STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Markey, P.J., Murphy and Boonstra, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

v.

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

GEORGE ROBERT TANNER,

Defendant/Appellee.
_____/

William J. Vailliencourt, Jr. (P39115)
Livingston County Prosecuting Attorney

Mark Gatesman (P56139)
Attorney for Defendant/Appellee
_____/

PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTIONAL BASIS

This Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2) and MCR 7.302(H)(4).

STATEMENT OF QUESTION PRESENTED

When a defendant has otherwise properly waived his right to counsel and to remain silent, that waiver is not rendered invalid under the United States or Michigan Constitutions simply because police did not inform him that counsel had been appointed for him. To the extent that *People v Bender* announced a prophylactic rule that requires suppression in such circumstances, it was wrongly decided and should be overruled. Because the trial court's suppression order is based solely on *Bender*, should the order be reversed and Defendant's motion to suppress be denied?

The People answer: Yes

Defendant answers: No

The Circuit Court was required to follow *Bender*.

The Court of Appeals was required to follow *Bender*.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant is charged with Open Murder[1] and Mutilation of a Dead Body[2] for the killing of Christopher Townsend in Livingston County on October 15, 2011.

Defendant filed a motion to suppress his confession. He alleged that because police did not inform Defendant that counsel had been appointed for him prior to his interrogation, his waiver of rights was invalid and that under the Michigan Supreme Court's 1996 decision in *People v Bender*,[3] suppression was required.[4] At a hearing on the motion on May 4, 2012, the trial court ordered an evidentiary hearing.

The facts elicited at the May 30, 2012 evidentiary hearing were largely uncontested. After his arrest on October 17, 2011, Defendant made a request for counsel when being advised of his *Miranda*[5] rights and police terminated the interview.[6] The next day, however, while lodged in the Livingston County Jail, Defendant told Nicole Brady, a mental health professional at the jail, that he had some things he wanted to get off his chest and that he wanted to talk to police about why he was lodged. Even though Brady told Defendant that it was his right not to talk and that he could have an attorney, Defendant said he still wanted to talk to investigators. Brady told Defendant she

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[1]Contrary to MCL 750.316.

[2]Contrary to MCL 750.160.

[3]*People v Bender*, 452 Mich 594; 551 NW2d 71 (1996).

[4]7a-9a.

[5]*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[6]50a, 60a-62a.

would alert jail staff.[7]

Brady told the jail administrator, Lt. Tom Cremonte, about Defendant's request to talk to investigators.[8] Cremonte saw Defendant and asked him about his request. Defendant asked Cremonte if he could get him an attorney, but Cremonte explained that that was not his role and that he could get the investigators if Defendant wanted to talk to them. Defendant said that he wanted to meet with investigators so Cremonte advised the lead detective, Michigan State Police Detective Sean Furlong.[9]

In the meantime, information had been provided to Livingston County Prosecutor David Morse that Defendant had requested that a lawyer be present for his interview with police. Based on the mistaken information, Morse contacted the circuit court and an attorney, Marcus Wilcox, was appointed to represent Defendant for that interrogation.[10]

Before getting to the jail to interview Defendant, Furlong confirmed with Cremonte that Defendant had not, in fact, requested that an attorney be appointed to be present during an interview. Furlong testified that his belief was that an attorney had been appointed as a contingency in the event Defendant asked for counsel during the interview.[11]

As Furlong and Detective Dale Smith walked into the jail, they met Wilcox, who asked if

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[7] 19a-20a, 12a-26a.

[8] 25a, 34a.

[9] 30a-32a, 45a-46a.

[10] 52a, 63a-67a.

