CRIMINAL PROCEEDINGS BENCHBOOK, VOLUME 1

Content formerly part of the original MJI Circuit Court Benchbook and the MJI Criminal Procedure Monograph Series

- Pretrial Proceedings
- Trial

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Michigan Supreme Court

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- The Honorable David F. Viviano, *MJI Superivsing Justice*
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Statements in this benchbook represent the professional judgment of the author and are not intended to be authoritative statements by the justices of the Michigan Supreme Court. This benchbook was created in 2013 by consolidating materials that were initially published in 2006, 2009, and 2013. The text has been revised, reordered, and updated through January 1, 2017.

Acknowledgments

The *Criminal Proceedings Benchbook, Volume 1*, is part of a two-volume set. The *Criminal Proceedings Benchbook, Volume 1*, concerns pretrial and trial matters, and the *Criminal Proceedings Benchbook, Volume 2*, concerns posttrial matters.

The *Criminal Proceedings Benchbooks, Volumes 1 and 2*, derive from the former MJI *Circuit Court Benchbook: Criminal Proceedings* and MJI *Criminal Procedure Monograph Series*. The information from those publications has been combined and reorganized to better serve MJI's core audience.

The MJI *Michigan Circuit Court Benchbook* was originally authored by Judge J. Richardson Johnson, 9th Circuit Court. In 2009, the *Michigan Circuit Court Benchbook* was revised and broken into three volumes: *Circuit Court Benchbook: Civil Proceedings—Revised Edition*; *Circuit Court Benchbook: Criminal Proceedings—Revised Edition*; and *Evidence Benchbook*. The three volumes were revised by MJI Research Attorneys Sarah Roth and Lisa Schmitz.

The MJI *Criminal Procedure Monograph* series formerly contained the following titles:

- Monograph 1: *Issuance of Complaints & Arrest Warrants—Fourth Edition*
- Monograph 2: *Issuance of Search Warrants—Fourth Edition*
- Monograph 3: *Misdemeanor Arraignments & Pleas—Third Edition*
- Monograph 4: *Felony Arraignments & Pleas—Third Edition*
- Monograph 5: *Preliminary Examinations—Third Edition*
- Monograph 6: *Pretrial Motions—Third Edition*
- Monograph 7: *Probation Revocation—Fourth Edition*
- Monograph 8: *Felony Sentencing—Revised Edition*
- Monograph 9: *Postconviction Proceedings*

Former MJI *Criminal Procedure Monographs 1-7* were originally authored in 1992 by MJI staff members Leonhard J. Kowalski, Dawn F. McCarty,

and Margaret Vroman. The 1992 edition was funded in part by a grant from the W.K. Kellogg Foundation. Subsequent editions of these monographs were revised by MJI Research Attorneys with the assistance of an editorial advisory committee.

Former MJI *Criminal Procedure Monograph 8* was originally authored by former MJI Publications Manager Phoenix Hummel. Ms. Hummel and MJI Research Attorney Lisa Schmitz contributed to the revised edition and were assisted by an editorial advisory committee. MJI Publications Manager Sarah Roth served as editor.

Former *MJI Criminal Procedure Monograph 9* was originally authored by MJI Research Attorney Lisa Schmitz. Former MJI Publication Manager, Phoenix Hummel, served as editor. In addition, Ms. Schmitz was assisted by an editorial advisory committee.

Using This Benchbook

This benchbook is intended for Michigan judges who handle criminal cases. The purpose of this benchbook is to provide a single source to address issues that may arise while the judge is on the bench. The benchbook is designed to be a quick reference, not an academic discussion. In that context, one of the most difficult challenges is organizing the text so that the user can readily find any topic as it arises.

This book has underlying themes that may assist the user to understand the overarching concepts around which the book is organized. This book is based upon the following concepts:

- The focus is on process rather than substantive law although substantive law is discussed when important or necessary to decision-making and the process as a whole.
- The text covers the routine issues that a judge may face and non-routine issues that require particular care when they arise.
- The text is intended to include the authority the judge needs to have at his or her fingertips to make a decision.
- The text is designed to be read aloud or incorporated in a written decision.
- The text attepmts to identify whether the court's decision is discretionary.

With these concepts in mind, the text is organized as follows:

- The format generally follows the sequence of the Michigan Court Rules and the Michigan Rules of Evidence.
- The format generally follows the typical sequence in which issues arise during the course of a case.
- At the beginning of each chapter is a table of contents that lists what is covered in the chapter.
- Sections in each chapter are identified by the word or phrase typically used to identify the topic (a keyword concept).

- The discussion of each topic is designed to move from the general to the specific without undue elaboration.

- If the court is required to consider particular factors when making a decision, every effort has been made to identify the necessary elements.

- Every effort has been made to cite the relevant Michigan law using either the seminal case or the best current authority for a body of law. United States Supreme Court decisions are cited when Michigan courts are bound by that authority and they are the original source. There are references to federal decisions or decisions from other states when no applicable Michigan authority could be located.

- Every effort has been made to cite the source for each statement. If no authority is cited for a proposition, then the statement is the committee's opinion.

- If a proceeding or rule of evidence is based upon a statute, reference to that authority is given in the text.

The **Michigan Judicial Institute (MJI)** was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing educational programs and written materials for Michigan judges and court personnel. In addition to formal seminar offerings, MJI is engaged in a broad range of publication activities, services, and projects that are designed to enhance the professional skills of all those serving in the Michigan court system. MJI welcomes comments and suggestions. Please send them to **Michigan Judicial Institute, Hall of Justice, P.O. Box 30048, Lansing, MI 48909. (517) 373–7171.**

Criminal Proceedings Benchbook, Vol. 1

Summaries of Updates: September 2, 2016–January 1, 2017

Updates have been issued for the *Criminal Proceedings Benchbook, Vol. 1*. A summary of each update appears below. The updates have been integrated into the website version of the benchbook. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 2: Initiating Criminal Proceedings

2.10(B) Information or Indictment

- Where "[the] defendant knew of the prosecution's intent to amend the charges [to add an additional charge] . . . before trial started, he [did] not demonstrate[] that the amendment during the trial itself denied him the opportunity to cross-examine the witnesses on the new charge." *People v Perry (Rodney),* ___ Mich App ___, ___ (2016) (additionally holding that the timing of the prosecutor's decision to request the addition of the new charge was "not evidence of presumptive vindictiveness[]" where the record was devoid of any indication that "the prosecution deliberately penalized [the] defendant for exercising his right to a trial[]").

2.11 Notice of Intent to Seek Enhanced Sentence

- Effective January 1, 2017, ADM File No. 2013-39 amended MCR 6.112(H) to provide that the trial court may permit amendment of the prosecution's notice of intent to seek an enhanced sentence unless it "would unfairly surprise or prejudice the defendant."

Chapter 3: Right to Counsel and Waiver of Counsel

3.4(C) Indigence—Waiver of Fees and Court-Appointed Counsel

- Under MCL 768.34, a defendant may not be ordered to repay the cost of appointed counsel if the prosecution enters an order of nolle prosequi. *People v Jose*, ___ Mich App ___, ___ (2016) (additionally holding that MCR 6.005(C) did not provide authority for the trial court to order reimbursement for the work appointed counsel performed before trial where "[t]he court never determined that [the] defendant was 'able to pay part of the cost of a lawyer' and never 'require[d] contribution[]'" under MCR 6.005(C)) (third alteration in original).

Chapter 4: Preliminary Examinations

4.1(C) District Court Jurisdiction in Felony Pretrial Proceedings

- Effective January 1, 2017, ADM File No. 2013-18 amended several court rules to "permit courts to expand the use of videoconferencing technology in many court proceedings, and clarify the proceedings at which videoconferencing technology may be used." September 21, 2016, Staff Comment to ADM File No. 2013-18. Among these amendments, MCR 4.401(E) was added to provide that "[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006."

4.4 Probable Cause Conference

- Effective January 1, 2017, ADM File No. 2013-18 amended several court rules to "permit courts to expand the use of videoconferencing technology in many court proceedings, and clarify the proceedings at which videoconferencing technology may be used." September 21, 2016, Staff Comment to ADM File No. 2013-18. Among these amendments, MCR 4.401(E) was added to provide that "[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006."

Chapter 5: Misdemeanor Arraignments and Pleas

5.3 A District Court Magistrate's Authority

- Effective January 1, 2017, ADM File No. 2013-18 amended several court rules to "permit courts to expand the use of videoconferencing technology in many court proceedings, and

clarify the proceedings at which videoconferencing technology may be used." September 21, 2016, Staff Comment to ADM File No. 2013-18. Among these amendments, MCR 4.401(E) was added to provide that "[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006."

5.5(A) Arraignment on Arrest by Warrant

- Effective January 1, 2017, ADM File No. 2013-18 amended several court rules to "permit courts to expand the use of videoconferencing technology in many court proceedings, and clarify the proceedings at which videoconferencing technology may be used." September 21, 2016, Staff Comment to ADM File No. 2013-18. Among these amendments, MCR 4.401(E) was added to provide that "[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006."

5.5(B) Arraignment on Arrest by Warrant

- Effective January 1, 2017, ADM File No. 2013-18 amended several court rules to "permit courts to expand the use of videoconferencing technology in many court proceedings, and clarify the proceedings at which videoconferencing technology may be used." September 21, 2016, Staff Comment to ADM File No. 2013-18. Among these amendments, MCR 4.401(E) was added to provide that "[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006."

Chapter 6: Felony Arraignments and Pleas

6.3 A District Court Magistrate's Authority

- Effective January 1, 2017, ADM File No. 2013-18 amended several court rules to "permit courts to expand the use of videoconferencing technology in many court proceedings, and clarify the proceedings at which videoconferencing technology may be used." September 21, 2016, Staff Comment to ADM File No. 2013-18. Among these amendments, MCR 4.401(E) was added to provide that "[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006."

Chapter 7: Pretrial Release

7.6(A) Bond Forfeiture

- "MCL 765.28(1) and MCR 3.604(I)(2) do not conflict[]" because they govern "two separate and distinct events[;]" MCL 765.28(1) governs "the procedure for providing a surety notice of a default[,]" while MCR 3.604(I)(2) governs "the procedure to provide notice of a hearing on a motion for judgment." *In re Forfeiture of Bail Bond (People v Stanford)*, ___ Mich App ___, ___ (2016).

- Where "the trial court did not even mail the notice [of the defendant's default] until the eighth day[]" following the defendant's failure to appear, "the notice was not timely[]" under MCL 765.28(1) and "the court [could not] require the surety to pay the surety bond[,]" even though "notice of the *hearing* on the motion to enter judgment against the surety *was* timely pursuant to MCR 3.604(I)(2)." *In re Forfeiture of Bail Bond (People v Stanford)*, ___ Mich App ___, ___ (2016) (emphases added).

Chapter 8: Pretrial Motions & Proceedings

8.3(E) Discovery

- Where autopsy photographs that were under the control of the medical examiner were not turned over to either the prosecution or the defense until after the defendant's trial, "the prosecution's failure to disclose the . . . photographs constituted a *Brady* [*v Maryland*, 373 US 83 (1963),] violation[;]" "whether inadvertent or not, . . . the prosecution suppressed the photographs for *Brady* purposes, despite the fact that the medical examiner had sole possession of them[.]" *People v Dimambro*, ___ Mich App ___, ___ (2016).

8.4(B)(2) Witnesses—Disclosure, Production, and Appointment

- Although the trial court abused its discretion in denying appointment of an expert witness under MCL 775.15, "the error in denying funds may not have prejudiced the defendant," and the Court of Appeals acted prematurely in vacating the defendant's convictions and ordering a new trial "before the results of independent forensic analysis [were] known." *People v Agar (Agar II)*, ___ Mich ___, ___ (2016), vacating in part and reversing in part 314 Mich App 636, 646-648 (2016).

8.21(A) Double Jeopardy Issues

- Under the issue-preclusion component of the Double Jeopardy Clause, if "a jury returns inconsistent verdicts, convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact[,]" and an appellate court vacates the conviction for legal error unrelated to the verdicts' inconsistency, retrial on the charge resulting in conviction is not barred "when [the] verdict inconsistency renders unanswerable 'what the jury necessarily decided.'" *Bravo-Fernandez v United States*, 580 US ___, ___, ___ n 6 (2016), abrogating *People v Wilson (Dwayne)*, 496 Mich 91, 105-107 (2014) (citation omitted).

8.21(B) Double Jeopardy Issues

- "[A]n appellate court's vacatur of a conviction [does not] alter[] issue-preclusion analysis under the Double Jeopardy Clause[;]" accordingly, if "a jury returns inconsistent verdicts, convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact[,]" and an appellate court vacates the conviction for legal error unrelated to the verdicts' inconsistency, retrial on the charge resulting in conviction is not barred by the Double Jeopardy Clause "when [the] verdict inconsistency renders unanswerable 'what the jury necessarily decided.'" *Bravo-Fernandez v United States*, 580 US ___, ___, ___ n 6 (2016), abrogating *People v Wilson (Dwayne)*, 496 Mich 91, 105-107 (2014) (citation omitted).

8.21(C) Double Jeopardy Issues

- "When the dispositive question is whether the Legislature intended two convictions to result from a single statute," if "no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended." *People v Perry (Rodney)*, ___ Mich App ___, ___ (2016) (citations and quotation marks omitted). However, if there is a "clear indication of legislative intent and [an] absence of ambiguity, the rule of lenity does not apply." *Id.* at ___.

