MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

DETROIT 911 OPERATORS' RESPONSES TO BOY'S CALLS AT ISSUE IN APPEAL TO BE ARGUED BEFORE SUPREME COURT NEXT WEEK
Also before the Court: defendants cite Michigan Medical Marihuana Act in seeking to have drug charges dropped; Court of Appeals upheld charges in both cases

LANSING, MI, January 4, 2012 – Two 911 operators who treated a five-year-old boy's emergency calls as a prank seek to have lawsuits against them dismissed, in an appeal that the Michigan Supreme Court will hear in oral arguments next week.

The boy, Robert Turner, called 911 twice, telling operators that his mother had passed out. The first operator told Turner that she would dispatch police, but did not, logging the call as a prank; the second operator, whom the boy called about three hours later, did send an officer after scolding the boy for "playing on the phone." Turner's mother died of a heart attack, apparently sometime during the three-hour interval. Turner's older sister sued the operators on his behalf and on behalf of her mother's estate, alleging wrongful death and intentional infliction of emotional distress (*Patterson v Nichols and Sutton*) Both operators moved to dismiss these claims, contending in part that their conduct did not rise to the level of gross negligence and that they did not intend to cause the boy any distress. But both the trial court and the Court of Appeals refused to dismiss the lawsuits, with the Court of Appeals observing in part that the operators had been grossly negligent and that there was a genuine issue of material fact as to whether their gross negligence was the proximate cause of the mother's death.

Also before the Court are *People v Kolanek* and *People v King*, in which the defendants assert the Michigan Medical Marihuana Act as a defense to drug charges. In *Kolanek*, the defendant did not apply for a medical marijuana registry identification card until after his 2009 arrest for marijuana possession, although he had spoken with his doctor, who supported his medical use of marijuana, before the MMMA passed in 2008. The defendant sought to have the drug charges dismissed under § 8 of the MMMA, which provides an affirmative defense for patients who, although they do not have a registry identification card, meet certain criteria for the medical use of marijuana. The Court of Appeals declined to dismiss the drug possession charges, holding that, to assert the § 8 affirmative defense, a person must obtain the physician certification required by § 8(a) after the MMMA's passage and before being arrested. The Court of Appeals also held that the defendant may raise the § 8 defense before a jury. In *King*, the defendant had a valid registry identification card, but was arrested and charged with two counts of manufacturing marijuana. A divided Court of Appeals upheld the drug charges; the majority found that the defendant did not satisfy the MMMA's requirement of keeping marijuana plants in an "enclosed, locked facility." King kept his marijuana plants in an unlocked living room closet and in an outdoor locked chain-link dog kennel without a top and not anchored to the ground. The

dissenting judge would have held that the kennel was an "enclosed, locked facility"; moreover, in the absence of evidence that others had access to the home, the defendant's home qualified as an "enclosed, locked facility," the dissenting judge added.

The Court will also hear *People v Grissom*, in which the defendant, who was convicted of rape, seeks a new trial based on information that came to light after his trial. The defendant contends that the information, which includes several police reports from California, shows that the complainant is a habitual liar who had falsely reported being sexually assaulted on other occasions. A divided Court of Appeals upheld the defendant's conviction, with the majority finding that the new information did not have a bearing on the charge against the defendant, and that there was substantial evidence of his guilt that did not depend on the complainant's credibility. The dissenting judge said that the new information would have changed the complexion of the case and that it was reasonably probable that the outcome would have been different if the complainant had been cross-examined using the information.

The remaining six cases that the Court will hear include terminations of parental rights, criminal, and insurance law issues.

The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice on **January 11 and 12, starting at 9:30 a.m**. each day. The Court's oral arguments are open to the public.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs are online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Wednesday, January 11
Morning Session

PATTERSON v NICHOLS AND SUTTON (case nos. 142438-9, 142441)
Court of Appeals case nos. 288375, 291287, 296198
Attorney for plaintiff Delaina Patterson, as Personal Representative for the Estate of Sherrill Turner, Deceased, and Robert Turner, a Minor, Individually, by his Next Friend, Delaina Patterson: Heather A. Glazer/(248) 355-5555
Attorney for defendant Terri Sutton: Mark S. Mackley/(313) 964-7600
Attorney for defendant Sherry Nichols, a/k/a Sharon J. Nichols: Rhonda Y. Reid Williams/(313) 961-2600
Trial Court: Wayne County Circuit Court
At issue: A five-year-old boy called 911 twice, telling both operators that his mother had passed out. The first operator told the boy that she would send police, but did not, recording the call as a prank; the second operator scolded the boy for "playing on the phone," but did send a police officer. The boy's mother, who had suffered a heart attack, died; she might have survived had medical help been sent after the first call. The plaintiffs sued the 911 operators, alleging wrongful death and intentional infliction of emotional distress. The operators moved to dismiss these claims,

but the trial court denied their motions for summary disposition and the Court of Appeals affirmed. Did the operators have a duty to the boy's mother? If so, can their conduct be viewed as the proximate cause of her death? Can the operators' conduct be viewed as "so reckless as to demonstrate a substantial lack of concern for whether an injury results"? Can the plaintiffs maintain their claim for intentional infliction of emotional distress?