[11] 52a, 68a, 70a.

they knew what he was there for. Furlong said they would let him know.[12] Cremonte took Furlong and Smith to see Defendant, told Defendant that they were the investigators handling his case and confirmed with Defendant that these were the people that Defendant wanted to talk to.[13] After Defendant confirmed that he wanted to talk to police, Furlong then advised Defendant of his *Miranda* rights and Defendant agreed to talk to investigators.[14] Defendant did not assert either his right to counsel or his right to remain silent.[15] But Furlong did not tell Defendant that Wilcox was in the jail lobby available to represent him if he desired.[16]

Wilcox testified that he wasn't even sure he knew Defendant's name and that he sat in the lobby until he was later told by Cremonte that Defendant didn't want an attorney and that Wilcox wasn't needed and could leave.[17] Wilcox made no request to meet with Defendant or that police not talk to Defendant.[18]

Observing that the facts were largely uncontested,[19] the trial court found that Defendant requested counsel at his earlier interrogation on October 17, but that he reinitiated contact with

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[12]53a.

[13]54a.

[14]55a-59a. A transcript of this colloquy was admitted at the hearing as People's Exhibit 1. 113a-115a.

[15]59a.

[16]75a.

[17]35a, 37a, 86a-87a, 90a.

[18]35a-36a.

[19]105a.

police and did not reassert his right to counsel on October 18.[20] However, the trial court concluded that under the prophylactic rule enunciated by Chief Justice Brickley in *People v Bender*,[21] police were required to tell Defendant that he had counsel appointed to represent him and that because police did not do so, *Bender* required the suppression of Defendant's statement.[22]

Accordingly, the trial court granted Defendant's motion and signed an order suppressing Defendant's statement on May 30, 2012.[23] From the trial court's order, the People sought leave to appeal with the Court of Appeals. The Court of Appeals denied the application for lack of merit in the grounds presented on October 2, 2012.

The People filed an application for leave to appeal, which this Court granted on April 3, 2013. The Court ordered the parties to address whether *People v Bender* should be overruled.[24]

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[20]105a-106a.

[21]*Bender*, 452 Mich at 620-623.

[22]109a-118a.

[23]116a.

[24]*People v Tanner*, 493 Mich 958 (2013).

ARGUMENT

When a defendant has otherwise properly waived his right to counsel and to remain silent, that waiver is not rendered invalid by the United States or Michigan Constitutions simply because police did not inform him that counsel had been appointed for him. To the extent that *People v Bender* announced a prophylactic rule that requires suppression in such circumstances, it was wrongly decided and should be overruled. Because the trial court's suppression order is based solely on *Bender*, the order should be reversed and Defendant's motion to suppress should be denied.

Standard of Review and Preservation of Issue

Findings of fact at a suppression hearing are reviewed for clear error while questions of law and the trial court's ultimate decision whether to suppress are reviewed *de novo*.[25] However, as this Court recently explained in *People v White*, because the facts are undisputed, the *de novo* standard of review applies.[26]

The issue was preserved by the People's opposition to Defendant's motion to suppress.

Discussion

As the trial court observed at the conclusion of the evidentiary hearing, the facts in this case are relatively uncontested. After asserting his right to counsel in an earlier interrogation, Defendant later reinitiated contact with police, waived his rights, and gave a confession. In the interim, however, an attorney was appointed to represent Defendant and was present at the jail when the second interrogation occurred. Believing that counsel was present to represent Defendant *in the event* Defendant *reasserted* his right to counsel, police did not tell Defendant about the lawyer. The trial court, finding that this Court's 1996 decision in *People v Bender* controlled, granted

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[25] *People v Crockran*, 292 Mich App 253, 256; 808 NW2d 499 (2011).

[26] *People v White*, 493 Mich 187, 193; 828 NW2d 329 (2013).

Defendant's motion to suppress his confession.

A. The Current State of the Law

In *Moran v Burbine*, a suspect being interrogated by police was not told that an attorney had been retained for the suspect. The question presented to the United States Supreme Court was whether that tainted the validity of the suspect's waiver of his right to counsel in such a way that the subsequent confession must be excluded.[27] The Court held that such a rule lacks any basis in *Miranda* or the federal Constitution. As the United States Supreme Court explained in *Moran*:[28]

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Under the analysis of the Court of Appeals, the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his Miranda rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. ... Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, *the analysis is complete and the waiver is valid as a matter of law.*

This Court, however, gave a different answer in *Bender* and concluded that suppression of a confession in such circumstances was required. The underlying rationale for that answer is unclear. *Bender* resulted in three different opinions, none of which enjoyed majority support. Justice

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[27] *Moran v Burbine*, 475 US 412, 415-416; 106 S Ct 1135; 89 L Ed 2d 410 (1986).