- "[T]he plain language of [MCL 750.253] permits multiple convictions [of uttering counterfeit notes] for uttering multiple notes during only one transaction[;]" the statutory text "evidences the Legislature's intent to punish a defendant for each counterfeit bill that was introduced[,] uttered, passed, or tendered[.]" *People v Perry (Rodney)*, ___ Mich App ___, ___ (2016).

8.27(C) Motion to Suppress Identification of Defendant

- The defendant was not entitled to a corporeal lineup with counsel rather than a photographic lineup where he was in custody for another offense at the time of the lineup; under *People v Hickman*, 470 Mich 602, 607 (2004), "a defendant's right to counsel 'attaches only to . . . [an] identification conducted at or after the initiation of adversarial judicial proceedings[,]'" and adversarial proceedings for the subject offense had not yet been initiated when the photographic lineup occurred. *People v Perry (Rodney)*, ___ Mich App ___, ___ (2016) (extending the reasoning of *Hickman*, 470 Mich at 603-604, 607-609—which addressed a *corporeal* identification—to a *photographic* lineup).

Chapter 9: Fourth Amendment Search and Seizure Issues

9.4(A)(2) Search and Seizure Issues—Where Did the Search Take Place?

- "[The] defendant had a legitimate expectation of privacy in his mother's apartment that society recognizes as reasonable[,]" and he therefore "had standing to challenge the search of [the apartment] and the seizure of" incriminating evidence from the apartment. *People v Mahdi*, ___ Mich App ___, ___ (2016) (noting that "police officers recovered . . . several items indicating that [the] defendant resided [in the apartment] with his mother," and that he "answered the door when the police officers arrived at [the apartment], indicating that he had control over the apartment and the ability to regulate its access[]").

9.4(G) Search and Seizure Issues—Where Did the Search Take Place?

- The defendant's probationer status at the time of a warrantless search of his mother's apartment and the seizure of incriminating evidence therefrom did not permit officers to conduct the search based only on reasonable suspicion that criminal activity was occurring; *United States v Knights*, 534 US 112 (2001), was distinguishable "because the prosecution did not submit evidence regarding the conditions of [the] defendant's probation in the trial court." *People v Mahdi*, ___ Mich App ___, ___ (2016) (holding that "[w]ithout the probation conditions, there [was] insufficient evidence in the record to conclude that the officers had reasonable suspicion that a probationer *subject to a search condition* was engaged in criminal activity[]").

9.5(B)(6) Search and Seizure Issues—Was a Warrant Required?

- The seizure of a wallet, keys, and a cell phone from the defendant's mother's apartment "fell outside the scope of [the mother's] consent[]" where "[t]he testimony establishe[d] that a reasonable person would have believed that the scope of the search pertained [only] to illegal drugs hidden in the apartment." *People v Mahdi*, ___ Mich App ___, ___ (2016).

9.5(B)(8) Search and Seizure Issues—Was a Warrant Required?

- Police officers conducting a warrantless search of the defendant's mother's apartment "were not entitled to seize [a] wallet, keys, and [a] cell phone under the plain view exception to the warrant requirement because the incriminating character of the items seized was not immediately apparent[]" and "further investigation was necessary in order to establish a connection between the items and the suspected criminal activity." *People v Mahdi*, ___ Mich App ___, ___ (2016).

9.7(A)(1) Search and Seizure Issues—Is Exclusion the Remedy if a Violation is Found?

- "[T]he inevitable discovery doctrine [did] not apply to the seizure of [a] cell phone, wallet, and set of keys[]" from the defendant's mother's apartment where, "[e]ven assuming that the officers had probable cause to obtain a warrant for [these items], the officers were not in the process of obtaining a warrant when they seized the items." *People v Mahdi*, ___ Mich App ___, ___ (2016).

Chapter 10: Trial

10.5(D) Oaths or Affirmations

- The Michigan Supreme Court vacated Part II of *People v Sardy (Sardy I)*, 313 Mich App 679, 691-711 (2015), which rejected the defendant's argument that his right of confrontation was violated by the admission at trial of the child-victim's unsworn preliminary examination testimony and held, among other things, that the victim was unavailable under MRE 804(a)(3) based on her inability to testify due to lack of memory. *People v Sardy (Sardy II)*, ___ Mich ___, ___ (2016) (remanding to the Court of Appeals for reconsideration).

10.5(F) Oaths or Affirmations

- The Michigan Supreme Court vacated Part II of *People v Sardy (Sardy I)*, 313 Mich App 679, 691-711 (2015), which rejected the defendant's argument that his right of confrontation was violated by the admission at trial of the child-victim's unsworn preliminary examination testimony and held, among other things, that the victim was unavailable under MRE 804(a)(3) based on her inability to testify due to lack of memory. *People v Sardy (Sardy II)*, ___ Mich ___, ___ (2016) (remanding to the Court of Appeals for reconsideration).

10.7(D)(2) Conducting the Trial

- Effective January 1, 2017, ADM File No. 2013-18 amended several court rules to "permit courts to expand the use of videoconferencing technology in many court proceedings, and clarify the proceedings at which videoconferencing technology may be used." September 21, 2016, Staff Comment to ADM File No. 2013-18. Among these amendments, MCR 4.401(E) was added to provide that "[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006."

10.11(A)(4)(a) Confrontation

- The Michigan Supreme Court vacated Part II of *People v Sardy (Sardy I)*, 313 Mich App 679, 691-711 (2015), which rejected the defendant's argument that his right of confrontation was violated by the admission at trial of the child-victim's unsworn preliminary examination testimony and held, among other things, that the victim was unavailable under MRE 804(a)(3) based on her inability to testify due to lack of memory. *People v Sardy (Sardy II)*, ___ Mich ___, ___ (2016) (remanding to the Court of Appeals for reconsideration).

10.11(E) Confrontation

- The Michigan Supreme Court vacated Part II of *People v Sardy (Sardy I)*, 313 Mich App 679, 691-711 (2015), which rejected the defendant's argument that his right of confrontation was violated by the admission at trial of the child-victim's unsworn preliminary examination testimony and held, among other things, that the victim was unavailable under MRE 804(a)(3) based on her inability to testify due to lack of memory. *People v Sardy (Sardy II)*, ___ Mich ___, ___ (2016) (remanding to the Court of Appeals for reconsideration).

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Appendix: Practical Resources for Courts

Chapter 1: Common Issues Arising in Trial Court Proceedings

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1.1 Access to Court Proceedings and Records

A. Record of Proceedings

MCR 8.108(B)(1) states that a "court reporter or recorder shall attend the court sessions under the direction of the court and take a verbatim record of the following:

> "(a) the voir dire of prospective jurors;
>
> (b) the testimony;
>
> (c) the charge to the jury;
>
> (d) in a jury trial, the opening statements and final arguments;
>
> (e) the reasons given by the court for granting or refusing any motion made by a party during the course of a trial; and
>
> (f) opinions and orders dictated by the court and other matters as may be prescribed by the court."

MCR 8.108(E) states in part that "[t]he court reporter or recorder shall furnish without delay, in legible English, a transcript of the records taken by him or her (or any part thereof) to any party on request."

MCR 8.109(A) indicates that a trial court is authorized to use audio or video recording equipment for making the record of court proceedings if the equipment meets the standards published by the State Court Administrative Office (SCAO)[1] or is analog equipment that SCAO has approved for use. In addition, trial courts that use audio or video recording equipment "must adhere to the audio and video recording operating standards published by [SCAO]." MCR 8.109(B).

Occasionally, proceedings occur without a court reporter present, or with a recording system that was not turned on or did not function correctly. MCR 7.210(B)(2) provides specific steps for an appellant to follow "[w]hen a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder . . . to settle the record and to cause the filing of a certified settled statement of facts to serve as a substitute for the transcript." If a settled statement of facts is made and certified as prescribed by

[1] See SCAO's Standards for Digital Video and Audio Recording.

MCR 7.210(B)(2), it controls the timing of the appellant's brief in the same manner as would a transcript. MCR 7.212(A)(1).

B. Open or Closed Trial[2]

All trials must be open to the public. MCL 600.1420. See also US Const, Am VI; Const 1963, art 1, § 20 (entitling criminal defendant to public trial). A criminal trial must be open to the public, unless the court finds that no alternative short of closure will adequately assure a fair trial for the accused. *Richmond Newspapers, Inc v Virginia*, 448 US 555, 580-581 (1980).

C. "Gag Orders"

The term "gag order" refers to a court order directed to attorneys, witnesses, and parties prohibiting them from discussing a case with reporters, or to a court order prohibiting reporters from publishing information related to a case. A court order prohibiting reporters from publishing information related to a case is unconstitutional. *Nebraska Press Ass'n v Stuart*, 427 US 539, 556 (1976) ("The [United States Supreme] Court has interpreted [First Amendment] guarantees to afford special protection against orders that [impose a prior restraint on speech by] prohibit[ing] the publication or broadcast of particular information or commentary"). "A prior restraint on a First Amendment right will be upheld only if there is a clear showing that the exercise of the First Amendment right will interfere with the right to a fair trial." *People v Sledge*, 312 Mich App 516, 531 (2015). "In order to determine whether the right to a fair trial justified the prior restraint, a court 'must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important.'" *Id.*, quoting *Nebraska Press Ass'n*, 427 US at 562.

MCR 8.116(D)(1) should be followed in assessing whether to grant a gag order prohibiting discussion of the case with reporters. A gag order that is reasonable and serves a legitimate purpose that overrides any limited incidental affects on First Amendment rights is permissible. *In re Detroit Free Press*, 463 Mich 936 (2000).

"[A] gag order precluding all potential trial participants from making any extrajudicial statement regarding the case to the media

[2] See Section 8.12 for more information on a pretrial motion to close the courtroom.

or to any person for the purpose of dissemination to the public[] . . . [was] overbroad and vague . . . [and] constituted a prior restraint on freedom of speech, freedom of expression, and freedom of the press[.]" *Sledge*, 312 Mich App at 537 (noting that "the vague and overbroad scope of people covered by the gag order indicate[d] that it [was] an impermissible prior restraint on . . . freedom of expression[,]" and that "[a]lthough the gag order [did] not directly prohibit the media from discussing the case, it prohibit[ed] the most meaningful sources of information from discussing the case with the media[,]" thereby impairing "the right of the [intervening newspaper] to obtain information from all potential trial participants") (citations omitted). Additionally, the trial court erred by "fail[ing] to make findings of fact or conclusions of law to justify the gag order[,]" which was issued sua sponte for the ostensible purpose of protecting the defendants' right to a fair trial; the court did not "consider the nature and extent of the pretrial news coverage, whether the gag order would prevent the danger to [the] defendants' right to a fair trial, whether there were any willing speakers[,] . . . and whether there were any alternatives to the gag order." *Id*. at 531 (citations omitted).

If "there were willing speakers that [a] court intend[s] to preclude from speaking[]" by issuing a gag order, a news agency "[has] standing to challenge the gag order [both] as a recipient of speech and as a news gatherer." *Sledge*, 312 Mich App at 526, 527 (holding that where a newspaper "identified at least one willing speaker who felt restrained because of [a] gag order[,]" and "the gag order cut the [newspaper] off from access to important sources of information since it prohibited any potential trial participant from speaking with the news media regarding the case[,]" the newspaper had standing to challenge the order) (citations omitted).

D. Access to Court Files and Records

1. Records

"For purposes of [MCR 8.119(A)], records are as defined in MCR 1.109, MCR 3.218, MCR 3.903, and MCR 8.119(D)-(G)." MCR 8.119(A).[3] In general, "[c]ourt records are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules."

[3] "Court records are defined by MCR 8.119 and [MCR 1.109(A), and] . . . are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules." MCR 1.109(A)(1). "Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and the[] court rules." MCR 1.109(A)(1).

MCR 1.109(A)(1). MCR 1.109(A)(1)(a) provides that "[c]ourt records include, but are not limited to:

> "(*i*) documents, attachments to documents, discovery materials, and other materials filed with the clerk of the court,
>
> (*ii*) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records."[4]
>
> > **Note:** "Discovery materials that are not filed with the clerk of the court are not court records. Exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930[5] during the pendency of a proceeding are not court records." MCR 1.109(A)(2).

The clerk of the court is required to "maintain a~~ paper and/or electronic~~ file ~~for~~of each action," including "all pleadings, process, written opinions and findings, orders, and judgments filed in the action,~~[]"~~ and ~~"all~~any other materials prescribed by court rule, statute, or ~~as ordered by the~~ court order to be filed with the clerk of the court." MCR 8.119(D)(1)(b)~~MCR 8.119(D)(1)(d)~~.

2. Access to Records

MCR 1.109(E) provides that "[r]equests for access to public court records shall be granted in accordance with MCR 8.119(H)." MCR 8.119(H) provides, in part:

> "Except as otherwise provided in [MCR 8.119](F),[6] only case records as defined in [MCR 8.119](D)[7] are public records, subject to access in accordance with these rules."

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[4] "A document [is] a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to paper." MCR 1.109(B). See also MCR 1.109(C)(1), providing that "pleadings and other documents prepared for filing in the courts" must be "transmitted through an approved electronic means or created electronically by the court and maintained in a digital image."

[5] MCR 3.930 governs exhibits in juvenile proceedings. See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 21, for discussion of court records in juvenile proceedings.

Additionally, MCR 8.119(H)(1) provides that "[u]nless access to a case record or information contained in a record as defined in [MCR 8.119](D) is restricted by statute, court rule, or an order [sealing a record] pursuant to [MCR 8.119](I),[8] any person may inspect that record and may obtain copies as provided in [MCR 8.119](J)."[9]

MCR 8.119(G) provides, in part, that "[a]ll court records not included in [MCR 8.119(D)-(F)] are considered administrative and fiscal records or nonrecord materials and are not subject to public access under [MCR 8.119](H)."