Background: On February 20, 2006, shortly before 6 p.m. five-year-old Robert Turner called 911 after finding his mother, Sherrill Turner, lying unconscious on the floor of her bedroom. He told 911 operator Sherry Nichols that his "mom has passed out." When Nichols asked to speak to his mother, Robert said, "She's not gonna . . . she not gonna talk." Although Nichols told the boy that she would send the police to the house, she did not do so, logging the call as a child's prank. Three hours later, Robert again called 911, reaching operator Terri Sutton. When Robert said that his mom "has passed out in her room," Sutton asked, "Where the grown-up at?" Robert answered, "In her room. . . ." Sutton asked to speak to her, and Robert repeated that his mother had passed out and was not going to talk. Sutton said: "Okay. Well, you know what then? She's gonna talk to the police. Okay. She's gonna talk to the police because I'm sending them over there." When Robert said, "She's still not gonna talk," Sutton responded: "I don't care. You shouldn't be playing on the phone. . . . Now put her on the phone before I send the police out there to knock on the door and you gonna be in trouble." Sutton dispatched a police officer, who arrived at the Turner home about 9:30 p.m., responding to Sutton's report of a "child playing on phone." When he discovered Sherrill Turner lying unresponsive on the floor, the officer summoned emergency medical services. The EMS workers, who arrived about 20 minutes later, determined that Ms. Turner was dead. It appeared that she had died sometime within the past two hours.

Delaina Patterson, Robert's older sister, sued Nichols and Sutton on behalf of Sherrill Turner's estate and on Robert Turner's behalf. Patterson alleged that the two 911 operators were grossly negligent and that their negligence caused her mother's death. The lawsuit also included a claim for intentional infliction of emotional distress.

Sutton moved to dismiss the claims against her, arguing that she was entitled to governmental immunity. As to the wrongful death claim, Sutton contended that she owed Sherrill Turner no duty to provide assistance, that her failure to summon medical aid did not amount to gross negligence, and that her conduct was not the proximate cause of the woman's death. As to the claim for intentional infliction of emotional distress, Sutton argued that she was entitled to governmental immunity under MCL 691.1407(2) because she did not commit an intentional tort; Sutton maintained that she did not intend to cause Robert any distress. Nichols filed a similar motion, making the same arguments that Sutton had made. The trial court denied both defendants' motions.

Both Nichols and Sutton appealed, but in an unpublished per curiam opinion, the Court of Appeals affirmed the trial court's ruling. Turning to the wrongful death claim first, the Court of Appeals noted that governmental employees are immune from tort liability unless their conduct amounts to "gross negligence that is the proximate cause of the injury of damage." MCL 691.1407(2)(c). "Gross negligence" is defined at MCL 691.1407(7)(a) as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." The Court of Appeals concluded that Nichols' and Sutton's conduct was grossly negligent, and that there was a genuine issue of material fact whether that grossly negligent conduct was the proximate cause of Sherrill Turner's death. "[A] question of fact clearly exists regarding whether the underlying medical event or defendants' failure to provide the requested medical assistance was 'the proximate cause,' i.e., the one most immediate, efficient, and direct cause of decedent's death," the Court of Appeals

panel stated. As to the intentional infliction of emotional distress claim, the appellate panel ruled that there was a question of fact regarding whether Nichols and Sutton were acting in good faith, and whether they were performing discretionary rather than ministerial acts. Moreover, a reasonable jury could conclude that Nichols and Sutton engaged in "extreme and outrageous conduct," the Court of Appeals said. Accordingly, the 911 operators were not entitled to dismissal of the intentional tort claim on governmental immunity grounds, the appellate court concluded. Sutton and Nichols appeal.

PEOPLE v GRISSOM (case no. 140147)
Court of Appeals case no. 274148
Prosecuting attorney: Timothy K. Morris/(810) 985-2400
Attorney for defendant James Eugene Grissom: Christine A. Pagac/(313) 256-9833
Trial Court: St. Clair County Circuit Court
At issue: The defendant was convicted of first-degree criminal sexual conduct based on his alleged sexual assault of a woman in her van in the parking lot of a Meijer store. After the defendant's direct appeal was exhausted, he sought relief from judgment based on police reports that included several false allegations of victimization, including fabricated allegations of rape, made by the complainant. On remand, a majority of the Court of Appeals affirmed the trial court's denial of relief from judgment, with one judge dissenting. Whether, and under what circumstances, can newly-discovered impeachment evidence be grounds for a new trial, see generally *People v Barbara*, 400 Mich 352, 363 (1977)? If impeachment evidence can be grounds for a new trial, would the defendant have had a "reasonably likely chance of acquittal," MCR 6.508(D)(3)(b)(*i*)?
Background: The complainant claimed that, shortly after noon on May 12, 2001, James Grissom physically and sexually assaulted her in her car in the parking lot of the Fort Gratiot Meijer store. According to the complainant, Grissom penetrated her both with his finger and with his penis. Although she later gave a detailed account of the assault, she did not initially report being raped. Her husband later testified that he knew that something was wrong at the time; when the complainant returned home, she told him that she had been physically attacked, but did not immediately report the sexual assault, her husband said. According to her husband, the complainant had a cut by her mouth and was "incoherent" and "rambling," but neither of them contacted the police that day. Two days later, the complainant provided the same limited information to the police, who treated the incident as an attempted carjacking, and to her treating physician. On May 15, the complainant did tell a friend that she was sexually assaulted; the friend advised her to tell her husband. Later that day, the complainant told her husband some details of the sexual assault, but not about the penile penetration; on May 16, she told the complete story to her gynecologist, who sent her to an emergency room. The emergency room physician who examined the complainant concluded that her injuries were consistent with forceful penetration, but the doctor did not rule out other reasons for the injuries. The complainant, who was accompanied by her husband, told the emergency room doctor about the digital penetration, but not about the penile penetration.