[28] *Id.* at 422-423 (citations omitted, emphasis added).

Cavanagh's opinion, joined by Justices Levin and Mallett, specifically relied on the Michigan Constitution, Const 1963, art 1, § 17. Chief Justice Brickley wrote a concurring opinion explaining his separate reasoning in support of a prophylactic rule. Justice Boyle, joined by Justices Riley and Weaver, dissented and found no basis in Michigan law to interpret the Michigan Constitution any differently than its counterpart in the federal constitution.

As recognized by this Court in *People v Sexton*, the ultimate holding in *Bender* is contained in the concurring opinion of Chief Justice Brickley.[29] *Bender*'s holding is that a defendant subjected to custodial interrogation must not only waive his *Miranda* rights, but in order for such a free and voluntary waiver to be valid, police must also advise the defendant if counsel is available to him. As Chief Justice Brickly explained:[30]

> The right to counsel and the right to be free of compulsory self-incrimination are part of the bedrock of constitutional civil liberties that have been zealously protected and in some cases expanded over the years. Given 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. 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.

Rejecting *Moran*, *Bender* nonetheless explicitly disclaimed any reliance on the Michigan Constitution as a rationale for its holding. Instead, *Bender* announced that the rule was simply a "prophylactic" one:[31]

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[29]*People v Sexton*, 458 Mich 43, 53; 580 NW2d 404 (1998); *See also Crockran*, 292 Mich App at 257.

[30]*Bender*, 452 Mich at 621 (Brickley, C.J.).

[31]*Id.* at 620-621.

> This 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). I conclude that rather than interpreting these provisions, it would be more appropriate to approach 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 v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966); namely, by announcing a prophylactic rule.

Although *Bender* has been criticized,[32] this Court had not been presented with the question of whether it should be overruled.[33] Because Defendant's motion to suppress was premised exclusively on *Bender* and *Bender* was the sole foundation for the trial court's suppression order, that question is now squarely before the Court.

B. *Bender* was wrongly decided.

1. *Bender as a prophylactic rule.*

Bender should be overruled. *Bender* disclaims any reliance on the Michigan Constitution. It contradicts the federal constitution as construed by *Moran*. Instead, it relies on policy judgments about law enforcement practices and how best to avoid "mischief." Although framed at preventing

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[32]For example, Judge O'Connell observed in *People v Young*:

> The "policy concern" laying at the heart of the *Bender* decision may be found in the following sentence: "we invite much mischief," the majority writes, "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 a suspect's benefit." *Id.*, p. 622. This may be true, but, to paraphrase the dissent, one's personal desire to avoid "much mischief," no matter how sincere and heartfelt, does not translate that belief into a constitutional right.

People v Young, 222 Mich App 498, 504-506; 565 NW2d 5 (1997)(concurring/dissenting opinion of Judge O'Connell), *rev'd*, 458 Mich 43; 580 NW2d 404 (1998).

[33]*See, e.g., Sexton*, 458 Mich at 45 n 1 ("These three cases do not furnish an opportunity for this Court to revisit the holding of *Bender*.).

an inquisitorial system of justice, it upsets a suspect's choice to speak that is knowingly and voluntarily made. As aptly pointed out by Justice Boyle in her dissent, the rule in *Bender* simply "engrafts its own 'enlightened' view" of the Michigan Constitution on the citizens of this State "without a single foundation in the language, historical context, or jurisprudence of this Court."[34]

In this case, Defendant's statement is admissible as a matter of federal constitutional law. And, because Justice Cavanagh's opinion did not win majority support, there is no basis for suppressing the statement under the *state* constitution either. It is only because of a violation of a policy-driven prophylactic rule that the statement is being suppressed. But the Michigan Constitution forbids the judicial branch from exercising legislative authority. Const 1963, art III, § 2 explicitly states: "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." The judicial branch has no authority to control, supervise, or set aside the actions of an officer of a coequal branch of government so long as the actions are not contrary to existing law.[35]

Justice Boyle's observation that the Court "has no authority to make policy" and that "[t]here is no principled basis" for the *Bender* decision is an accurate one.[36] The Legislature is well-equipped to address defects that may exist in the criminal -justice system. And it is fully able to act when it reaches a consensus on a question of policy and determines when evidence should or should not be

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[34]*Bender*, 452 Mich at 624 (Boyle, J, dissenting).