Supreme Court Administrative Order No. 2006-2[10] addresses the confidentiality of social security numbers and management of non-public information contained within public documents.

"[A] court is prohibited from sealing court orders and court opinions under [the plain language of MCR 8.119(I)(5)[11]][.]" *Jenson v Puste*, 290 Mich App 338, 347 (2010). "Significantly, [MCR 8.119(I)(5)] does not allow a court the authority to exercise discretion in deciding whether to seal [a court order or opinion], unlike the limited discretion that [MCR 8.119(I)(1)] allows when a motion involves other court records." *Jenson*, 290 Mich App at 342-347 (trial court properly held that it did not have the authority to seal a personal protection order (PPO) pursuant to MCR 8.119(I)(5)).

Access to court records can be restricted by the Legislature. *In re Midland Publishing Co, Inc*, 420 Mich at 159. For example, MCL 750.520k allows a court, in a criminal sexual conduct case, to order the suppression of the victim's and actor's names and details of the alleged offense until after the preliminary

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[6] MCR 8.119(F) provides that "[c]ourt recordings, log notes, jury seating charts, and all other records such as tapes, backup tapes, discs, and any other medium used or created in the making of a record of proceedings and kept pursuant to MCR 8.108 are court records and are subject to access in accordance with [MCR 8.119](H)(2)(b)." MCR 8.119(H)(2)(b), in turn, requires every court, by administrative order, to "establish a policy for whether to provide access for records defined in [MCR 8.119](F) and if access is to be provided, outline the procedure for accessing those records[.]"

[7] See Section 1.1(D)(1) for discussion of records.

[8] See Section (F) for discussion of sealing records under MCR 8.119(I).

[9] MCR 8.119(J) governs access and reproduction fees.

[10] Available at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/AOs/AOs-Responsive%20HTML5/index.html#t=AOs%2FAdministrative_Orders%2FAO_No_2006-2_%E2%80%94_Privacy_Policy_and_Access_to_Court_Records.htm.

[11] Effective January 1, 2013, ADM File No. 2006-47 relettered MCR 8.119(F) (governing sealed records) as MCR 8.119(I), but this subrule is otherwise substantially the same. MCR 8.119(I)(5) provides that "[a] court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record." See Section (F) for discussion of sealing records under MCR 8.119(I).

examination. For a partial listing of statutes, court rules, and cases that restrict public access to court records, see the State Court Administrative Office's Case File Management Standards.[12]

To determine whether a right of access exists regarding a document, a court should ask whether the document has historically been open to the public and press, and whether access "'plays a significant positive role in the function of the particular process in question.'" *In re People v Atkins*, 444 Mich 737, 740 (1994), quoting *Press-Enterprise Co v Superior Ct of California*, 478 US 1, 8 (1986) (after the defendant was found competent to stand trial, the court provided newspapers with an edited (as opposed to full text) version of the psychiatrist's written report; because competency reports that have not been admitted into evidence have traditionally been viewed as confidential, and public access would not play a significant positive role in the functioning of the particular process in question, the court's denial of full access to the report was affirmed).

"[T]he press has a qualified right of postverdict access to jurors' names and addresses, subject to the trial court's discretion to fashion an order that takes into account the competing interest of juror safety and any other interests that may be implicated by the court's order." *In re Disclosure of Juror Names (People v Mitchell)*, 233 Mich App 604, 630-631 (1999). If a court determines that jurors' safety concerns are "legitimate and reasonable," the court may deny media access to jurors' names and addresses. *Id.* at 630. Jurors' privacy concerns alone are insufficient to deny access to jurors' names. *Id.*

Committee Tips:

- *Reports and records may be privileged or confidential and their treatment should be scrutinized in each case. Examples are substance abuse evaluations and treatment records, medical records and reports, and psychological/psychiatric records and reports.*
- *Consider whether the document can be removed from the file pursuant to the court's authority to strike pleadings or parts of pleadings under MCR 2.115(B).*

[12] Available at http://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

• Consider whether a filed document can be removed from the file by court order. See MCR 8.119(H).

• For other information parties wish to keep confidential, consider having the document marked as an exhibit, reviewed by the court on the record, and then returned to the parties at the conclusion of the proceeding. See MCR 1.109(A)(2); MCR 2.518(A) (exhibits received and accepted into evidence under MCR 2.518 are not court records). (Note, however, that MCR 1.109(C)(2) provides that "[a]n attachment or discovery material that is submitted for filing shall be made part of the public case file unless otherwise confidential.")

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3. Record Retention

"The [S]tate [C]ourt [A]dministrative [O]ffice [(SCAO)] shall establish and maintain records management policies and procedures for the courts, including a records retention and disposal schedule, in accordance with [S]upreme [C]ourt rules." MCL 600.1428(1). "The record retention and disposal schedule shall be developed and maintained as prescribed in . . . . MCL 399.5." MCL 600.1428(1). *Record*, as used in MCL 600.1428, "means information of any kind that is recorded in any manner and that has been created by a court or filed with a court in accordance with [S]upreme [C]ourt rules." MCL 600.1428(4).

"Subject to the records reproduction act, [MCL 24.401 to MCL 24.406], a court may dispose of any record as prescribed in [MCL 600.1428(1)]." MCL 600.1428(2).

"A record, regardless of its medium, shall not be disposed of until the record has been in the custody of the court for the retention period established under [MCL 600.1428(1)]." MCL 600.1428(3).

MCR 8.119(K) provides:

> "Retention Periods and Disposal of Court Records. For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case file and other case records, (3) court recordings, log notes, jury seating charts, and recording media, and (4) nonrecord material. The records of the trial courts shall be retained in the

> medium prescribed by MCR 1.109. The records of a trial court may not be ~~destroyed~~disposed of except as authorized by the records retention and disposal schedule and upon order by the chief judge of that court. Before ~~destroying~~disposing of records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such ~~by State Archives~~ in the Michigan trial courts approved records retention and disposal schedule. An order disposing of court records~~destruction~~ shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, ~~and~~ Archives of Michigan, and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.5."[13] ~~MCR 8.119(K).~~

"Michigan law (MCL 399.5 and [MCL] 750.491) requires that all public records be listed on an approved Retention and Disposal Schedule that identifies the minimum amount of time that records must be kept to satisfy administrative, legal, fiscal, and historical needs." General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, p *ii* (2006). Accordingly, trial courts are required to comply with General Records Retention and Disposal Schedule #16 - Michigan Trial Courts ("Schedule #16"), which "lists the records that are created and maintained by Michigan trial courts, for what period they are to be retained, and when those records can be disposed of." General Records Retention and Disposal Schedule #16 - Michigan Trial Courts at p *ii*. Schedule #16 "**must be used in conjunction with the Michigan Trial Court Case File Management Standards**."[14] *Id.* at p *ii* (emphasis in original).

"Courts may destroy [public] records or transfer them to the Archives of Michigan for permanent preservation at the end of the assigned retention period.[15] Unless a statute or court rule prescribes otherwise, a court may retain records longer than the specified period of time. Any record not [listed in Schedule #16] or not having a statutory retention period may not be

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[13] The established retention periods can be found in the SCAO's General Records Retention Disposal Schedule #16 - Michigan Trial Courts, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_schd.pdf.

[14] Available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

[15] "Destruction of a ~~file~~case record does not negate, rescind, or set aside an adjudication." MCR 3.925(E) ~~MCR 3.925(E)(1)~~.

disposed of without first submitting a list or schedule required by MCL 399.5 or securing an amendment to this schedule." General Records Retention and Disposal Schedule #16 - Michigan Trial Courts at p *ii*.

E. Access and Reproduction Fees

Where a court is required by law or court rule to provide free case record access to a person or entity, it cannot charge an access or reproduction fee for that record. MCR 8.119(J)(1). "If a court maintains its public records in electronic format only,

> "(a) the court may not charge a fee to access those case records when access is made on-site through a public terminal or when a verbal request for public information is made on-site to the clerk.
>
> (b) the court or a contracted entity may charge a fee, in accordance with Supreme Court order, to access those case records when the access is made off-site through a document management, imaging, or other electronic records management system." MCR 8.119(J)(2).

MCR 8.119(J)(3) provides:

> "Reproduction of a case record means the act of producing a copy of that record through any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to [MCL] 24.403.
>
> > (a) A court may charge only for the actual cost of labor and supplies and the actual use of the system, including printing from a public terminal, to reproduce a case record and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce a case record.
> >
> > (b) If a person wishes to obtain copies of documents in a file, the clerk shall provide copies upon receipt of the actual cost of reproduction.
> >
> > (c) Except as otherwise directed by statute or court rule, a standard fee may be established, pursuant to [MCR 8.119(H)(2)], for providing copies of documents on file."

F. Limitations on Access to Court Records

MCR 8.119(I)(1)-(3) provide as follows:

> "(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts [sic] records, in whole or in part, in any action or proceeding, unless
>
> > (a) a party has filed a written motion that identifies the specific interest to be protected,
> >
> > (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
> >
> > (c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.
>
> (2) In determining whether good cause has been shown, the court must consider,
>
> > (a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
> >
> > (b) the interest of the public.
>
> (3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records."

MCR 8.119(I) is not intended to limit a court's authority to issue protective orders under MCR 2.302(C) for trade secrets, etc. MCR 8.119(I)(4).

"[A] court is prohibited from sealing court orders and court opinions under [the plain language of MCR 8.119(I)(5)[16]][.]" *Jenson v Puste*, 290 Mich App 338, 347 (2010). "Significantly, [MCR 8.119(I)(5)] does not allow a court the authority to exercise discretion in deciding whether to seal [a court order or opinion], unlike the limited discretion that [MCR 8.119(I)(1)] allows when a motion involves other court records." *Jenson*, 290 Mich App at 342-

[16] Effective January 1, 2013, ADM File No. 2006-47 relettered MCR 8.119(F) (governing sealed records) as MCR 8.119(I), but this subrule is otherwise substantially the same. MCR 8.119(I)(5) provides that "[a] court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record."

347 (trial court properly held that it did not have the authority to seal a personal protection order (PPO) pursuant to MCR 8.119(I)(1)).

"Any person may file a motion to set aside an order that disposes of a motion to seal the record, or an objection to entry of a proposed order. MCR 2.119[17] governs the proceedings on such a motion or objection." MCR 8.119(I)(6).

If a court grants a motion to seal a court record, the court must send a copy of the order to the Clerk of the Michigan Supreme Court and to the State Court Administrative Office. MCR 8.119(I)(7).

When a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals. MCR 7.211(C)(9)(a). Any requests to view the sealed file will be referred to the trial court. *Id*. MCR 8.119(I) also governs the procedure for sealing a Court of Appeals file. MCR 7.211(C)(9)(c). "Materials that are subject to a motion to seal a Court of Appeals file in whole or in part shall be held under seal pending the court's disposition of the motion." MCR 7.211(C)(9)(c).

MCR 8.119(D) provides, in part:

> "Documents and other materials made confidential by court rule, statute, or order of the court [sealing a record] pursuant to [MCR 8.119](I) must be designated as confidential and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court pursuant to [MCR 8.119](I) that makes a document or other materials in that case confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed."

See also MCR 2.518(C), which provides:

> "Confidentiality. If the court retains discovery materials filed pursuant to MCR 1.109(C) or an exhibit submitted pursuant to [MCR 2.518] after a hearing or trial and the material is confidential as provided by law, court rule, or court order pursuant to MCR 8.119(I), the court must continue to maintain the material in a confidential manner."

[17] See the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 3, for a discussion of MCR 2.119.

G. Access to Judge

1. Ex Parte Communications

"A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . ." except for the limited exceptions set out in the Michigan Code of Judicial Conduct 3.A(4). The exceptions include communications for scheduling, consulting with court personnel, and, with the consent of the parties, conferring separately with the parties and their attorneys in an effort to reach resolution. Michigan Code of Judicial Conduct 3.A(4)(a), (c), and (d). The prohibition on ex parte communications may also apply to nonparties such as probation agents. See *People v Black*, 103 Mich App 109, 115 (1981) ("[w]here the trial court has communicated with the probation officer ex parte, [the reviewing court] must presume that th[e] right [to the effective assistance of counsel] has been denied"); *People v Crawford (Alvin)*, 115 Mich App 516, 520 (1982) ("when a trial court holds an ex parte conversation with a presentence investigator, there is a rebuttable presumption of prejudice to the defendant that, if not rebutted, requires reversal").

However, "not all communications between a judge and *jury* are critical stages—meaning a stage at which there is a 'reasonable probability that [a defendant's] case could suffer significant consequences from his [or her] total denial of counsel.'" *Bourne v Curtin*, 666 F3d 411, 412-414 (CA 6, 2012) (emphasis supplied; citation omitted) (trial court did not reversibly err by failing to consult with the parties before denying the jury's request to review trial testimony; the court's ex parte communication with the jury concerning its request did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings, and the petitioner did not contend that he suffered actual harm as a result of the ex parte communication); see also *Peoples v Lafler*, 734 F3d 503, 518-519 (CA 6, 2013) (rejecting the habeas petitioner's "claim[] that he was denied the right to counsel because the trial court told the jury, outside of the presence of [the petitioner] or his attorney, that a trial transcript was not available[;]" because "[t]he jury already had heard all testimony from the trial, . . . a transcript could only have provided this information a second time[,]" and it was therefore "not objectively unreasonable for the state [appellate] court to conclude that communication regarding the transcript was 'administrative' and outside of the class of 'critical stage' jury instructions that subjects a defendant to

prejudice if made without counsel[]"); *People v Powell (Willie)*, 303 Mich App 271, 274-276 (2013) (the trial court's instruction to the jury "to continue its deliberations until it could reach an agreement[]" was "administrative in nature[]" and did not violate the defendant's rights to be present and to have counsel at a critical stage of trial).