The complainant did not report the full details of the assault to the police until about a year later; while driving near the Fort Gratiot Meijer, she spotted the person who she thought attacked her. She identified Grissom as her alleged attacker by reviewing photographs at the police station. She did not select Grissom at a line-up; an investigating detective noted that Grissom had shaved his beard and mustache, and cut his hair, before the line-up. But the complainant did describe a

ring that Grissom once owned; several months before trial, she also stated that Grissom had a skull tattoo on his upper arm, which he did. At the trial, which took place in 2003, evidence was presented that Grissom worked at the Meijer store on the day of the assault. A jury convicted Grissom of two counts of first-degree criminal sexual conduct; he was sentenced to 15 to 35 years in prison.

Grissom filed a motion for relief from judgment, seeking a new trial; he contended that newly-discovered evidence showed that the complainant was a liar. The information included a sheriff's report from 2005, showing that the complainant contacted the sheriff's department to report that she had been sexually assaulted by both her brother and her father when she was a child. She also claimed to have been a rape and kidnapping victim in California in 2001, but later admitted that this was not true. Grissom also produced several reports from Bakersfield, California, showing that the complainant disappeared from a restaurant parking lot, that the complainant alleged that she had been kidnapped, and that she told various people that she had been raped several times, including in a restaurant parking lot. The complainant later denied that some of these events occurred. In addition, Grissom produced a Fresno, California police report, which was based on a statement from one of the complainant's California acquaintances. According to this report, the complainant alleged that she had been gang-raped by her brother and his friends, who were convicted, and that her brother assaulted her again when he was released from prison; according to the police report, the complainant admitted that some of her previous accusations were false. The report concluded that the complainant had lied to her friends, family, and police, and was "possibly mentally unstable."

The trial court denied Grissom's motion for a new trial, and the Court of Appeals affirmed the trial court's ruling in a split unpublished per curiam opinion. The majority concluded that some of the statements in the California police reports were inadmissible based on relevance or hearsay grounds, or due to Michigan's rape shield law. Moreover, the majority said, the newly-discovered information did not contain substantive evidence bearing on the offense for which Grissom was convicted. Because the new information would be used merely for impeachment purposes, it was not grounds for a new trial, the majority held. The majority added that significant evidence implicated Grissom that did not involve the complainant's credibility: Grissom was at the scene of the crime on the date and time that it allegedly occurred, and several doctors concluded that the complainant's physical condition was consistent with an assault and rape. Moreover, the victim told several people within a short time that she was raped, and the core of her story did not change, the majority noted. The Court of Appeals majority also noted that Grissom denied, then later admitted, owning the ring described by the complainant, that he had the tattoo the complainant described, and that he changed his appearance for the line-up – all indicia of his guilt. The newly-discovered evidence did not make a different result probable on retrial, the majority concluded.

But the dissenting Court of Appeals judge contended that many of the statements in the police reports would be admissible, and that they supplied powerful ammunition for impeaching the complainant's credibility. Moreover, the dissent said, Grissom has a constitutional right under the Confrontation Clause to question the complainant about her prior allegations. *People v Hackett*, 421 Mich 338, 348 (1984). The newly-discovered evidence strongly supports the assertion that the complainant suffers from emotional problems that predate the Michigan events; the information provides either a motive or an explanation for her fabrications about multiple sexual assaults, the dissent stated. Cross-examination directed at exposing the complainant as a

habitual liar would have changed the entire complexion of the case, and it was reasonably likely that Grissom would have been acquitted, the dissenting judge concluded. Grissom appeals.

PEOPLE v REESE (case no. 142913)
Court of Appeals case no. 292153
Prosecuting attorney: Timothy A. Baughman/(313) 224-5792
Attorney for defendant Verdell Reese: Valerie R. Newman/(313) 256-9833
Trial Court: Wayne County Circuit Court
At issue: The defendant was charged with second-degree murder, and, alternatively, with voluntary manslaughter under a theory of imperfect self-defense. Following a bench trial, he was convicted of manslaughter. On appeal, the defendant argued that the prosecution had not provided sufficient evidence that he was the initial aggressor; moreover, because the trial court found that he had a valid self-defense claim, he should not have been found guilty of the homicide, the defendant maintained. The Court of Appeals reversed the defendant's manslaughter conviction and remanded for a new trial on that count, concluding that the factual record and the court's findings were inconsistent with the manslaughter verdict. Can the doctrine of imperfect self-defense mitigate second-degree murder to voluntary manslaughter and, if so, was the doctrine appropriately applied in this case?
Background: Verdell Reese was charged with second-degree murder. At a bench trial – a trial where a judge, rather than a jury, makes findings of fact – Reese was found guilty of manslaughter, as well as being a felon in possession of a firearm and committing a felony with a firearm. The trial judge found that Reese and the victim, Leonardo Johnson, were arguing over a debt, and that Reese fired first at Johnson from a vehicle as Johnson walked toward his home. The two then exchanged words; Johnson shot at Reese, who fired more shots at Johnson, and Johnson was shot to death by Reese, the trial judge found. The trial court then determined that Reese "did not act in lawful self- defense" and was "clearly . . . the aggressor" finding that Reese "fired the first shot prompting Mr. Johnson to be on guard, prompting Mr. Johnson to pull his weapon on you, prompting you then to pull your weapon on him and no question, this was a shoot-out." The trial court opined that Reese would have been entitled to a claim of self-defense if he had "backed off … and made peace." The judge ruled that the prosecution had not proved a case of second-degree murder, but instead convicted Reese of manslaughter, saying that the lesser charge was justified by the doctrine of "imperfect self-defense." Reese was sentenced, as a third habitual offender, to eight to 30 years in prison for the manslaughter conviction and to one to five years for being a felon in possession of a firearm, to follow the mandatory two-year sentence for the felony-firearm conviction.