[35]*See, e.g., People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996)(it is a violation of the separation of powers to invalidate an action of the executive branch unless it is contrary to law). There are substantial questions about a court's authority to "invalidate[ ] official conduct without finding an actual constitutional violation." Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW L Rev 100, 102 (1985).

[36]*Bender*, 452 Mich at 625 (Boyle, J, dissenting).

suppressed. One example where the Legislature has already acted in a similar area is to protect the rights of deaf persons who may be arrested and interrogated by police. MCL 393.505 provides that if police arrest a deaf person, they must procure a qualified interpreter before interrogating them. Failure to do so renders the statement inadmissible in court. Similarly, there had long been efforts to require the videotaping of interrogations through judicial challenges to the admissibility of such statements. Even though those challenges were rejected by the courts, the Legislature recently amended the Code of Criminal Procedure to require the audiovisual recording of certain custodial interrogations conducted by police.[37] And it provided for a specific remedy in circumstances where there is a violation.[38]

This Court has long recognized that when the Legislature creates on obligation for law enforcement, it is up to the Legislature to determine the scope of any remedy when there is a violation. For instance, when analyzing violations of the knock-and-announce statute,[39] arrests by police outside their jurisdiction,[40] or violations of the search warrant statute,[41] this Court engaged in a review of what the Legislature - as the policymakers - intended as a remedy. But in *Bender*, this Court determined not only the existence and scope of the law enforcement obligation, it also made

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[37]2012 PA 479 (effective March 28, 2013). *See* MCL 763.7 *et seq*.

[38]MCL 763.9 provides that while exclusion is not a proper remedy for a violation "the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement."

[39]*People v Stevens*, 460 Mich 626; 597 NW2d 53 (1999).

[40]*People v Hamilton*, 465 Mich 526; 638 NW2d 92 (2002).

[41]*People v Sobczak-Obetts*, 463 Mich 687; 625 NW2d 764 (2001).

its own determination as to what the remedy should be.

But contrary to those policy-making efforts by the Legislature, the *Bender* rule is a *per se* one of automatic exclusion subject to no exception. Even federal constitutional violations are subject to a good faith exception[42] or a separate determination as to whether exclusion will serve a deterrence rationale.[43] And unlike a statutory rule that can be amended at will by the Legislature at any time, *Bender* can be modified only by this Court and only when its applicability is squarely before the Court.[44] That "there may be policy reasons" for the *Bender* decision "is irrelevant."[45]

Bender's prophylactic rule is designed to supposedly protect the right to counsel.[46] But *Miranda* adequately protects that right by giving a person being interrogated the absolute power to terminate a custodial interrogation completely by simply requesting counsel.[47] *Bender*'s holding rests on an assumption that the United States Supreme Court found flawed in the Sixth Amendment context in its 2009 opinion in *Montejo v Louisiana*.[48] In *Montejo*, the question was whether a

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[42]*See, e.g., People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).

[43]*See, e.g., Herring v United States*, 555 US 135; 129 S Ct 695; 172 L Ed 2d 496 (2009).

[44]In *Crockran*, a pre-trial appeal involving the suppression of a confession in a murder case based on *Bender*, the People argued in the Court of Appeals that *Bender* should be overruled. The Court of Appeals recognized that while it could not overrule *Bender*, it nonetheless granted relief to the prosecutor finding that, on the facts of that case, *Bender* did not apply. *Crockran*, 292 Mich App at 256-263.