Committee Tip:

The prohibition on ex parte communications precludes a judge from obtaining or seeking substantive information without both parties having the opportunity to participate. It is recommended that court staff be carefully trained to intercept prohibited ex parte communications. These communications can include efforts by the parties or other persons interested in the case to contact the judge, contacts with or from police or other agencies, and communications with jurors. The judge also should not view the scene without notifying the parties, who should have the opportunity to be present.

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2. Judge's Appearance by Video Communication Equipment

The State Court Administrative Office is authorized to approve the use of two-way interactive video technology in the trial courts to allow judges to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes. Administrative Order No. 2012-7.[18]

Remote participation is limited to specific situations, including judicial assignments and circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district. Administrative Order No. 2012-7.[19]

[18] Available at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/AOs/AOs-Responsive%20HTML5/index.html#t=AOs%2FAdministrative_Orders%2FAO_No_2012-7_%E2%80%94_Adoption_of_Administrative_Order_to_Allow_State.htm.

A judge who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area. Administrative Order No. 2012-7.[20]

H. Standard of Review

A trial court's decision to permit public access to court proceedings and documents is reviewed for an abuse of discretion, in light of the facts and circumstances of the particular case. *Int'l Union, United Auto, Aerospace and Agricultural Implement Workers of America v Dorsey*, 268 Mich App 313, 329 (2005), rev'd in part on other grounds 474 Mich 1097 (2006), citing *Nixon v Warner Communications, Inc*, 435 US 589, 599 (1978).

1.2 Attorney Conduct[21]

A. Attorney's Duty to the Court

An attorney is responsible for aiding the administration of justice. An attorney has a duty to uphold the legal process and act in conformity with standards imposed on members of the bar. These standards include the rules of professional responsibility and judicial conduct adopted by the Michigan Supreme Court. MCR 9.103(A). Grounds for discipline include conduct that is prejudicial to the proper administration of justice or that violates the Michigan Rules of Professional Conduct (MRPC). See MCR 9.104(1) ("conduct prejudicial to the proper administration of justice"), and MCR 9.104(4) ("conduct that violates the standards or rules of professional conduct adopted by the Supreme Court").

The authority to supervise and discipline Michigan attorneys derives from the state constitution and rests with the Michigan Supreme Court. *Schlossberg v State Bar Grievance Bd*, 388 Mich 389, 394 (1972). This constitutional responsibility is discharged, in turn, by the Attorney Grievance Commission (acting as the Supreme Court's prosecution arm) and the Attorney Discipline Board (acting as the Supreme Court's adjudicative arm). MCR 9.100 *et seq*.

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[19] Available at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/AOs/AOs-Responsive%20HTML5/index.html#t=AOs%2FAdministrative_Orders%2FAO_No_2012-7_%E2%80%94_Adoption_of_Administrative_Order_to_Allow_State.htm.

[20] Available at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/AOs/AOs-Responsive%20HTML5/index.html#t=AOs%2FAdministrative_Orders%2FAO_No_2012-7_%E2%80%94_Adoption_of_Administrative_Order_to_Allow_State.htm.

[21] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1, for information related to ineffective assistance of counsel.

"Michigan has a long tradition of judicial oversight of the ethical conduct of its court officers." *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 194 (2002). All Michigan judges have an independent responsibility to supervise the ethical conduct of attorneys who appear in their courtrooms. *Attorney Gen v Michigan Pub Svc Comm*, 243 Mich App 487, 491-492 (2000). This tradition is reflected in the Michigan Code of Judicial Conduct. Canon 3(B)(3) provides that "[a] judge should take or institute appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Judges, as well as lawyers, are obliged by the Michigan Rules of Professional Conduct to report attorney misconduct. *Grievance Administrator v Fieger*, 476 Mich 241 (2006); MRPC 8.3.

B. Attorney's Duty to the Client

An attorney must represent and advocate on behalf of his or her client. In doing so, the attorney must not make inflammatory remarks with the intent to prejudice the jury. Each party is entitled to a fair trial uninfluenced by appeals to passion. *Wayne Co Rd Comm'rs v GLS LeasCo, Inc*, 394 Mich 126, 131 (1975). For instance, it is improper and prejudicial for a prosecutor to appeal to the civic duty of the jury. *People v Weatherspoon*, 171 Mich App 549, 558 (1988).

The severity and repetitiveness of prejudicial remarks are considered when determining if a new trial is warranted. *Wayne County Road Comm'rs*, 394 Mich at 131. Whereas one remark may not prejudice the jury, repetitive remarks may be so damaging that a new trial is required. The harmful effects of prejudicial remarks can often be corrected through the court's instruction to the jury. The judge may prevent a miscarriage of justice by explaining to jurors that attorneys' comments are not evidence. *People v Johnson (Roger)*, 382 Mich 632, 649 (1969).

C. Motion to Disqualify Attorney

Although not specifically addressed by court rule, case law suggests that the court has the authority to consider a motion to disqualify counsel. *Rymal v Baergen*, 262 Mich App 274, 316-322 (2004); *Evans & Luptak*, 251 Mich App at 193-203. Typically, a motion to disqualify is based on an alleged conflict of interest. See MRPC 1.7 (General Rule), MRPC 1.8 (Prohibited Transactions), and MRPC 1.9 (Former Client). Another potential ground for disqualification may arise if the lawyer is a potential witness. MRPC 3.7. A conflict of interest exists where "the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused." *People v Mayhew*, 236 Mich App 112, 126-127 (1999). A conflict of interest also exists where the prosecutor was privy to

confidential information while in an attorney-client relationship. *People v Herrick*, 216 Mich App 594, 599 (1996).

See *People v Tesen*, 276 Mich App 134, 141 (2007), where an individual prosecutor was properly disqualified because he took the lead role in interviewing the child victim and was likely to be called to testify at trial.[22] Although other people witnessed the prosecutor interview the child and could have testified about what they observed, none of the witnesses could testify to the prosecutor's qualifications, training, and experience in the use of forensic interview protocol when questioning child victims. *Id.* at 144-145. Questions related to a person's qualifications, experience, and training "would clearly be of some value to a [fact-finder] trying to determine the weight and credibility of the victim's account of the charged offenses." *Id.* at 144.

D. Standard of Review

Whether a conflict of interest exists is a question of fact that is reviewed for clear error. *Avink v SMG*, 282 Mich App 110, 116 (2008). The application of "ethical norms" to a decision whether to disqualify counsel is reviewed de novo. *Id.* at 116.

1.3 Contempt of Court

"Michigan courts have, as an inherent power, the power at common law to punish all contempts of court." *In re Contempt of Dougherty*, 429 Mich 81, 91 n 14 (1987). "This contempt power inheres in the judicial power vested in th[e Michigan Supreme Court], the Court of Appeals, and the circuit and probate courts by Const 1963, art 6, § 1." *Dougherty*, 429 Mich at 91 n 14. MCL 600.1701 defines a court's power to punish contempt by fine or imprisonment or both. Contempt may be either civil or criminal and either direct or indirect. Direct contempt occurs in the immediate view and presence of the court; indirect contempt is outside of the immediate view and presence of the court. Civil contempt is coercive and intended to compel the offending person to take some action of which he or she is capable to purge the contempt. It is prospective. Willful disobedience is not necessary for civil contempt. *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499-501 (2000). The purpose of criminal contempt is to punish for past conduct. *Jaikins v Jaikins*, 12 Mich App 115, 120 (1968).

For a more detailed discussion on contempt of court, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

[22] See MRPC 3.7 (Lawyer as Witness).

1.4 Judicial Discretion

Many decisions of a judge are discretionary, and are reviewed for an abuse of that discretion. It is prudent for the judge to recognize his or her discretion when making those types of decisions. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.* at 269. "An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *Id*.

1.5 Judicial Disqualification

Due process requires an unbiased and impartial decisionmaker. *Cain v Dep't of Corrections*, 451 Mich 470, 497 (1996). "A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B)." Michigan Code of Judicial Conduct, Canon 3(C). However, the Supreme Court has cautioned that an objective standard applies and that, under the court rule, recusal is not required based on an "appearance of impropriety." *Adair v State of Michigan*, 474 Mich 1027, 1038-1041 (2006). The Court also discussed with approval the federal "duty to sit" doctrine—an obligation to remain on a case absent good grounds for recusal. *Id.* at 1040-1041.

MCR 2.003(C)(1) sets out a nonexhaustive list of grounds for the disqualification of a judge. For example, disqualification is warranted when "[t]he judge is biased or prejudiced for or against a party or attorney[,]" MCR 2.003(C)(1)(a), or when "[t]he judge, based on objective and reasonable perceptions, has either (*i*) a serious risk of actual bias impacting the due process rights of a party as enunciated in [*Caperton v AT Massey Coal Co*, 556 US 868 (2009)], or (*ii*) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct[,]" MCR 2.003(C)(1)(b).

"[A] trial judge's ruling regarding the admission of evidence, no matter how erroneous, is not grounds for disqualification[under MCR 2.003(C)(1)(b),] . . . [and j]udicial disqualification based on due process grounds is reserved for extreme cases." *People v Roscoe*, 303 Mich App 633, 647-648 (2014) (citing *Caperton*, 556 US at 886-887, 890, and holding that "a ruling against a defendant, even if erroneous, does not create a serious, objective risk of actual bias that rises to an unconstitutional level[]") (additional citation omitted).

"Under the Due Process Clause [of the Fourteenth Amendment of the United States Constitution] there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams (Terrance) v Pennsylvania*, 579 US ___, ___ (2016). "No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision[, and w]hen a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." *Id.* at ___ (holding that where a state supreme court justice was formerly involved in a case as the prosecutor and had given his official approval to seek the death penalty against the defendant, the justice's failure to recuse himself from postconviction proceedings in which the defendant sought relief from his conviction and death sentence constituted reversible constitutional error).

"[A]n unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." *Williams (Terrance)*, 579 US at ___ (quoting *Puckett v United States*, 556 US 129, 141 (2009), and holding that "a due process violation arising from the participation of an interested judge is a defect 'not amenable' to harmless-error review, regardless of whether the judge's vote was dispositive[]") (alteration in original).

For a more detailed discussion on judicial disqualification, see the Michigan Judicial Institute's *Judicial Disqualification in Michigan*.

1.6 Pro Se Litigants

In both civil and criminal cases, a party has a right to represent himself or herself. Const 1963, art 1, § 13. See also MCL 600.1430 and MCL 763.1.

Practice Note: Committee Tips:

No special warnings or cautions are required. However, it is good practice to caution the pro se litigant that he or she has a right to consult with and be represented by an attorney and that he or she should not expect special treatment because he or she is a pro se litigant.

The court may reference particular statutes, court rules, or rules of evidence that may have significance in a particular case.

Explain to a pro se litigant that he or she does not have to testify, but if testifying, he or she may be subjected to cross-examination.

Although a party has a right to represent himself or herself, an individual may not represent another person or entity. For example, a corporation can only appear through an attorney. *Peters Production, Inc v Desnick Broadcasting Co*, 171 Mich App 283, 287 (1988). Also, a minor's next friend cannot act as the minor's attorney unless he or she is an attorney. *Marquette Prison Warden v Meadows*, 114 Mich App 121, 124 (1982). Finally, a personal representative may not represent an estate. *Shenkman v Bragman*, 261 Mich App 412, 416 (2004).

"[A] person who represents himself or herself cannot recover actual attorney fees even if the pro se individual is a licensed attorney." *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 432 (2007). This is because the phrase "actual attorney fees" requires that an agency relationship exist between an attorney and the attorney's client and that a fee for the attorney's services be a sum of money actually paid or charged. *Id.* at 432. An award of actual attorney fees requires that an attorney be acting on behalf of a client separate from the attorney. *Id.*

1.7 Appointment of Foreign Language Interpreters[23]

A. Statutory and Constitutional Rights to Simultaneous Translation

MCL 775.19a provides:

> "If an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language, the inability to adequately communicate by reason of being mute, or because the person suffers from a speech defect or other physical defect which impairs the person in maintaining his or her rights in the case, the judge shall appoint a qualified person to act as an interpreter. Except as provided in the [Deaf Persons' Interpreters Act, MCL 393.501 *et seq.*], the interpreter shall be compensated for his or her services in the same amount and manner as is provided for interpreters in [MCL 775.19]."

[23] For information on Language Access, see http://courts.mi.gov/administration/scao/officesprograms/fli/pages/default.aspx.

Under MCL 775.19a, a "trial court possesse[s] an affirmative duty to establish [a] defendant's proficiency in English or appoint an interpreter" where there is record evidence "that [the] defendant [is] incapable of understanding English at a level necessary to effectively participate in his [or her] defense without simultaneous translation of the trial proceedings." *People v Gonzalez-Raymundo*, 308 Mich App 175, 189, 190 (2014) (citations omitted). "[W]hen presented . . . with indications that a defendant may lack sufficient comprehension of the English language, [the trial court should] either satisfy itself of [the] defendant's proficiency, provide for simultaneous interpretation, or, in the case where a defendant wishes to waive such a right, secure the defendant's personal, informed waiver." *Id*. at (citations omitted). A court's "fail[ure] to satisfy this duty[] . . . [may] effectively prevent[] [a] defendant from being truly present at his [or her] trial and [may] interfere[] with his [or her] ability to assist in his [or her] defense, including in the cross-examination of witnesses." *Id*. at 190.