Reese appealed, contending in part that the judge should not have found him guilty of manslaughter in light of his self-defense claim. In an unpublished opinion, the Court of Appeals affirmed Reese's convictions for being a felon-in-possession and for felony-firearm, but remanded for a new trial on the manslaughter count. The court held that it could not reconcile the evidence with the trial court's findings of fact and conclusions of law with respect to imperfect self-defense. Among other matters, the appellate panel noted the "paucity of the evidence" as to whether Reese actually fired first: "The evidence indicates the initial firing of two shots in an unknown direction and by an unknown individual before the face-to-face confrontation between Reese and Johnson." The Court of Appeals explained that imperfect self-defense is a qualified defense, mitigating second-degree murder to voluntary manslaughter; imperfect self-defense applies only where the defendant would have been entitled to self-defense had he not been the initial aggressor. The Court

of Appeals questioned the trial court's labeling of Reese as the aggressor, and criticized the trial court for failing to address Reese's state of mind when he initiated the confrontation, noting that Reese would not be able to invoke the doctrine of imperfect self-defense if the circumstances indicated that he initiated the confrontation with the intent to kill or do great bodily harm. The Court of Appeals concluded that it could not state with confidence that the trial judge's factual findings or conclusions of law were sufficient to sustain Reese's manslaughter conviction. The prosecutor appeals.

Afternoon Session

IN RE C. I. MORRIS, MINOR (case no. 142759)
Court of Appeals case nos. 299470, 299471
Attorney for petitioner Department of Human Services: Jonathan E. Duckworth/(313) 456-3019
Attorney for respondent David L. Morris: Vivek S. Sankaran/(734) 763-5000
Attorney for lawyer guardian ad litem C.I. Morris, Minor: Arthur Bowman, Jr./(313) 833-6628
Attorney for amicus curiae American Indian Law Section of the State Bar of Michigan: Matthew L.M. Fletcher/(517) 432-6909
Attorney for amicus curiae Little Traverse Bay Bands of Odawa Indians: Allie Greenleaf Maldonado/(231) 242-1403
Trial Court: Wayne County Circuit Court
At issue: The circuit court terminated both parents' parental rights to their daughter. The parents appealed and, in the Court of Appeals, the Department of Human Services admitted that it failed to give notice under the Indian Child Welfare Act, 25 USC 1912(a), despite knowing that the child at issue might have Indian heritage. The Court of Appeals affirmed the termination, but the Michigan Supreme Court remanded to case to the Court of Appeals for further consideration in light of the department's confession of error. On remand, the Court of Appeals readopted its original opinion and "conditionally affirmed" the circuit court's termination decision, but remanded the case to the circuit court for further proceedings regarding both parents with regard to the requirements of the ICWA. Is the Court of Appeals "conditional affirmance" remedy an appropriate resolution of an ICWA violation?
Background: Natasha Lynn Brumley and David Lenin Morris challenge the termination of their parental rights to their daughter, who was removed from Brumley's custody after the child tested positive for cocaine at birth. During a preliminary hearing in family court, both parents indicated that they were of Cherokee descent. The family court ordered the parents to comply with a parent-agency agreement, and the Department of Human Services provided various services to Brumley and Morris, including substance abuse rehabilitation programs for Brumley and parenting classes for both of them. But the family court ultimately terminated their parental rights, finding in part that neither Brumley nor Morris benefitted from the services offered to them.

The parents appealed, but the Court of Appeals affirmed the circuit court's ruling in an unpublished per curiam opinion. Because the Court of Appeals did not initially address the Department of Human Services' confession of error regarding its failure to give notice under the Indian Child Welfare Act, 25 USC 1912(a), the Supreme Court remanded the case to the Court of Appeals to address that issue. Under the ICWA, 25 USC 1901 *et seq.*, child custody proceedings involving foster care placement or termination of parental rights to an "Indian child," 25 USC

1903(4), are subject to specific federal procedures and standards. ICWA requires that an interested Indian tribe receive notice of termination proceedings involving an Indian child: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . ." [25 USC 1912(a).] Under the ICWA, an "Indian child" is any unmarried individual less than 18 years of age who is either (1) an Indian tribe member or (2) both eligible for Indian tribe membership and an Indian tribe member's biological child. 25 USC 1903(4). The question whether a person is a member of a tribe or eligible for membership is for the tribe itself to answer. *In re NEGP*, 245 Mich App 126, 133 (2001). The failure to comply with the Indian tribe notice requirements may lead to invalidation of the proceedings. 25 USC 1914.

On remand, the Court of Appeals acknowledged the Department of Human Services' statement that it failed to comply with the ICWA's notice requirements. The appellate panel conditionally affirmed the circuit court's termination ruling, but remanded the case to the circuit court so that it could comply with the notice requirements of the ICWA. Morris appeals.

IN RE J.L. GORDON, MINOR (case no. 143673)
Court of Appeals case no. 301592
Attorney for petitioner Department of Human Services: Danielle Walton/(248) 858-0685
Attorney for respondent Courtney Hinkle: Karen Gullberg Cook/(248) 644-7678
Attorney for amicus curiae Michigan Indian Legal Services, Inc. and the American Indian Law Section of the State Bar of Michigan: Cameron A. Fraser/(231) 947-0122
Trial Court: Oakland County Circuit Court
At issue: A woman challenges the circuit court's termination of parental rights to her son, asserting in part that the Department of Human Services and the circuit court failed to comply with the notice requirements of the Indian Child Welfare Act, 25 USC 1901 *et seq*., and failed to create a complete record of their attempts at compliance. The Court of Appeals affirmed the termination, rejecting the mother's ICWA challenges; the appellate court held that there was ample evidence that the tribe had actual notice of the proceedings. Moreover, the circuit court was relieved from any further ICWA notification efforts by the mother's own statement on the record regarding her ineligibility for tribal membership, the Court of Appeals stated. Were the notice requirements of § 1912(a) of the ICWA invoked when the mother stated at the preliminary hearing that her parents were tribal members but she was not? Were the Department of Human Services and the circuit court obligated to make a complete record of their compliance with the ICWA's notice requirements? Can a parent waive a minor child's status as an "Indian Child" under the ICWA, 25 USC 1903(4), or waive compliance with the federal law's requirements? If so, did the mother's statement on the record that her family had been notified directly by the tribe that they were not entitled to money or benefits constitute a waiver?
Background: Courtney Hinkle first came to the attention of Children's Protective Services after she was suspected of neglecting her months-old infant. When the child was one year old, CPS learned that he had been treated for second-degree burns to his hands, allegedly caused by a fall into a fireplace, and that Hinkle had not obtained follow-up medical care for him as directed. CPS filed a court action, and the child was taken into protective custody and placed in foster care. After