[45]*Bender*, at 635 (Boyle, J, dissenting).

[46]*Id.* at 621 (Brickley, C.J.).

[47]The United States Supreme Court has recently emphasized that a suspect must actually invoke his Fifth Amendment privilege in order to assert it. *Salinas v Texas*, 570 US ___, *slip op* at 1 (June 17, 2013). *See also Berghuis v Thomkins*, 560 US 370; 130 S Ct 2250; 176 L Ed 2d 1098 (2010)(suspect must assert rights under *Miranda*).

[48]*Montejo v Louisiana*, 556 US 778; 129 S Ct 2079; 173 L Ed 2d 955 (2009).

defendant could validly waive his Sixth Amendment right to counsel even though counsel was already appointed to represent him.[49] The question, just as in this case, was not whether a defendant has a right to counsel, but whether he can execute a valid waiver of that right. The United States Supreme Court rejected a rule prohibiting a waiver in the Sixth Amendment context in *Montejo*, just as they rejected such a rule in the Fifth Amendment context in *Moran*. In fact, the *Montejo* Court found it irrelevant whether the right to counsel arose under the Fifth Amendment or the Sixth Amendment.[50] It held that the right to counsel, whether under *Miranda* or the Sixth Amendment, is adequately protected by existing rules that require police to terminate an interrogation when a defendant asserts his right to counsel and to honor that assertion by not badgering a defendant into waiving his previously asserted right.[51] Accordingly, 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.[52] Those same observations apply with equal force to the prophylactic rule created in *Bender*. *Bender* inappropriately changes the focus from the validity of a defendant's waiver to the knowledge and conduct of police. It changes *Miranda* rights from a clear and uniform command to a scheme that "require[s] that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."[53] But the Constitution has never been held to require anything more than a suspects' uncoerced decision not

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[49] *Id.* at 789-790.

[50] *Id.* at 795.

[51] *Id.*

[52] *Id.* at 795-796.

[53] *Moran*, 475 US at 422.

to rely on his rights along with the knowledge that he "could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction."[54]

2. *The Bender rule is not based on the Michigan Constitution.*

Not only is there no basis for a policy-driven prophylactic rule, there is no basis for construing the Michigan Constitution to require a stricter rule than that contained in *Miranda* and *Moran*. In *Sitz v Department of State Police*, this Court analyzed how the Michigan Constitution should be interpreted.[55] The Court began by recognizing that a more expansive view of the Michigan Constitution "must rest on more than a disagreement with the United States Supreme Court."[56] But the *Sitz* Court further explained that while there should not be "a conclusive presumption artificially linking state constitutional interpretation to federal law," there must instead be "a searching examination to discover what law 'the people have made'" in adopting the Michigan Constitution.[57] In other words, the Court held that there must be "a principled basis in the history of our jurisprudence for the creation of new rights."[58] Among the factors to consider are:[59]

> 1) the textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest.

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[54] *Id.*

[55] *Sitz v Department of State Police*, 443 Mich 744; 506 NW2d 209 (1993).

[56] *Id.*, at 752-753, discussing *People v Nash*, 418 Mich 196; 341 NW2d 439 (1983).

[57] *Id.* at 758-759.

[58] *Id.* at 763.

[59] *Id.* at 763 n 14.

Looking to these factors, the language of the two provisions is virtually identical. Article I, section 17 of the Michigan Constitution provides, in relevant part: "No person shall be compelled in any criminal case to be a witness against himself..." while the Fifth Amendment to the United States Constitution provides: "No person ... shall be compelled in any criminal case to be a witness against himself..." Absent a textual distinction, what clue is there to guide a court that the Michigan Constitution offers different protection than the federal constitution?