Additionally, "[t]he lack of simultaneous translation [may] implicate[a] defendant's rights to due process of law guaranteed by the United States and Michigan Constitutions." *Gonzalez-Raymundo*, 308 Mich App at 188, citing US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. "Specifically, a defendant has a right to be present at a trial against him[or her, and] a defendant's lack of understanding of the proceedings against him [or her] renders him [or her] effectively absent[;]" furthermore, "lack of simultaneous translation impairs a defendant's right to confront witnesses against him [or her] and participate in his [or her] own defense." *Gonzalez-Raymundo*, 308 Mich App at 188 (citations omitted). Because the right to simultaneous translation "is . . . not merely statutory as codified by [MCL 775.19a], but [also] constitutional, . . . [it is] subject to . . . every reasonable presumption against its loss." *Gonzalez-Raymundo*, 308 Mich App at 188.

B. Right to Appointment of Foreign Language Interpreter Under the Michigan Court Rules

Effective September 11, 2013, ADM File No. 2012-03 adopted MCR 1.111 to "provide court-appointed foreign language interpreters for . . . [limited English proficient (LEP)] persons to support their access to justice[.]"[24] MCR 1.111, which "focuses on the critical legal requirement[of] *meaningful access*[,]" requires the court "to provide an interpreter for a party or witness if the court determines

[24] For a summary of MCR 1.111, see http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2012-03_2013-09-11_formatted.pdf.

one is needed for either the party or the witness to meaningfully participate." ADM File No. 2012-03.[25] See MCR 1.111(B)(1).

"'Limited English proficient' person means a person who does not speak English as his or her primary language, and who has a limited ability to read, write, speak, or understand English, and by reason of his or her limitations, is not able to understand and meaningfully participate in the court process." Administrative Order No. 2013-8.[26]

C. Determining Whether to Appoint a Foreign Language Interpreter[27]

"Any doubts as to eligibility for interpreter services should be resolved in favor of appointment of an interpreter." MCR 1.111(F)(6). "At the time of determining eligibility, the court shall inform the party or witness of the penalties for making a false statement. The party has the continuing obligation to inform the court of any change in financial status and, upon request of the court, the party must submit financial information." MCR 1.111(F)(7).

1. Appointment for Witness or Party

"If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding,[28] or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party."[29] MCR 1.111(B)(1).

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[25] Additionally, ADM File No. 2012-13 rescinded former MCR 2.507(D), which provided that "[t]he court may appoint an interpreter of its own selection and may set reasonable compensation for the interpreter. The compensation is to be paid out of funds provided by law or by one or more of the parties, as the court directs, and may be taxed as costs, in the discretion of the court." ADM File No. 2012-13 also added MCR 8.127 to establish a Foreign Language Board of Review for regulation of foreign language interpreters.

[26] Available at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/AOs/AOs-Responsive%20HTML5/index.html#t=AOs%2FAdministrative_Orders%2FAO_No_2013-8_%E2%80%94_Trial_Court_Requirements_for_Providing.htm. Effective September 11, 2013, Administrative Order No. 2013-8 was adopted as part of ADM File No. 2012-03.

[27] See Section 1.7(E) for information on the various types of foreign language interpreters, including when it is appropriate to appoint each one.

[28] "'Case or Court Proceeding' means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

2. Appointment for Person Other than Witness or Party

"The court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." MCR 1.111(B)(2).

3. Determining Whether Services are Necessary for Meaningful Participation

"In order to determine whether the services of a foreign language interpreter are necessary for a person to meaningfully participate under [MCR 1.111(B)(1)], the court shall rely upon a request by an LEP individual (or a request made on behalf of an LEP individual) or prior notice in the record." MCR 1.111(B)(3). "If no such requests have been made, the court may conduct an examination of the person on the record to determine whether such services are necessary." *Id*.

"During the examination, the court may use a foreign language interpreter." MCR 1.111(B)(3). "For purposes of this examination, the court is not required to comply with the requirements of [MCR 1.111(F)] and the foreign language interpreter may participate remotely." MCR 1.111(B)(3).

4. Denying Request for Interpreter

"Any time a court denies a request for the appointment of a foreign language interpreter . . . , it shall do so by written order." MCR 1.111(H)(1). "An LEP individual may immediately request review of the denial of appointment of a foreign language interpreter[.]" MCR 1.111(H)(2). "A request for review must be submitted to the court within 56 days after entry of the order." *Id*.

D. Waiver of Right to Interpreter

"A person may waive the right to a foreign language interpreter established under [MCR 1.111(B)(1)] unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding."[30] "The

[29] "'Party' means a person named as a party or a person with legal decision-making authority in the case or court proceeding." MCR 1.111(A)(2).

[30] "'Case or Court Proceeding' means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

court must find on the record that a person's waiver of an interpreter is knowing and voluntary." *Id*. "When accepting the person's waiver, the court may use a foreign language interpreter." *Id*. "For purposes of this waiver, the court is not required to comply with the requirements of [MCR 1.111(F)] and the foreign language interpreter may participate remotely." MCR 1.111(C).

A defendant does not make "an informed waiver of his [or her] right to receive simultaneous translation during his [or her] trial[]" under MCL 775.19a where there is no indication "that [the] defendant [has] made a personal and informed decision to waive his [or her] right to an interpreter[]" and "where . . . the trial court [does not] inquire[] of [the] defendant personally concerning his [or her] awareness of his [or her] constitutional and statutory right to an interpreter[.]" *Gonzalez-Raymundo*, 308 Mich App at 188, 189 (holding that defense counsel's assertion that the defendant "went along with" counsel's advice to waive his right to an interpreter "[did not] operate[] to affirmatively waive [the] defendant's rights[]").

E. Classifications of Foreign Language Interpreters

1. Certified Foreign Language Interpreters

"When the court appoints a foreign language interpreter under [MCR 1.111(B)(1)], the court shall appoint a certified foreign language interpreter whenever practicable." MCR 1.111(F)(1).

A *certified foreign language interpreter* is a person who has:

> "(a) passed a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,
>
> (b) met all the requirements established by the state court administrator for this interpreter classification, and
>
> (c) registered with the State Court Administrative Office." MCR 1.111(A)(4).

2. Qualified Foreign Language Interpreters

"If a certified foreign language interpreter is not reasonably available, and after considering the gravity of the proceedings and whether the matter should be rescheduled, the court may appoint a qualified foreign language interpreter who meets the qualifications in [MCR 1.111(A)(6)]." MCR 1.111(F)(1). "The

court shall make a record of its reasons for using a qualified foreign language interpreter." *Id*.

A *qualified foreign language interpreter* is:

> "(a) A person who provides interpretation[31] services, provided that the person has:
>
> > (*i*) registered with the State Court Administrative Office; and
> >
> > (*ii*) met the requirements established by the state court administrator for this interpreter classification; and
> >
> > (*iii*) been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or
>
> (b) A person who works for an entity that provides in-person interpretation services provided that:
>
> > (*i*) both the entity and the person have registered with the State Court Administrative Office; and
> >
> > (*ii*) the person has met the requirements established by the state court administrator for this interpreter classification; and
> >
> > (*iii*) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or
>
> (c) A person who works for an entity that provides interpretation services by telecommunication equipment, provided that:
>
> > (*i*) the entity has registered with the State Court Administrative Office; and
> >
> > (*ii*) the entity has met the requirements established by the state court administrator for this interpreter classification; and

[31] "'[I]nterpretation' mean[s] the oral rendering of spoken communication from one language to another without change in meaning." MCR 1.111(A)(5).

> (*iii*) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services[.]" MCR 1.111(A)(6).

3. Other Capable Person

"If neither a certified foreign language interpreter nor a qualified foreign language interpreter is reasonably available, and after considering the gravity of the proceeding and whether the matter should be rescheduled, the court may appoint a person whom the court determines through voir dire to be capable of conveying the intent and content of the speaker's words sufficiently to allow the court to conduct the proceeding without prejudice to the limited English proficient person." MCR 1.111(F)(2).

4. Court Employee As Foreign Language Interpreter

"A court employee may interpret[32] legal proceedings as follows:

> (a) The court may employ a person as an interpreter. The employee must meet the minimum requirements for [certified foreign language] interpreters established by [MCR 1.111(A)(4)]. The state court administrator may authorize the court to hire a person who does not meet the minimum requirements established by [MCR 1.111(A)(4)] for good cause including the unavailability of a certification test for the foreign language and the absence of certified interpreters for the foreign language in the geographic area in which the court sits. The court seeking authorization from the state court administrator shall provide proof of the employee's competency to act as an interpreter and shall submit a plan for the employee to meet the minimum requirements established by [MCR 1.111(A)(4)] within a reasonable time.
>
> (b) The court may use an employee as an interpreter if the employee meets the minimum requirements for interpreters established by [MCR

[32] "'Interpret' . . . mean[s] the oral rendering of spoken communication from one language to another without change in meaning." MCR 1.111(A)(5).

1.111] and is not otherwise disqualified." MCR 1.111(E)(2).

F. Appointing More Than One Interpreter

In general, "[t]he court shall appoint a single interpreter for a case or court proceeding." MCR 1.111(F)(3). However, "[t]he court may appoint more than one interpreter after consideration of[:]

- the nature and duration of the proceeding;
- the number of parties in interest and witnesses requiring an interpreter;
- the primary languages of those persons; and
- the quality of the remote technology that may be utilized when deemed necessary by the court to ensure effective communication in any case or court proceeding." MCR 1.111(F)(3) (bullets added).

G. Avoiding Potential Conflicts of Interest

"The court should use all reasonable efforts to avoid potential conflicts of interest when appointing a person as a foreign language interpreter and shall state its reasons on the record for appointing the person if any of the following applies:

(a) The interpreter is compensated by a business owned or controlled by a party or a witness;

(b) The interpreter is a friend, a family member, or a household member of a party or witness;

(c) The interpreter is a potential witness;

(d) The interpreter is a law enforcement officer;

(e) The interpreter has a pecuniary or other interest in the outcome of the case;

(f) The appointment of the interpreter would not serve to protect a party's rights or ensure the integrity of the proceedings;

(g) The interpreter does have, or may have, a perceived conflict of interest;

(h) The appointment of the interpreter creates an appearance of impropriety." MCR 1.111(E)(1).

H. Recordings

"The court may make a recording of anything said by a foreign language interpreter or a limited English proficient person while testifying or responding to a colloquy during those portions of the proceedings." MCR 1.111(D).

I. Interpreter Oath or Affirmation

"The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following:

> 'Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God?'" MCR 1.111(G).

J. Interpreter Costs

"The court may set reasonable compensation for interpreters who are appointed by the court." MCR 1.111(F)(4). "Court-appointed interpreter costs are to be paid out of funds provided by law or by the court." *Id*. See also MCL 775.19a; MCL 775.19.

"If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court for all or a portion of interpretation costs." MCR 1.111(F)(5). "A person is 'financially able to pay for interpretation costs' if the court determines that requiring reimbursement of interpretation costs will not pose an unreasonable burden on the person's ability to have meaningful access to the court." MCR 1.111(A)(3). "For purposes of [MCR 1.111], a person is financially able to pay for interpretation costs when:

> (a) The person's family or household income is greater than 125% of the federal poverty level[33]; and
>
> (b) An assessment of interpretation costs at the conclusion of the litigation would not unreasonably impede the person's ability to defend or pursue the claims involved in the matter." MCR 1.111(A)(3).

"Any time a court . . . orders reimbursement of interpretation costs, it shall do so by written order." MCR 1.111(H)(1). "An LEP individual may immediately request review of . . . an assessment for the reimbursement of interpretation costs." MCR 1.111(H)(2). "A request for review must be submitted to the court within 56 days

[33] See https://aspe.hhs.gov/2013-poverty-guidelines for the federal poverty guidelines.

after entry of the order." *Id.* For information on options to assist the court with collections issues that may arise, see the State Court Administrative Office's *Trial Court Collections Best Practices Manual*.

1.8 Mens Rea and Criminal Liability

SPECIAL NOTE: This section has been added in order to address MCL 8.9, which was added by 2015 PA 250, effective December 22, 2015, and which applies to certain crimes committed on or after January 1, 2016. This newly-added discussion will be expanded when this benchbook is revised.

A. Statutory Construction

MCL 8.9 sets out general statutory construction standards for determining the culpable mental state that is required for a criminal offense.

1. Applicability

MCL 8.9 applies only to crimes committed on or after January 1, 2016. See 2015 PA 250, effective December 22, 2015, enacting section 1.

MCL 8.9(7) provides that MCL 8.9 "does not apply to, and shall not be construed to affect, crimes under[:]"

- the Michigan Vehicle Code, MCL 257.1 *et seq.*;
- the Public Health Code, MCL 333.1101 *et seq.*;
- the Identity Theft Protection Act, MCL 445.61 *et seq.*;
- the Michigan Penal Code, MCL 750.1 *et seq.*; or
- Chapter 752 of the Michigan Compiled Laws.

2. General Criminal Liability Standards[34]

MCL 8.9(1) provides:

> "Except as otherwise provided in [MCL 8.9], a person is not guilty of a criminal offense committed on or after January 1, 2016 unless both of the following apply:

[34] See MCL 8.9(10) for applicable definitions of *culpable*, *intent*, *knowledge*, and other terms used in MCL 8.9.