attempting to provide services for Hinkle and concluding that she did not benefit from them, the Department of Human Services filed a petition seeking termination of Hinkle's parental rights. At the conclusion of the termination hearing, the circuit judge found that DHS had established grounds for termination, and that termination was in the child's best interests.

Hinkle appealed to the Court of Appeals, contending that DHS and the circuit court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and failed to create a complete record of their attempts at compliance. Under the ICWA, child custody proceedings involving foster care placement or termination of parental rights to an "Indian child," 25 USC 1903(4), are subject to specific federal procedures and standards. ICWA requires that an interested Indian tribe receive notice of termination proceedings involving an Indian child, 25 USC 1912(a). Under the ICWA, an "Indian child" is any unmarried individual less than eighteen years of age who is either (1) an Indian tribe member or (2) both eligible for Indian tribe membership and an Indian tribe member's biological child. 25 USC 1903(4). The question whether a person is a member of a tribe or eligible for membership is for the tribe itself to answer. *In re NEGP*, 245 Mich App 126, 133 (2001). The failure to comply with the Indian tribe notice requirements may lead to invalidation of the proceedings. 25 USC 1914.

The circuit court record disclosed that Hinkle informed the judge that her family was part of the Saginaw Chippewa Indian tribe in Mt. Pleasant. Hinkle stated that she and her child were not tribal members, and that her biological mother was not a member of the tribe, but that her mother's siblings were, including the aunt who was caring for her son during his foster care placement. She stated that she and her mother were awaiting word as to their own eligibility for tribal membership. The circuit judge directed DHS to investigate the child's possible tribal membership and to notify the tribe of the proceedings. At a later hearing, the caseworker stated that she mailed a certified letter to the tribe, but had not heard back as to the child's membership. At a subsequent hearing, the caseworker informed the court that Hinkle's mother had been told that the family was not eligible for tribal "benefits." The foster mother stated that she was a tribal mother, and that she tried to obtain information regarding the child's status from the tribe, but that the tribe refused to release that information to anyone but DHS or the court. The court directed the caseworker to contact the tribe again. The ICWA notice issue was not mentioned again at any hearing and the file contains no mention of any further communications with the tribe.

The Court of Appeals affirmed the trial court's termination of Hinkle's parental rights in an unpublished per curiam opinion. Hinkle did not demonstrate that the trial court and DHS failed to satisfy ICWA's notice requirement, the Court of Appeals stated; there was ample evidence that the tribe had actual notice of the proceedings, the appellate court said. Moreover, "[g]iven respondent's own statement in court that she received a response that she and her son were not eligible for tribal membership, the trial court was relieved from embarking on further ICWA tribal notification efforts," the Court of Appeals concluded. Hinkle appeals.

PEOPLE v RAO (case no. 142537)
Court of Appeals case no. 289343
Prosecuting attorney: Marilyn J. Day/(248) 858-0679
Attorney for defendant Malini Rao: Frank D. Eaman/(313) 962-7210
Trial Court: Oakland County Circuit Court
At issue: The defendant was convicted of second-degree child abuse, based in part on findings made at a hospital that the child had multiple rib fractures of various ages. Ten months later, the defendant moved for a new trial, supporting her motion with current x-rays that she claimed

showed that the rib injuries were still present. The defendant argued that this evidence supported her claim that the injuries were the result of a metabolic disorder, not child abuse. The trial court denied the motion for a new trial, but the Court of Appeals reversed and remanded the case for an evidentiary hearing regarding the significance of the newly-discovered evidence. Do the x-rays constitute newly-discovered evidence? If so, would the evidence have made a different result probable on retrial, given the other evidence implicating the defendant as the cause of other injuries the child suffered?

Background: After a report of possible child abuse was made to Children's Protective Services, a caseworker visited Malini Rao's home and observed that her adopted daughter had a swollen cheek, bruised face, black eye, and cuts to her lower lip and eyelid. Rao admitted that she sometimes struck the child in the face in order to discipline her. The caseworker took the child and Rao to the hospital so that the child could be evaluated by a physician. X-rays revealed multiple rib fractures at various stages of healing; the examining physician reported that the number of injuries of varying ages made him suspect "non-accidental trauma" or child abuse. A physician with expertise in child abuse reached the same conclusion after reviewing those x-rays and conducting a skeletal survey.

The child was removed from the home, and Rao was charged with second-degree child abuse. The jury trial lasted ten days, and both the prosecutor and Rao's counsel presented medical evidence regarding the abnormalities observed to the child's ribs on x-rays. The prosecutor's expert witnesses testified that the injuries were caused by child abuse, but the defense's experts testified that the injuries were likely the result of accidental trauma or a metabolic disorder. The jury convicted Rao as charged; she was sentenced to a five-year term of probation.