Although the plurality opinion in *Bender* relying on the Michigan Constitution cited both *Sitz* and *Nash* and discussed the standards applicable to construing the Michigan Constitution,[60] it did not engage in any analysis of those factors. It instead relied only on policy considerations. As Justice Boyle accurately observed, the opinion was "without a single foundation in the language, historical context, or the jurisprudence of this Court."[61] While the *Bender* plurality relied on *People v Wright*,[62] the decision in *Wright*, just like *Bender*, was a fractured one where the Court could not agree on a ground for decision.[63] Moreover, just like *Bender*, the *Wright* plurality engaged in no analysis of the Michigan Constitution or why it established a standard different from federal law. Rather than analyzing the history of the Michigan provision as support for their conclusion that the Michigan Constitution required more than federal law, both the *Wright* plurality and the *Bender* plurality cited opinions from other states.[64] The *Wright* plurality even acknowledged that this Court

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[60] *Bender*, 452 Mich at 613 n 17 (Cavanagh, J.).

[61] *Id.* at 624 (Boyle, J., dissenting).

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

[63] *Sexton*, 458 Mich at 64-65.

[64] *Wright*, 441 Mich at 148-152; *Bender*, 452 Mich at 612 n 16.

had "held that the interpretation of our constitutional privilege against self-incrimination and that of the Fifth Amendment are the same."[65] But the *Wright* plurality rejected that precedent with the simple statement that "[b]ecause we believe that it was necessary, in order to allow Mr. Wright to make a knowing and fully voluntary waiver of his Fifth Amendment rights, we extend the rights afforded under Const 1963, art I, § 17, to include information of a retained counsel's in-person efforts to contact a suspect."[66]

As Justice Boyle observed in her *Bender* dissent, not only is the language of the relevant constitutional provisions the same, but "there is nothing in the record of the 1961 Constitutional Convention that would indicate any intent to engraft a different interpretation than that embodied in the Fifth Amendment."[67] Similarly, Justice Boyle noted that "previous decisions of this Court illustrate a solid and unwavering line of authority for interpreting our protection against self-incrimination identically with the federal guarantee."[68] As Justice Boyle quoted from this Court's opinion in *Paramount Pictures Corp v Miskinis*:[69]

> Having examined prior decisions of this Court, we find nothing which requires an interpretation of our constitutional privilege against self-incrimination different from that of the United States Constitution.

Because there is no basis in Michigan's history or jurisprudence to provide any greater protections

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[65] *Wright*, 441 Mich at 154, *citing In re Moser*, 138 Mich 302,305; 101 NW 588 (1904).

[66] *Wright*, 441 Mich at 154.

[67] *Bender*, 452 Mich at 629 (Boyle, J., dissenting).

[68] *Id.* at 630 (Boyle, J., dissenting).

[69] *Id.* at 631 (Boyle, J., dissenting), *quoting Paramount Pictures Corp v Miskinis*, 418 Mich 708, 726; 551 NW2d 71 (1984).

than the Fifth Amendment, this Court should follow Justice Boyle's opinion and rule consistent with *Moran*.[70]

3. *Defendant's statement was freely and voluntarily given.*

The thrust of *Bender*'s error is that it suppresses otherwise admissible confessions by persons who have validly waived their rights. In this case, Defendant gave a statement that was freely and voluntarily made after being fully advised of his *Miranda* rights. He did not assert his right to remain silent or his right to counsel. Defendant's waiver was in compliance with both the federal constitution and the state constitution. Just as in *Moran*, "the record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements."[71] And just as in *Moran*, it was Defendant who initiated contact with police.[72] *Moran*'s observation that "[t]here [is no] question about [the defendant's] comprehension of the full panoply of rights set out in the *Miranda* warnings and of the potential consequences of a decision to relinquish them" is equally applicable here.[73] *Bender* "fatally undermine[s] the validity of [an] otherwise proper waiver" by requiring police to inform a defendant about the availability of counsel. The United States Supreme Court has properly characterized such a rule as "untenable as a matter of both logic and precedent."[74] Accordingly, there was no legitimate legal basis to suppress Defendant's statement in this case. To the extent *Bender* requires suppression, it was wrongly decided.

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[70] *Id.* at 625-658 (Boyle, J, dissenting).

[71] *Moran*, 475 US at 421.

[72] *Id.* at 422.