> (a) The person's criminal liability is based on conduct that includes either a voluntary act or an omission to perform an act or duty that the person is capable of performing.
>
> (b) The person has the requisite degree of culpability for each element of the offense as to which a culpable mental state is specified by the language defining the offense."

MCL 8.9(8)-(9) provide:

> "(8) If a statute defining an offense prescribes a culpable mental state but does not specify the element to which it applies, the prescribed culpable mental state applies to each material element of the offense that necessarily requires a culpable mental state.
>
> (9) The mere absence of a specified state of mind for an element of a covered offense shall not be construed to mean that the legislature affirmatively intended not to require the prosecution to prove any state of mind."

3. Strict Liability

MCL 8.9(2) provides:

> "If the statutory language defining a criminal offense does not specify any degree of culpability and plainly imposes strict criminal liability for the conduct described in the statute, then culpability is not required for a person to be guilty of the offense. The fact that a subsection of a statute plainly imposes strict liability for an offense defined in that subsection does not by itself plainly impose strict criminal liability for an offense defined in another subsection of that statute that does not specify a degree of culpability."

4. Degree of Culpability Satisfying Intent, Knowledge, or Recklessness Requirement

MCL 8.9(5) provides:

> "If a statute defining a criminal offense provides that negligence suffices to establish an element of the offense, then intent, knowledge, or recklessness

> is also sufficient culpability to satisfy that element. If recklessness suffices to establish an element of an offense, then knowledge or intent is also sufficient culpability to satisfy that element. If knowledge suffices to establish an element of an offense, then intent is also sufficient culpability to satisfy that element."

5. Unspecified Mens Rea

MCL 8.9(3) provides:

> "Except as provided in [MCL 8.9(4)], if statutory language defining an element of a criminal offense that is related to knowledge or intent or as to which mens rea could reasonably be applied neither specifies culpability nor plainly imposes strict liability, the element of the offense is established only if a person acts with intent, knowledge, or recklessness."

MCL 8.9(4) provides, however, that MCL 8.9(3) "does not relieve the prosecution of the burden of proving the culpable mental state required by any definition incorporated into the offense."

6. Voluntary Intoxication[35]

MCL 8.9(6) provides:

> "It is not a defense to a crime that the defendant was, at the time the crime occurred, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound. However, it is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily ingested a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired."

[35] See Section 8.7(E) for discussion of voluntary intoxication.

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Part A: Complaints & Arrest[1]

2.1 Arrest

A. Probable Cause

"'A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that individual committed a felony.'" *People v Tierney*, 266 Mich App 687, 705 (2005), quoting *People v Kelly (Albert)*, 231 Mich App 627, 631 (1998). In reviewing a challenge to probable cause, the court "must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *Kelly (Albert)*, 231 Mich App at 631. "'The prosecution has the burden of establishing that an arrest without a warrant is supported by probable cause.'" *Tierney*, 266 Mich App at 705, quoting *People v Davenport*, 99 Mich App 687, 691 (1980).

"An 'officer must consider the totality of the circumstances, recognizing both the inculpatory *and* exculpatory evidence, before determining if he [or she] has probable cause to make an arrest. . . . [A] suspect's satisfactory explanation of suspicious behavior is certainly a factor' in determining whether probable cause exists.'" *Miller (Alan) v Sanilac Co*, 606 F3d 240, 249 (CA 6, 2010), quoting *Gardenhire v Schubert*, 205 F3d 303, 318 (CA 6, 2000). In *Miller (Alan)*, 606 F3d at 249, summary judgment was improper where a genuine issue of material fact existed regarding whether the police officer had probable cause to arrest the defendant for reckless driving where the defendant acknowledged driving 30 miles per hour past a stop sign, but explained that the road was icy and that he was unable to brake at the intersection.

Under "the collective knowledge approach[,]" probable cause to lawfully arrest exists where "numerous law enforcement agents . . . possess different information that, in its totality, . . . [is] sufficient for a fair-minded person of average intelligence to believe that [a suspect] had committed or was committing a crime." *People v Nguyen*, 305 Mich App 740, 754-755 (2014) (citations omitted).

"Because distinctly different probable-cause standards distinguish . . . arrest and bind-over decisions," a district court's conclusion that it lacked probable cause to bind a defendant over for trial on the charge for which he was arrested does not necessarily render the

[1] For information on motions to suppress evidence based on an illegal seizure, see Chapter 9.

arrest itself invalid. *People v Cohen*, 294 Mich App 70, 72, 76-77 (2011) (circuit court erroneously concluded that in the absence of probable cause to bind the defendant over for trial on charge of possession of cocaine, police lacked probable cause to arrest for that offense, and that evidence of additional crime obtained following arrest therefore must be suppressed; police had probable cause to arrest based on the defendant's joint constructive possession of cocaine paraphernalia, which was observed in plain view and within the defendant's reach in car occupied by only driver and the defendant, and evidence discovered after the constitutionally valid arrest was admissible in prosecution for additional offense).

B. Delay Between Crime and Arrest

The Speedy Trial Clause of the Sixth Amendment does not protect the defendant against lengthy prearrest delay, only from pretrial delay following an arrest. *United States v Lovasco*, 431 US 783, 788 (1977).[2] Generally, a defendant is protected against unreasonable prearrest delay by the applicable statute of limitations. *People v Bisard*, 114 Mich App 784, 788-789 (1982). A delay between an offense and the arrest of the defendant may violate the defendant's federal and state due process rights. *People v Cain (Janice)*, 238 Mich App 95, 109 (1999). The due process inquiry must consider the reasons for the delay as well as the prejudice to the defendant. *Lovasco*, 431 US at 790. A delay in bringing charges against a defendant may deny the due process right to a fair trial if the prosecutor delays to gain a tactical advantage or to deprive the defendant of an opportunity to defend against the charges. *Id*. at 797 n 19.

An "oppressive" delay between the alleged crime and the defendant's arrest may implicate a defendant's due process rights and lead to a motion to dismiss. *People v Tanner (Hattie Mae)*, 255 Mich App 369, 414 (2003), rev'd on other grounds 469 Mich 437 (2003). In deciding the motion, the court must balance the actual prejudice to the defendant with the prosecutor's reasons for the delay. *Cain (Janice)*, 238 Mich App at 108-109; *Bisard*, 114 Mich App at 790-791.

The defendant must produce evidence that he or she sustained "actual and substantial" prejudice because of the delay. *Cain (Janice)*, 238 Mich App at 108; *Bisard*, 114 Mich App at 791. "Actual and substantial" prejudice means that the defendant's ability to defend

[2] Additionally, the Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]" and therefore does not "apply to the sentencing phase of a criminal prosecution[.]" *Betterman v Montana*, 578 US ___, ___ (2016) (holding "that the Clause does not apply to delayed sentencing[]").

against the charges was "meaningfully impaired" by the delay. *Id*. at 110; *Bisard*, 114 Mich App at 788. "Proof of 'actual and substantial' prejudice requires more than just generalized allegations." *People v Crear*, 242 Mich App 158, 166 (2000). "Alleged imperfections of a witness'[s] memory are generally insufficient to establish actual and substantial prejudice." *Id*. at 166. Additionally, the death of a witness, by itself, is insufficient to establish actual prejudice, as is the loss of physical evidence. *People v Adams (Stephan)*, 232 Mich App 128, 136-138 (1998). "When a delay is deliberately undertaken to prejudice a defendant, little actual prejudice need be shown to establish a due process claim. Where, however, there is a justifiable reason for the delay, the defendant must show more—that the prejudice resulting from the delay outweighs any reason provided by the state." *Bisard*, 114 Mich App at 790.

Once the defendant has made a showing of prejudice, the prosecution has the burden of persuading the court that the reasons for the delay justified any prejudice that resulted. *Cain (Janice)*, 238 Mich App at 109; *Bisard*, 114 Mich App at 791. In evaluating the reason for the delay, the court may consider the explanation for the delay, whether the delay was deliberate, and whether undue prejudice attached to the defendant. *Bisard*, 114 Mich App at 786-787, 791. See also *Adams (Stephan)*, 232 Mich App at 132-139 (12-year delay did not violate the defendants' due process rights where physical evidence was lost, but its potentially exculpatory value was unsubstantiated), and *Cain (Janice)*, 238 Mich App at 107-111 (defendant unable to establish unfair prejudice during 16-month delay where witnesses had slight memory failure and evidence that was unrelated to the case was thrown away). And see *People v Patton*, 285 Mich App 229, 236-237 (2009) (the defendant was unable to establish actual and substantial prejudice because he did not identify any specific prejudice; rather, he made general allegations that the prearrest delay prevented him from contacting witnesses but gave no details on the substance of a defense to the charge, or details regarding how the witnesses would have supported a defense).

"It is appropriate for a prosecuting attorney to wait for the collection of sufficient evidence before charging a suspect, even when that wait is extended by the disappearance of a key witness." *People v Woolfolk*, 304 Mich App 450, 452-456 (2014), aff'd on other grounds 497 Mich 23 (2014) (citing *People v Herndon*, 246 Mich App 371, 390-391 (2001), and *Cain (Janice)*, 238 Mich App at 110-111, and holding that a nearly five-year delay in arresting the defendant for a murder "was reasonable and justified under the circumstances[]" where the principal witness originally told the police that he did not know who shot the victim, then disappeared for several years and was convicted of an unrelated crime in Missouri before making a

statement implicating the defendant; the officer in charge of the murder case, who "had [no] reason to believe that [the witness] was not being truthful[]" in his original interview, "was not aware that [the witness] was about to disappear[,]" and "the prosecution lacked access to and jurisdiction over" the witness during the time he was being prosecuted in Missouri).

C. Delay Between Warrantless Arrest and Arraignment

Persons arrested without a warrant must be promptly brought before a neutral magistrate for a probable cause determination. *People v Cipriano*, 431 Mich 315, 319 (1988); MCL 764.13; MCL 764.26; MCR 6.104(A).

"[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of [a warrantless] arrest will, as a general matter, [be found to] comply with the promptness requirement" of the federal constitution's Fourth Amendment. *Riverside v McLaughlin*, 500 US 44, 56 (1991). However, a probable cause determination is not automatically proper simply because it is made within 48 hours. *Id.* at 56. A delay of less than 48 hours may still be unconstitutional if it is an unreasonable delay. *Id*.

Police authorities may only hold an arrestee for more than 48 hours before arraignment if they can "'demonstrate the existence of a bona fide emergency or other extraordinary circumstance'" that would justify the delay. *People v Whitehead*, 238 Mich App 1, 2 (1999), quoting *Riverside*, 500 US at 57.

See also *People v Cain (Darryl) (Cain I)*, 299 Mich App 27, 49-50 (2012), vacated in part on other grounds 495 Mich 874 (2013) (the defendant was not deprived of due process despite not being arraigned until three days after his arrest where "no evidence was obtained as a direct result of the 'undue delay,' which would have begun . . . 48 hours after [the] defendant's arrest[;]" because the evidence against the defendant, including his statement to police and his identification from a photo lineup, was obtained within 48 hours after his arrest, "there was no evidence to suppress[]").

D. Arrest Outside Jurisdiction

An arrest by an officer outside the officer's jurisdiction does not require dismissal of the charge or exclusion of the evidence obtained as a result of the arrest. *People v Hamilton*, 465 Mich 526, 527 (2002). "The Fourth Amendment exclusionary rule only applies to constitutionally invalid arrests, not merely statutorily illegal arrests." *Id.* at 532-533. Probable cause that a crime has been committed is all that is required for a constitutional arrest; the crime

committed may be a felony or a misdemeanor. *Id*. at 533. Where probable cause to arrest exists, the arrest is constitutional and the exclusionary rule does not apply. *Id*.

E. Standard of Review

A trial court's decision on a motion to dismiss on the basis of prearrest delay is reviewed for an abuse of discretion. *Herndon*, 246 Mich App at 389. To the extent that a claim of prearrest delay implicates constitutional due process rights, it is reviewed de novo. *Cain (Janice)*, 238 Mich App at 108. The trial court's related factual findings are reviewed for clear error. *Tanner (Hattie Mae)*, 255 Mich App at 412.

2.2 Complaints and Warrants

A defendant has a constitutional right to be informed of the nature of the charges pending against him or her. Const 1963, art 1, § 20; *People v Higuera*, 244 Mich App 429, 442-443 (2001). A criminal complaint must be sufficiently specific to apprise the accused of the nature of the charges. *People v Quider*, 172 Mich 280, 285-286 (1912). "A complaint is a written accusation that a named or described person has committed a specified criminal offense," and it "must include the substance of the accusation against the accused and the name and statutory citation of the offense." MCR 6.101(A). A criminal complaint must also "adequately inform of the substance of the accusations," and its factual allegations must "provide the basis from which commission of the legal elements of the charge can be inferred." *Higuera*, 244 Mich App at 447. However, "'[t]he primary function of a complaint is to move the magistrate to determine whether a warrant shall issue.'" *Id*. at 443, quoting *Wayne Co Prosecutor v Recorder's Court Judge*, 119 Mich App 159, 162 (1982).

"Criminal prosecutions may be initiated in the court having jurisdiction over the charge upon the filing of an information." *People v Glass (Willie)*, 464 Mich 266, 277 (2001); MCL 767.1 *et seq*. The basis of an information is a signed warrant and complaint. *Glass (Willie)*, 464 Mich at 277. The complaint must state the substance of the alleged crime and reasonable cause to believe that the person named in the complaint is the person who committed the crime. *Id*., citing MCL 764.1d.