In 2009, ten months after she was convicted, Rao moved for a new trial. She claimed that recent x-rays established that abnormalities were still present in the child's ribs; this evidence supported her claim that the rib injuries were the result of a metabolic disorder, not abuse, Rao asserted. The trial court denied the motion for a new trial, but in a split unpublished opinion, the Court of Appeals reversed and remanded the case for an evidentiary hearing on the alleged newly-discovered evidence. The majority concluded that the 2009 x-rays were newly discovered, because Rao could not have known the condition of the child's ribs at the time of trial. Moreover, the majority stated, the evidence was exculpatory, "shatter[ing] the scientific cornerstone of the prosecution's evidence that the rib abnormalities were consistent only with fractures, not an underlying bone abnormality." Identifying important factual questions regarding the significance of the 2009 x-rays, the majority remanded the case to the trial court for an evidentiary hearing to address whether the new evidence likely would have affected the outcome of Rao's trial. The dissenting judge concluded that the evidence was not newly discovered – in fact, it did not even exist at the time of trial. But even if it was, said the dissenting judge, reversal was not warranted because it was unlikely that the evidence would make a different result probable on retrial. The prosecutor appeals.

Thursday, January 12
Morning Session

ATTORNEY GENERAL v BLUE CROSS BLUE SHIELD OF MICHIGAN, et al. (case nos. 142670-1)
Court of Appeals case nos. 290167, 295750
Attorney for plaintiff Attorney General: Michael E. Moody/(517) 373-7540

Attorneys for defendant Blue Cross Blue Shield of Michigan: Jeffery V. Stuckey, Joseph A. Fink/(517) 371-1730
Trial Court: Ingham County Circuit Court
At issue: The Attorney General challenges the legality of the State Accident Fund's purchase of three foreign worker's compensation carriers. Does MCL 550.1207(1)(o) bar not only Blue Cross Blue Shield of Michigan, but also its wholly-owned subsidiary, the Accident Fund, from purchasing foreign insurance companies?
Background: In 1994, the Michigan Legislature authorized the non-profit health insurance carrier Blue Cross Blue Shield of Michigan to acquire the State Accident Fund, the state's largest worker's compensation carrier, and operate it as a wholly-owned for-profit stock insurance subsidiary. In 2005, the Accident Fund bought United Wisconsin Insurance Company, a worker's compensation carrier. In the summer of 2007, the Fund acquired CWI Holdings, Inc., a Delaware company that owns 100 percent of CompWest Insurance Company, a California property and casualty insurance company that writes workers' compensation insurance primarily in California. Also in the summer of 2007, the Accident Fund acquired the Third Coast Insurance Company, an inactive property and casualty insurance company located in Illinois. In November 2007, Blue Cross made a capital contribution of $125 million to the Accident Fund for the stated purpose of allowing the workers' compensation companies to be able to maintain an "A" insurance rating. According to the Michigan Attorney General, the contribution was made in order for the Accident Fund to acquire CWI Holdings, which had a purchase price of $127.4 million.

In 2008, the Michigan Attorney General challenged the purchases. The Attorney General claimed that the purchases were prohibited by MCL 550.1207(1)(o), a statute governing Blue Cross's operations. That statute regulates the actions that may be taken by "[a] health care corporation," and it sets forth a general prohibition against the acquisition of any "domestic, foreign, or alien insurers . . . ." The statute does provide a limited exception to the general prohibition, but the Attorney General argued that the exception did not apply to the transactions at issue.

Both the trial court and the Court of Appeals, in a published opinion, rejected the Attorney General's argument. Both concluded that, because the Accident Fund was not a health care corporation, it was not barred by MCL 550.1207(1)(o) from making the challenged purchases. Indeed, said both courts, another provision of the statute, MCL 550.1207(1)(x)(i), specifically authorized the Fund to indirectly transact certain types of insurance, and supported the legitimacy of the Accident Fund acquisitions. The Attorney General appeals.

PEOPLE v KOLANEK (case nos. 142695, 142712)
Court of Appeals case no. 295125
Prosecuting attorney: Thomas R. Grden/(248) 858-0656
Attorney for defendant Alexander Edward Kolanek: Mark A. Ambrose/(248) 787-5101
Attorney for amicus curiae Attorney General Bill Schuette: Joel D. McGormley/(517) 373-4875
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Cheri L. Bruinsma/(269) 383-8900
Attorney for amicus curiae Scholten Fant P.C.: Bradford W. Springer/(616) 842-3030
Trial Court: Oakland County Circuit Court
At issue: Six days after he was arrested and charged with marijuana possession, the defendant applied for a medical marijuana registry identification card; the Department of Community Health

had begun accepting such applications only two days before his arrest. The defendant did not go to his doctor for certification for the medical use of marijuana until after his arrest, but he had spoken with his doctor before the Michigan Medical Marihuana Act (MCL 333.26421 *et seq*.) passed in 2008, and the doctor was supportive of his medical use of marijuana. The defendant sought to dismiss the drug charges under § 8 of the MMMA, which provides an affirmative defense for patients who, although they do not have a registry identification card, meet certain criteria for the medical use of marijuana. The Court of Appeals declined to dismiss the drug possession charges, holding that, to assert the § 8 affirmative defense, a person must obtain the physician certification required by § 8(a) after the passage of the MMMA and before being arrested. The Court of Appeals also held that the defendant may nevertheless raise the defense before a jury. Can a defendant assert a § 8 affirmative defense without first obtaining a valid "registry identification card"? To have a valid § 8 defense, must a defendant obtain the required physician statement after the MMMA's enactment date, but before the arrest date? May a defendant assert the § 8 defense at trial after a court has denied his motion to dismiss under § 8?