[73] *Id.*

[74] *Id.*

C. *Bender* should be overruled.

Assuming the Court concludes that *Bender* was wrongly decided, whether this Court should overrule its own precedent is a separate question. Although this Court has noted that overruling precedent is done with caution, it has equally observed that the doctrine of "stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions."[75] Before overruling precedent, the court should be convinced not only that the prior decision was wrongly decided, "but also that less injury will result from overruling than from following it."[76] To answer that inquiry involves an analysis of "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations."[77] Overruling *Bender* would have no such effect. Just as this Court observed in overruling a construction of the court rule governing a defendant's allocution at sentencing, there is nothing about this Court's decision in *Bender* that is so fundamental that it can "be said to have caused defendants to alter their conduct in any way.[78] If *Bender* is overruled, a defendant being interrogated still holds the ultimate control in deciding whether to terminate the interrogation or to request counsel. It's not as if a person being interrogated could rely on *Bender* to determine whether to ask for a lawyer - would a suspect *really* say to himself, "Since police will have to tell me that I have a lawyer, then I don't need to ask for one until they do?"

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[75] *People v Petit*, 466 Mich 624, 633; 648 NW2d 193 (2002).

[76] *Id.* at 634.

[77] *Id.* at 635.

[78] *Id.*

While police have attempted to act within the confines of *Bender*, mistakes still occur and the rules remain unclear. This case is perhaps a perfect illustration. The appointment of counsel was secured when it was not necessary. Police acted in good faith to protect Defendant's rights, but the interrogating officer was under the mistaken belief that the attorney was there just in case Defendant asked for one. Under the circumstances, had *no* action been taken to get an attorney appointed in case Defendant requested one, then there would be no question that the Defendant's statement would be admissible. But in this case, the axiomatic good deed did not go unpunished.

Under the *Bender* regime, questions still remain to be raised and litigated in future cases:

- What kind of contact triggers the police duty to inform?
- Must that contact be by an attorney, a family member, or anyone in particular?
- How can police verify that the attorney has been retained to protect the suspect's interest, as opposed to some third party that the suspect may be willing to cooperate with police against?
- When must the contact be made? What if it is after the suspect has already waived his rights?

It is questions like these that illustrate why the Constitution entrusts the Legislature, rather than the courts, with ironing out the practical compromises necessary to set public policy. The benefit of *Miranda* is that it is a bright-line rule that police know how to follow. *Bender*, however, requires police to modify *Miranda* rights depending on the circumstances.

Bender's harm is that it deprives the jury of powerful evidence that should "be made fully available to the jury in its pursuit of the truth with regard to what occurred."[79] And it does so not to

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[79] *White*, 493 Mich at 209.

vindicate any constitutional rights, but to educate police. A *Bender* violation is really like no other. The remedy called for by the rule is a *per se* one that is drastic and without exception - suppression of the confession. Even constitutional violations don't trigger such an automatic response. And the Legislature has already made a policy determination that criminal judgments should not be reversed because of a technical or procedural error that does not result in a miscarriage of justice.[80] But because the *Bender* rule is not a statute, there is a question whether Legislature could modify it. Yet the Legislature clearly has the ability to make the policy determination of whether the rule in *Bender*, or something more or less burdensome, should be enacted and what, if any, remedies should be imposed if there is a violation. This Court should overrule *Bender* and allow the Legislature the opportunity of making that policy for Michigan.

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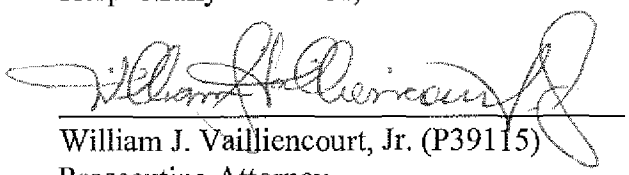
[80]MCL 769.26 provides: "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

RELIEF REQUESTED

FOR THE FOREGOING REASONS, the People request that the Court reverse the order of the circuit court or grant any other relief as may be appropriate.

Respectfully submitted,



William J. Vailliencourt, Jr. (P39115)
Prosecuting Attorney

Dated: June 25, 2013