The complaint must be signed and sworn to before a judicial officer or court clerk. MCR 6.101(B). "A complaint may not be filed without a prosecutor's written approval . . . or unless security for costs is filed with the court." MCR 6.101(C).

"A court must issue an arrest warrant, or a summons . . . if presented with a proper complaint and if the court finds probable cause to believe that

the accused committed the alleged offense." MCR 6.102(A). The probable cause determination "may be based on hearsay evidence and rely on factual allegations in the complaint, affidavits from the complainant or others, the testimony of a sworn witness adequately preserved to permit review, or any combination of these sources." MCR 6.102(B). The court rule also governs the contents of the warrant, interim bail, execution and return of the warrant, and release on interim bail. MCR.6.102(C)–MCR 6.102(F).

The court may issue a summons instead of an arrest warrant if requested by the prosecutor. MCR 6.103(A). The court rule provides for the form of the summons, as well as its service and return. MCR 6.103(B)–MCR 6.103(C).

The procedures for arraignment on the warrant or complaint are governed by MCR 6.104.[3] A person in custody "must be taken without unnecessary delay before a court." MCR 6.104(A). At a defendant's arraignment, the court must address issues of pretrial release, possible appointment of counsel, and scheduling the defendant's preliminary examination.

Before an information is filed, the person accused has a right to a preliminary examination to determine whether a crime has been committed and whether there is probable cause to believe that the person accused committed it. MCL 767.42; *Glass*, 464 Mich at 277-278.

If the case is bound over to circuit court after arraignment in district court, an information must be filed on or before the date set for arraignment in circuit court. See MCL 767.1 and MCL 767.40. See also MCR 6.112(B) and MCR 6.112(C).

"Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense." MCR 6.112(G). MCR 6.112(G) places the burden on the defendant to demonstrate prejudice and establish that the error was not harmless. *People v Waclawski*, 286 Mich App 634, 707 (2009). In *Waclawski*, 286 Mich App at 705, an original felony information was not filed by the prosecutor. However, the defendant was unable to establish prejudice where the record revealed that the defendant was aware of the charges against him and participated in his own defense. *Id*. at 707.

[3] For more information on arraignments, see Chapter 5 on misdemeanor arraignments and Chapter 6 on felony arraignments.

2.3 Filing a Complaint

"A complaint is a written accusation that a named or described person has committed a specified criminal offense." MCR 6.101(A). A complaint must include the substance of the accusation against the accused, and in felony cases, the name and statutory citation of the offense. MCL 764.1d; MCR 6.101(A). A complaint may also contain "factual allegations establishing reasonable cause." MCL 764.1d.

A complaint serves a dual purpose: "It both initiates the judicial phase of the prosecution and provides a basis for the issuance of an arrest warrant." *People v Burrill*, 391 Mich 124, 128 (1974).

A. Persons Who May File a Complaint

1. Prosecuting Attorney

"A complaint may not be filed without a prosecutor's written approval endorsed on the complaint or attached to it, or unless security for costs is filed with the court." MCR 6.101(C) (applicable only to felonies, MCR 6.001(A)-MCR 6.001(B)). See also MCL 764.1(1).

2. Other Authorized Official

An agent of the state transportation department, a county road commission, or the public service commission may make a complaint for a *minor offense*[4] that constitutes a violation of the motor carrier act or the motor carrier safety act if that person has been delegated to enforce the act. See MCL 764.1(2)(a).

Similarly, a complaint alleging a minor offense that constitutes a violation of a law that provides for the protection of wild game or fish may be made by "[t]he director of the department of natural resources, or a special assistant or conservation officer appointed by the director . . . and declared by statute to be a peace officer[.]" See MCL 764.1(2)(b).

3. Private Citizen

Both statute, MCL 764.1(1)-MCL 764.1(2), and court rule, MCR 6.101(C) (applicable only to felonies, MCR 6.001[A]-[B]), allow a private citizen to file a complaint when security for costs is

[4]"'Minor offense' means a misdemeanor or ordinance violation for which the maximum permissible imprisonment does not exceed 92 days and the maximum permissible fine does not exceed $1,000.00." MCL 761.1(k).

filed with the court. See also *People v Herrick*, 216 Mich App 594, 597 n 1 (1996). However, the statute and the court rule are silent regarding the procedure a court should use when a citizen seeks to file security for costs.

B. Drafting and Typing a Complaint

Preferably, complaints should be typed on the following State Court Administrative Office forms:

MC 200 — Complaint, Felony

DC 225 — Complaint, Misdemeanor

However, MCL 764.1(3) provides:

> "A complaint for an arrest warrant may be made and an arrest warrant may be issued by any electronic or electromagnetic means of communication from any location in this state, if all of the following occur:
>
> > (a) The prosecuting attorney authorizes the issuance of the warrant. Authorization may consist of an electronically or electromagnetically transmitted facsimile of the signed authorization.
> >
> > (b) The judge or district court magistrate orally administers the oath or affirmation, in person or by any electronic or electromagnetic means of communication, to an applicant for an arrest warrant who submits a complaint under this subsection.
> >
> > (c) The applicant signs the complaint. Proof that the applicant has signed the complaint may consist of an electronically or electromagnetically transmitted facsimile of the signed complaint."

C. Required Signatures on a Complaint

1. Signature and Written Authorization of Prosecuting Attorney

When written authorization by the prosecutor is required for issuance of a warrant, it must be signed by the prosecuting attorney. MCL 764.1(1). See also MCR 6.101(C), which requires a complaint, in felony cases, to contain a prosecutor's signature unless security for costs is filed with the court.

2. Signature and Oath of Complaining Witness

MCL 764.1a(1) requires a complaint to be "sworn to before a magistrate or clerk." See also MCR 6.101(B) (applicable only to felonies, MCR 6.001(A)-MCR 6.001(B); requiring complaint to be "signed and sworn before a judicial officer or court clerk[]"). When a warrant is sought by electronic means, a facsimile of the applicant's signature may be transmitted electronically to the court. MCL 764.1(3)(c).

The complaining witness swearing to the complaint need not necessarily be the victim. See, e.g., *People v Graham*, 173 Mich App 473 (1988) (complainant was the victim's mother). See also MCL 764.1a(3), which provides:

> "The magistrate may require sworn testimony of the complainant or other individuals. Supplemental affidavits may be sworn to before an individual authorized by law to administer oaths. The factual allegations contained in the complaint, testimony, or affidavits may be based upon personal knowledge, information and belief, or both."

Under MCL 764.1a(4), a magistrate cannot refuse to accept a complaint on grounds that the complaint is signed upon information and belief by an individual other than the victim if:

- the complainant alleges a violation of MCL 750.81 (assault and battery, including domestic assault and battery) or MCL 750.81a (aggravated assault and battery, including domestic aggravated assault and battery);[5] and

- the person against whom the complaint is filed is a spouse or former spouse of the victim, has a child in common with the victim, has or has had a dating relationship[6] with the victim, or resides or has resided in the same house as the victim.

Under MCL 764.1a(5), a magistrate cannot "refuse to accept a complaint alleging that a crime was committed in which the victim is a vulnerable adult[7] on the grounds that the

[5] This requirement also applies to local ordinances substantially complying with MCL 750.81. MCL 764.1a(4).

[6] MCL 764.15a(b) defines *dating relationship* as "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."

complaint is signed upon information and belief by an individual other than the victim."

D. Amendments

"The trial court may allow the prosecution to amend the complaint to include a new charge if amendment would not cause 'unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend.'" *People v Carlton*, 313 Mich App 339, 353 (2015), quoting *People v Hunt (Arthur)*, 442 Mich 359, 364 (1993), and citing MCR 6.112(H). "The fact that the new charge might carry a more severe penalty is not a sufficient basis to conclude that [the defendant] would be unacceptably prejudiced[;] . . . the relevant inquiry is whether [the defendant] would have a fair opportunity to meet the charges against him[or her]." *Carlton*, 313 Mich App at 353 (citing *Hunt (Arthur)*, 442 Mich at 364-365, and noting that the district court failed to "articulate a sufficient basis to permit meaningful appellate review of its decision[]" to deny leave to amend the complaint).

2.4 Substantive Requirements of a Complaint

A. Nature of the Offense

A complaint must recite the substance of the accusation against the accused and may contain factual allegations establishing reasonable cause to arrest. MCL 764.1d. See also MCR 6.101(A) (applicable only to felonies, MCR 6.001(A)-MCR 6.001(B), and requiring a complaint to "include the substance of the accusation and the name and statutory citation of the offense[]"). "The primary function of a complaint is to move the magistrate to determine whether a warrant shall issue." *Wayne County Pros v Recorder's Court Judge*, 119 Mich App 159, 162 (1982).

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[7] *Vulnerable adult*, as used in this statute, is defined as it is in MCL 750.145m. MCL 764.1a(7)(b).Under MCL 750.145m(u), "'[v]ulnerable adult' means 1 or more of the following:

"(*i*) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.

"(*ii*) An adult as defined in . . . [MCL 400.703(1)(b)].

"(*iii*) An adult as defined in . . . [MCL 400.11(b)]."

Committee Tip:

Although not required under MCL 764.1a, it is recommended that the name and statutory citation of the offense be included in the complaint even on misdemeanor offenses to avoid arguments about the sufficiency of a complaint and to assist the court in knowing what the charge is.

"In charging the offense, a detailed recital of the evidence by which it will be established is not required. Such facts must be averred that, if admitted, would constitute the offense and establish the guilt of the accused. The elements of the offense must be so stated that [the accused] can know what he is to meet and can prepare for his [or her] defense." *People v Quider*, 172 Mich 280, 285-286 (1912). See also *People v Higuera*, 244 Mich App 429, 443 (2001) (where "the factual allegations provide the basis from which commission of the legal elements of the charge can be inferred[, a]ny deficiencies in the allegations of the actual charge . . . can be cured by amendment[]").

1. Statutory Violations

In felony cases, a complaint based on a violation of a statutory provision must include "the name and statutory citation of the offense." MCR 6.101(A). If the facts in a complaint sufficiently set out an offense under a particular section of a statute, it is immaterial that the complaint erroneously states the wrong section. *People v Wolfe*, 338 Mich 525, 536-537 (1953). Further, the facts contained in the complaint, not the conclusion of the person drafting it, control the particular section of law on which the charge should be predicated. *Id*. at 537.

2. Local Ordinance Violations

A complaint based on a violation of a local ordinance must substantially conform to the complaint requirements "as provided by law in misdemeanor cases in the district court." MCL 90.5(1); MCL 66.7. The complaint does not need to set out the ordinance or its provisions; rather, "[i]t is a sufficient statement of the cause of action in the [complaint] to set forth substantially, and with reasonable certainty as to time and place, the act or offense complained of and to allege it to be in violation of an ordinance of the city, referring to the ordinance by its title and the date of its passage or approval." MCL

90.10(1).[8] See also MCL 66.9(2), which contains substantially similar language.

B. Date and Place of Offense

Generally, a complaint is not invalidated merely because the complainant is unable to ascertain the exact date of the alleged violation. *Hamilton v People*, 46 Mich 186, 188-189 (1881). However, the complaint should establish that the offense was committed within the period of limitations. *People v Gregory*, 30 Mich 371, 372-373 (1874). Also, when time is an element of the offense charged, it should be set out in the complaint as part of the substance of the offense. See *Quider*, 172 Mich at 285-286.

The complaint should state the place where the offense is alleged to have been committed. A court may take judicial notice of a municipality within its jurisdiction; thus, it is sufficient if the complaint names the municipality where the crime occurred without naming the county. *People v Telford*, 56 Mich 541, 543 (1885). However, in *Gregory*, 30 Mich at 372-373, the complaint was fatally defective where it "named no county . . . except the county of 'Michigan.'" The Supreme Court reversed the defendant's conviction because the erroneous statement naming the county of Michigan "was no better than a blank," and thus the court lacked jurisdictional authority to proceed with the prosecution. *Id*.

For a violation of a local ordinance, the time and place should be stated on the complaint or warrant with "reasonable certainty." MCL 66.9(2); MCL 90.10(1).

C. Requirements under the Crime Victim's Rights Act

Under the juvenile and serious misdemeanor articles of the Crime Victim's Rights Act (CVRA), if a complaint, petition, appearance ticket, traffic citation, or other charging instrument cites any one of several enumerated offenses, or a violation of a local ordinance substantially corresponding to any one of the enumerated offenses, the prosecutor or law enforcement officer must include a statement on the charging instrument "that the offense resulted in damage to another individual's property or physical injury or death to another individual." MCL 780.783a (juvenile article); MCL 780.811a (serious misdemeanor article).

Along with the charging instrument, the investigating law enforcement agency must file a separate list of the name, address,

[8] MCL 90.10(1) "does not apply to an ordinance violation that constitutes a civil infraction." MCL 90.10(1).

and telephone number of each victim for any offenses falling under the juvenile or serious misdemeanor articles of the CVRA. MCL 780.784 (juvenile article) and MCL 780.812 (serious misdemeanor article).[9]

1. Juvenile Article Enumerated Offenses

MCL 780.783a states that an enumerated offense under the juvenile article of the CVRA is one of the "juvenile offense[s] described in [MCL 780.781(1)(g)(*iii*)-(*v*)[10]], or a local ordinance substantially corresponding to [one of those] juvenile offense[s]." MCL 780.781(1)(g)(*iii*)-(*v*) include the following offenses:

- injuring a worker in a work zone, MCL 257.601b(2);[11]
- leaving the scene of a personal-injury accident, MCL 257.617a;
- operating a vehicle while under the influence of or impaired by alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance, or with an unlawful blood-alcohol content, MCL 257.625, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual;
- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual; and
- operating a motorboat while under the influence of or visibly impaired by alcoholic liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 324.80176(1) or MCL 324.80176(3),[12] if the violation involves an accident resulting in damage to

[9]For a discussion of charging instrument requirements under the CVRA, or a discussion of the CVRA generally, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

[10] MCL 780.783a states that the enumerated offenses appear in MCL 780.781(1)(d)(*iii*)-(*v*). However, MCL 780.781 has been revised numerous times, and the offenses now appear in MCL 780.781(1)(g)(*iii*)-(*v*). MCL 780.783a has not been amended to reflect this change.