Background: Alexander Kolanek came to the attention of the police on April 6, 2009, when he and a bank customer got into an argument in the bank's parking lot. A sheriff's deputy who responded to the bank customer's 911 call searched Kolanek's car and found, among other things, a pill bottle containing eight marijuana cigarettes. Kolanek was charged with marijuana possession. Kolanek, who claimed that he had the marijuana for medical purposes as allowed by the Michigan Medical Marihuana Act (MCL 333.26421 *et seq*.), did not have a "registry identification card" at the time of his arrest. He submitted an application for a registry card on April 12, 2009, along with a qualifying patient certificate from his doctor. His Marijuana Registry Patient ID Card was issued on May 1, 2009.

On June 10, 2009, Kolanek moved to dismiss the charges, asserting an affirmative defense under § 8 of the MMMA, MCL 333.26428(a). Section 8 provides an affirmative defense for patients who have not been issued a registry identification card, yet meet certain criteria, MCL 333.26428. Under the § 8 affirmative defense, an unregistered patient is permitted to possess "a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana" for treatment of the patient's condition or symptoms.

At an evidentiary hearing in district court, Dr. Ray Breitenbach, a licensed physician, testified that he had been treating Kolanek for Lyme disease, and that the symptoms included chronic severe pain, fatigue, and malaise. Breitenbach opined that, on April 6, 2009, Kolanek would have received palliative benefit from the use of marijuana and that he would have been eligible to use it as a patient. After Kolanek's arrest, Breitenbach had filled out an affidavit including this diagnosis and opinion – it was the doctor's first authorization for medical use of marijuana. In an affidavit filed after the hearing, Breitenbach added that he had met with Kolanek on June 14, 2008, and discussed with him the then-anticipated passage of the MMMA. According to his affidavit, Breitenbach told Kolanek at that time that if the act passed, he would support Kolanek's authorization to use marijuana.

The district judge denied Kolanek's motion to dismiss the pending charges under the MMMA. The court noted that Kolanek was not required to possess a registry card in order to assert the affirmative defense. However, said the court, because he had not obtained a physician statement authorizing the medical use of marijuana until *after* his arrest, he was not entitled to the § 8 statutory presumption that the marijuana was for medical use. Since he otherwise failed to prove that he was using it for medical purposes, he was not entitled to relief, the district court concluded.

Kolanek appealed to the circuit court, which reversed, concluding that the district court's interpretation of § 8 was erroneous. The prosecutor appealed, and the Court of Appeals reversed the circuit court in a published per curiam opinion, remanding the case to the district court for reinstatement of the charges against Kolanek. The appeals court held that, to present a valid defense to the charges, Kolanek had to establish that he discussed the medical use of marijuana with a physician after the enactment of the MMMA but before his arrest. "[I]t is reasonable to assume that the affirmative defense created in § 8 was intended to protect those who actually had a medical basis for marijuana use recognized by a physician prior to said use and was not intended to afford defendants an after-the-fact exemption for otherwise illegal activities," the Court of Appeals stated. The Court of Appeals concluded, however, that nothing in the statute expressly precluded Kolanek from arguing his § 8 defense to the jury. Both Kolanek and the prosecutor appeal.

PEOPLE v KING (case no. 142850)
Court of Appeals case no. 294682
Prosecuting attorney: Joel D. McGormley/(517) 373-4875
Attorney for defendant Larry Steven King: John R. Minock/(734) 668-2200
Attorney for amicus curiae Arvid and Irina Perrin: Arvid B. Perrin/(989) 202-2242
Trial Court: Shiawassee County Circuit Court
At issue: The defendant possessed a valid registry identification card under § 4 of the Michigan Medical Marihuana Act (MCL 333.26424), but was arrested and charged with two counts of manufacturing marijuana because his marijuana plants were kept in an outdoor locked chain-link dog kennel and in an unlocked living room closet, neither of which complied, according to the prosecutor, with the requirement in § 4(a) of the act that marijuana plants be kept in an "enclosed, locked facility." The trial court dismissed the charges, but in a split published decision, the Court of Appeals reversed and remanded for reinstatement of the charges. The Court of Appeals majority held that the defendant did not satisfy the requirement that his plants be kept in an "enclosed, locked facility." Was the defendant immune from prosecution for manufacturing marijuana under § 4 of the MMMA where he had a valid registry identification card and possessed an amount of marijuana under the limit allowed by the MMMA? Was the presumption under § 4(d) rebutted by evidence that the defendant did not keep his 12 marijuana plants in an "enclosed, locked facility" under § 4(a), as defined in § 3(c), MCL 333.26423(c)? If so, may the defendant independently assert an affirmative defense under § 8(a), MCL 333.26428(a)?
Background: The state police received an anonymous tip that marijuana was being grown in the backyard of an Owosso house. Two officers drove to the house, where they saw a chain-link dog kennel covered with black plastic. Using binoculars, one officer could see marijuana plants growing inside the kennel where a section of the plastic had become detached. The officers spoke to Larry King, who produced a registry card for medical use of marijuana. When the officers asked King to show them the marijuana plants, King retrieved a key and unlocked a lock on the kennel. The kennel, which contained six marijuana plants, was six feet tall, but had an open top and was not anchored to the ground. The officers obtained a warrant to search King's home, and found additional marijuana plants growing inside King's unlocked living room closet.

