is not Overruled Here[87]

---

[85] *See Cremonte v Dept of State Police,* 232 Mich App 240; 591 NW2d 261 (1999), *limited by Lewis v State,* 464 Mich 781; 629 NW2d 868 (2001).

[86] 33a, 35a.

[87] While this Court's order plainly indicates that the *Bender* question is of interest to the Court, this Court has certainly encountered numerous situations where a case, though raising an interesting question, proved, when closely considered, to be a poor vehicle for actually resolving it. *See, e.g., In re MCI Telecommunications Complaint,* 460 Mich 396, 424, n 4; 596 NW2d 164 (1999). On first glance, especially

Candidly, regardless of this Court's ruling, which is certainly of ample interest to the Bench and Bar, defense counsel here has his work cut out for him. Considerable physical evidence, and a co-defendant who took a plea deal in exchange for testifying against this Defendant, as well as inculpatory testimony from his girlfriend and uncle, await this Defendant at trial. This certainly makes this a useful case for the Prosecution, which can argue for a reversal of *Bender* while largely playing with house money, as, either way, its case in chief will run days and be ominous in its implications for the Defendant. What this is not, however, is one of those hard sorts of cases that puts the Court in the unenviable position of deciding between consistency in Michigan law and concerns toward a particular result in one particular case. The Prosecution here cannot, at all, claim it would be handicapped in prosecuting its case even if the trial court's ruling here is affirmed and Defendant's statement is excluded.

Conclusion

The reasoning in *Bender* took into consideration nearly a century of concern by this court regarding police subterfuge to prevent attorney and client from communicating during interrogation. The history of Michigan's jurisprudence conclusively demonstrates that, in Michigan in order for a *Miranda* waiver to be knowing and intelligent, more is required under our Constitution than the Fifth and Sixth Amendments. Waiver of *Miranda* is not knowing and intelligent if a suspect is not informed of counsel's attempts on his or her behalf to contact him or her for the purpose of representation.

---

as the Prosecution presented it in its application, and with nothing but a denial of leave from the Court of Appeals, this case may have appeared to be a straightforward *Bender* question. On examination and briefing as a calendar case, however, the distinct factual underpinnings between this case and *Bender* alone may be enough to leave reconsideration of *Bender* to a case where, unlike here, the Defendant was not himself repeatedly requesting counsel, as *Bender* totally lacked that component.

In *Bender,* this Court reasoned that failing to follow the rule announced in *Cavanaugh* and *Wright* would encourage the police to do everything possible, short of a due process violation to prevent an attorney from contacting his client during or after the interrogation.[89] The facts in the instant case touch on the concerns raised in both *Cavanaugh* and *Wright.*[90]

In the instant case nearly two days after his invocation of his Fifth Amendment right, Defendant again asked for counsel, and, despite counsel actually having arrived, Defendant was instead given only yet another Miranda warning, which he finally waived. In the instant case, the waiver of *Miranda* was procured through attrition, rather than a knowing and intelligent waiver of the right to counsel and self-incrimination.

It has been unlawful in Michigan for police to prevent an attorney from contacting his or her client regarding representation, and to withhold from the suspect the fact that an attorney is employed on their behalf and has attempted to see them for purpose of representation.[91] This court has consistently held the Michigan Constitution requires more for a knowing and intelligent waiver of *Miranda* than its federal counterpart. The rational for Michigan standard is based on a historic review of the jurisprudence of this Court's interpretation of our states Constitution with regard to Due

---

[89] *Bender* at 616.

[90] Holding an accused incommunicable to parents and counsel is a subtle and insidious method of intimidating and cowing, tends to render a prisoner plastic to police assertiveness and demands, and is a trial of mental endurance under unlawful pressure. *Cavanaugh* at 686. ... the practice of holding 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.

[91] *People v Wright,* 441 Mich 140; 490 NW2d 351 (1992).

Process, and right to assistance for counsel. As in *Sitz* and *Kirby* where a review of this Court's past rulings regarding interpretation of our Constitution reveal that the protections our Constitution provides, the same holds true when determining if the precedence in *Bender* is required by Michigan's Constitution. A review of this Court's jurisprudence must lead to the inexplicable conclusion that for nearly 80 years the rule announced in *Bender,* which existed long before our Constitution was ratified in 1963, is indeed embedded in Michigan's Constitution. Based on the forgoing *Bende*r was not wrongly decided. Defendant invoked his right to counsel repeatedly here and consequently his waiver of *Miranda* on October 18, 2011 was not knowing and voluntary due to police failure to inform him of his counsel's appearance at the holding facility for the purpose of representing Defendant. The ruling of the trial court suppressing Defendant's confession should be affirmed.

RELIEF REQUESTED

Wherefore, Defendant George Robert Tanner respectfully requests that this Honorable Court affirm the Livingston County Circuit Court's May 30, 2012 order suppressing his October 18, 2011 statement and the Court of Appeals October 2, 2012 denial of leave to appeal in this matter.

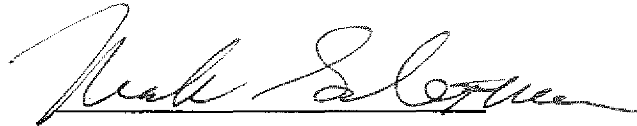
Respectfully Submitted:

Mark A. Gatesman, P56139
Counsel for Defendant-Appellee
211 East Grand River Avenue
Howell, MI 48843
(517) 231-7003

Dated: October 9, 2013

PROOF OF SERVICE

Mark A. Gatesman, P56139, hereby certifies that on October 9th, 2013, he personally served two copies of Defendant-Appellee's Brief on Appeal and Defendant-Appellee's Appendix on the Livingston County Prosecuting Attorney's Office, 210 S. Highlander Way, Howell, MI 48843 and one copy of Defendant-Appellee's Brief on Appeal and Defendant-Appellee's Appendix, by first class U.S. Mail, on the Michigan Attorney General, P.O. Box 30218, Lansing, MI 48909.



Mark A. Gatesman, P56139