King was charged with two counts of manufacturing marijuana, MCL 333.7401(2)(d)(iii). At the preliminary exam, after the prosecution presented the testimony of one of the officers, King's counsel moved to dismiss the charges, relying on the Michigan Medical Marihuana Act. The MMMA generally protects patients, caregivers, physicians and other persons from arrest,

prosecution, or penalty for the use of medical marijuana. The act creates two separate rebuttable presumptions – one for qualifying patients who possess a valid registry identification card issued by the Department of Community Health, MCL 333.26424, and another that provides an affirmative defense for patients who have not been issued a registry identification card, yet meet certain criteria, MCL 333.26428. Under § 4, a registered patient like King is permitted to possess no more than 2.5 ounces (roughly 71 grams) of usable marijuana and 12 marijuana plants kept in an "enclosed, locked facility." Under the § 8 affirmative defense, an unregistered patient is permitted to possess "a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana" for treatment of the patient's condition or symptoms. The district judge denied the motion to dismiss and bound King over for trial, stating that King had not complied with the "enclosed, locked facility" requirement. In the circuit court, King filed a motion to quash the bindover or to suppress evidence obtained during the search. He also sought to dismiss the charges, arguing that the search warrant was invalid and that he was entitled to an affirmative defense under § 8. In response, the prosecution argued that the search warrant was valid and that King failed to comply with the MMMA because he did not keep the marijuana in an "enclosed, locked facility" pursuant to MCL 333.26424(a). The circuit court granted King's motion and dismissed the charges. The judge first ruled that because King had a valid registry identification card and kept "a legal quantity" of marijuana in his dog kennel, which the judge found to be an enclosed, locked facility for purposes of MCL 333.26423(c), the officers did not have probable cause to seek a search warrant for the home. Nonetheless, the judge stated, King was not entitled to suppression of the evidence seized during the search because the officers acted in good faith reliance on the warrant. But the circuit judge went on to hold that, even assuming the search warrant was valid, the officers should not have seized the marijuana in the home because King had complied with the act.

The prosecutor appealed, and in a split published opinion, the Court of Appeals reversed the circuit court's ruling and remanded the case for further proceedings. The majority held that King failed to comply with "enclosed, locked facility" requirement. The closet in which some of King's marijuana was grown did not have a lock, and the backyard kennel had an open top and could be lifted from the ground, the majority noted. As a result, the Court of Appeals majority held, King was not entitled to the § 8 affirmative defense and was therefore subject to prosecution. The dissenting Court of Appeals judge would have affirmed the circuit court's ruling. He concluded that the kennel qualified as an "enclosed, locked facility." Moreover, in the absence of evidence that persons other than King had access to the home, the dissenting Court of Appeals judge determined that the home was also an "enclosed, locked facility." King appeals.

Afternoon Session

DEFRAIN v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (case no. 142956)
Court of Appeals case no. 294505
Attorney for plaintiff Nancy Jane DeFrain, Personal Representative of the Estate of William DeFrain: Leonard B. Schwartz/(248) 355-0300
Attorneys for defendant State Farm Mutual Automobile Insurance Company: Andrew D. Sugerman, W. Daniel Troyka/(734) 761-9000
Trial Court: Wayne County Circuit Court

At issue: A pedestrian who was struck by a hit-and-run driver filed a claim for uninsured motorist benefits 86 days after the accident. The insurer denied the claim for failure to comply with the policy's 30-day notice provision regarding hit-and-run motor vehicle claims. The claimant sued, and the insurance company moved to dismiss based on the 30-day notice provision, but the trial court denied the insurer's motion. The trial court found that the insurance policy was ambiguous as to who was required to provide notice and when; moreover, the insurer did not show that it was prejudiced by the delay, the circuit court said. The Court of Appeals upheld the circuit court on the lack of prejudice issue, but did not address the ambiguity issue. Is this case controlled by *Jackson v State Farm Mutual Auto Ins Co*, 472 Mich 942 (2005)? Is the 30-day notice provision enforceable without a showing of prejudice to the insurer?

Background: William DeFrain was walking in Florida on May 31, 2008, when he was struck by a hit-and-run driver. DeFrain suffered a brain injury that required hospitalization and surgery; he died on November 11, 2008. DeFrain's State Farm auto insurance policy included uninsured motorist coverage; the insured's duties under the policy included providing notice of an accident to State Farm "as soon as reasonably possible." The policy contained a separate provision about the insured's duties with regard to uninsured motorist coverage and hit-and-run accidents. Under this provision, a "person" making a claim under "Uninsured Motor Vehicle Coverage must report an accident, involving a 'hit-and-run' motor vehicle to the police within 24 hours and to ***us*** within 30 days."

DeFrain, or someone acting on his behalf, notified State Farm of the hit-and-run accident on August 25, 2008, 86 days after the accident. When State Farm refused to pay his claim, DeFrain sued, seeking uninsured motorist benefits for the hit-and-run accident. After DeFrain's death, Nancy DeFrain became the named plaintiff, as personal representative of DeFrain's estate. State Farm moved for summary disposition, arguing that DeFrain did not comply with the 30-day notice provision for hit-and-run accidents, and that DeFrain's lawsuit should be dismissed. To support its argument, State Farm relied on the peremptory order entered by the Michigan Supreme Court in *Jackson v State Farm*, 472 Mich 942 (2005), in which the Supreme Court reinstated the trial court's order dismissing a lawsuit against State Farm due to the claimant's failure to provide notice of a claim for uninsured motorist benefits within 30 days of a hit-and-run accident. DeFrain responded that the insurance policy was ambiguous regarding who was required to provide notice and when, and that State Farm was required to show that it suffered actual prejudice as a result of DeFrain's failure to comply with the notice provision. The circuit court agreed with DeFrain, and denied State Farm's motion.

State Farm appealed to the Court of Appeals, which affirmed the circuit court in a published opinion. The Court of Appeals ruled that the 30-day notice provision did not control because State Farm did not show that it was prejudiced by DeFrain's failure to comply with the provision. The Court of Appeals did not reach the question of whether the trial court erred in finding an ambiguity in the policy. State Farm appeals.

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