[11] MCL 780.781(1)(g)(*iii*) states that an offense includes "[a] violation of [MCL 257.601b(2)] (injuring a worker in a work zone)[.]" However, MCL 257.601b(2) has been subsequently amended to make it a misdemeanor to commit a moving violation that causes injury to *another person* in a work zone *or school bus zone*. See 2008 PA 296; 2011 PA 60. In deciding how this provision applies, the court should apply the rules of statutory interpretation.

another individual's property or physical injury or death to any individual.

2. Serious Misdemeanor Enumerated Offenses

MCL 780.811a states that an enumerated offense under the serious misdemeanor article of the CVRA is one of the "serious misdemeanor[s] described in [MCL 780.811(1)(a)(*xv*)-(*xvii*)], or a local ordinance substantially corresponding to [one of those] serious misdemeanor[s]." MCL 780.811(1)(a)(*xv*)-(*xvii*) include the following offenses:

- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual;

- operating a motorboat while under the influence of or visibly impaired by alcoholic liquor or a controlled substance, or with an unlawful blood alcohol content, MCL 324.80176(1) or MCL 324.80176(3),[13] if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual; and

- a violation of a local ordinance substantially corresponding to a violation enumerated in MCL 780.811(1)(a)(*i*)-(*xvi*).[14]

2.5 Finding Probable Cause to Issue Arrest Warrant

In addition to the presentation of a proper complaint, issuance of an arrest warrant requires the court to make a finding of probable cause[15] to believe that the individual accused in the complaint committed that offense. MCL 764.1a(1); MCR 6.102(A). The judge or district court magistrate[16] must make an independent determination of the existence

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[12] Effective March 31, 2015, 2014 PA 402 amended MCL 324.80176(1) and MCL 324.80176(3) to, among other things, replace the term *vessel* with *motorboat*; replace the term *intoxicating liquor* with *alcoholic liquor*; and add MCL 324.80176(1)(c) to prohibit a person from operating a motorboat with the presence of any amount of certain controlled substances in the body. However, MCL 780.781(1)(g)(*v*) still refers to "[a] violation of . . . [MCL 324.80176(1) or MCL 324.80176(3)] (operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content)[.]"

[13] Effective March 31, 2015, 2014 PA 402 amended MCL 324.80176(1) and MCL 324.80176(3) to, among other things, replace the term *vessel* with *motorboat*; replace the term *intoxicating liquor* with *alcoholic liquor*; and add MCL 324.80176(1)(c) to prohibit a person from operating a motorboat with the presence of any amount of certain controlled substances in the body. However, MCL 780.811(1)(a)(*xvi*) still refers to "[a] violation of . . . [MCL 324.80176(1) or MCL 324.80176(3)], operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content[.]"

of probable cause and may "not serve merely as a rubber stamp for the police." *United States v Leon*, 468 US 897, 914 (1984) (internal citation and quotation marks omitted). See also *People v Crawl*, 401 Mich 1, 26 n 15 (1977).[17] If a complaint is later found to have been issued without a finding of probable cause, an arrest warrant based on it is invalid. *People v Burrill*, 391 Mich 124, 132 (1974). However, such a complaint may nonetheless serve as a basis for starting judicial proceedings, and thus the court is not divested of jurisdiction when the complaint has insufficient factual support. *Id.*, see also *Frisbie v Collins*, 342 US 519, 522 (1952). Moreover, even without a valid warrant, an arrest may be legal if circumstances allowing arrest without a warrant exist.

A. Probable Cause Defined

> "'[A]rticulating precisely what . . . "probable cause" means is not possible. [It is a] commonsense, nontechnical conception[] that deals with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" [and] as such the standards are "not readily, or even usefully, reduced to a neat set of legal rules." . . . We have cautioned that [this] legal principle[] [is] not [a] "finely-tuned standard []" comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. [It is] instead [a] fluid concept[] that takes [its] substantive content from the particular contexts in which the standards are being

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[14]The offenses referenced by MCL 780.811a were amended and renumbered by 2006 PA 461, which deleted one of the offenses enumerated at MCL 780.811(1)(a) and renumbered the remaining offenses; however, MCL 780.811a has not been amended to reflect the change in numbering. Before 2006 PA 461, the offenses referenced by MCL 780.811a were:

(*xv*) operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, MCL 257.625, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual;

(*xvi*) selling of furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual; and

(*xvii*) operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, MCL 324.80176(1) or MCL 324.80176(3), if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual.

Thus, before 2006, the enumerated serious misdemeanor offenses were identical to the last three juvenile offenses referenced by MCL 780.783a and did not include the reference to local ordinances corresponding to *any* of the offenses listed in MCL 780.811(1)(a), as subparagraph (*xvii*) currently provides.

[15] MCL 764.1a states that the warrant may be issued upon a finding of *reasonable cause*, which is a term interchangeable with *probable cause*. See 1989 Staff Comment to MCR 6.102: "[MCR 6.102](A) states the requirements for issuance of a warrant set forth in MCL 764.1a except that it substitutes 'probable cause' for 'reasonable cause.' These terms are viewed as equivalent, with 'probable cause' being preferable because it is a familiar and recognized standard." This section will use the term "probable cause" as opposed to "reasonable cause."

> assessed.'" *Matthews v BCBSM*, 456 Mich 365, 387 n 34 (1998), quoting and editing *Ornelas v United States*, 517 US 690 (1996).

A finding of probable cause on a complaint is proper where the complaint and testimony are sufficient to enable the judge or district court magistrate[18] "to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play further steps of the criminal process." *People v Hill*, 44 Mich App 308, 312 (1973), overruled on other grounds *People v Mayberry*, 52 Mich App 450 (1974), quoting *Jaben v United States*, 381 US 214, 224-225 (1965).[19]

B. Evidentiary Support for a Finding of Probable Cause

MCL 764.1a(2) states:

> "The finding of [probable] cause by the magistrate[20] may be based upon 1 or more of the following:
>
> > "(a) Factual allegations of the complainant contained in the complaint.
> >
> > "(b) The complainant's sworn testimony.
> >
> > "(c) The complainant's affidavit.
> >
> > "(d) Any supplemental sworn testimony or affidavits of other individuals presented by the complainant or required by the magistrate."

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[16]For more information on the authority of district court magistrates to issue arrest warrants, see MCL 600.8511(e) and the Manual for District Court Magistrates, Section 3.

[17]Both *Crawl* and *Leon* involve search warrants; however, the "independent determination" requirement for issuing a search warrant also governs the issuance of arrest warrants. See *People v Burrill*, 391 Mich 124, 132 (1974); *Giordenello v United States*, 357 US 480, 485-486 (1958).

[18]For more information on the authority of district court magistrates to issue arrest warrants, see MCL 600.8511(e) and the Manual for District Court Magistrates, Section 3.

[19]The probable cause standard for arrests is different and distinct from the probable cause standard required to bind over a defendant after a preliminary examination. *People v Cohen*, 294 Mich App 70, 74 (2011). "'[T]he arrest standard looks only to the probability that the person committed the crime as established at the time of the arrest, while the preliminary [examination] looks both to that probability at the time of the preliminary [examination] *and* to the probability that the government will be able to establish guilt at trial.'" *Id*. at 76, quoting LaFave & Israel, Criminal Procedure (2d ed, 1992), § 14.3, pp 668-669.

[20]Under MCL 761.1(f), *magistrate* is defined to include "a judge of the district court or a judge of a municipal court." The term does not generally include district court magistrates, except under certain circumstances. For more information on the authority of district court magistrates to issue arrest warrants, see MCL 600.8511(e) and the Manual for District Court Magistrates, Section 3.

See also MCR 6.102(B) (applicable only to felonies, MCR 6.001[A]-[B]), which states:

> "A finding of probable cause may be based on hearsay evidence and rely on factual allegations in the complaint, affidavits from the complainant or others, the testimony of a sworn witness adequately preserved to permit review, or any combination of these sources."

"The factual allegations contained in the complaint, testimony, or affidavits may be based upon personal knowledge, information and belief, or both." MCL 764.1a(3). Thus, the factual basis is supplied by the operative facts relied on by the complaining witness and not merely by his or her conclusions. *Burrill*, 391 Mich at 132. It must appear that an affiant spoke with personal knowledge, or else the sources for the witness's belief must be disclosed. *Hill*, 44 Mich App at 311.[21] When the belief is based on information from other persons, other than an eyewitness, some basis of informant credibility must be shown. *Id*. at 311-312. This does not necessarily require the affiant to reveal the identity of the informant. *McCray v Illinois*, 386 US 300, 307-308 (1967). The information required to support informant credibility depends on its context, including the nature of the alleged crime and the source of the information. *Jaben*, 381 US at 224. See also *Adams v Williams*, 407 US 143, 147 (1972) ("Informants' tips, like all other clues and evidence . . . may vary greatly in their value and reliability.").

C. Record of Testimony and Affidavits

MCL 764.1a(3) provides:

> "The magistrate[22] may require sworn testimony of the complainant or other individuals. Supplemental affidavits may be sworn to before an individual authorized by law to administer oaths."

[21]Because the due process protections for both search warrants and arrest warrants derive from the same source, the Fourth Amendment, "probable cause" in either context requires the same precautions. *Giordenello v United States*, 357 US 480, 485-486 (1958). Unlike MCL 764.1a(3), however, the statute controlling the probable cause supporting a search warrant, MCL 780.653, expressly specifies that an affidavit must contain allegations that a named informant spoke with personal knowledge or that an unnamed informant spoke with personal knowledge and either that the unnamed person is credible or that the information is reliable.

[22]Under MCL 761.1(f), *magistrate* is defined to include "a judge of the district court or a judge of a municipal court." The term does not generally include district court magistrates, except under certain circumstances. For more information on the authority of district court magistrates to issue arrest warrants, see MCL 600.8511(e) and the Manual for District Court Magistrates, Section 3.

Any sworn testimony relied on in making the probable cause determination in a felony case must be "adequately preserved to permit review[.]" MCR 6.102(B).[23]

Although affidavits are not required to support a probable cause determination under MCL 764.1a(2) and MCR 6.102(B), if affidavits are used, they "must be verified by oath or affirmation." MCR 2.113(A). Regarding the necessary verification of an affidavit, MCR 2.114(B)(2)(a) requires an affidavit to be verified by "oath or affirmation of the party or of someone having knowledge of the facts stated[.]"[24]

Committee Tip:

The arraignment or plea or sentence may be conducted days, weeks, months, or years after the warrant was issued or may be conducted by someone other than the individual who signed the warrant. If an affidavit is used to establish probable cause and is in the court file, the court can easily refer to the affidavit when setting bond or taking a plea or sentencing to remind the court of the allegations.

2.6 Issuing an Arrest Warrant

An arrest warrant is an order by a court to arrest a person and bring him or her before the court to answer to the charge alleged in the complaint and to be further dealt with according to law. MCL 764.1b. "As endorsed pursuant to [MCL 764.1b], the complaint shall constitute both a complaint and warrant." MCL 764.1c(2).

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[23] The 1989 Staff Comment to MCR 6.102 states that "[a]n objective of [MCR 6.102(B)] is to ensure that there is a reviewable record in the event that the probable cause determination is subsequently challenged. Accordingly, if any oral testimony is relied on, it must be preserved adequately in some fashion to permit a review of its sufficiency to support the probable cause determination. An electronically recorded or verbatim written record obviously satisfies this requirement. A written or recorded oral summary of the testimony sufficiently contemporaneous to be reliable, and certified as accurate by the judicial officer, may also satisfy this requirement."

[24] Even though MCR 2.113 and MCR 2.114 are rules governing civil procedure, the rules may also be applied to matters of criminal procedure. See MCR 6.001(D)(1)-(3), which state, in pertinent part: "The provisions of the rules of civil procedure apply to cases governed by this chapter [(Criminal Procedure)], except

"(1) as otherwise provided by rule or statute,

"(2) when it clearly appears that they apply to civil actions only, or

"(3) when a statute or court rule provides a like or different procedure."

"If an accused is arrested without a warrant, a complaint complying with MCR 6.101 must be filed at or before the time of arraignment." MCR 6.104(D). "On receiving the complaint and on finding probable cause, the court must either issue a warrant or endorse the complaint as provided in MCL 764.1c." MCR 6.104(D). "Arraignment of the accused may then proceed in accordance with [MCR 6.104(E)]." MCR 6.104(D). Stated another way, the court must either sign/issue the warrant *or* endorse the complaint before proceeding to arraignment. MCR 6.104(D).

A complaint may also serve as a warrant if the officer makes a warrantless arrest of a person, he or she is in custody, and the court endorses the complaint with a finding of probable cause. MCL 764.1c(2); MCR 6.104(D).

The proper sanction to be imposed for arresting an individual based on an invalid arrest warrant is the suppression of evidence obtained from the person following his or her illegal arrest, not divestiture of the court's jurisdiction. *Burrill*, 391 Mich at 133. Thus, even if the complaint or warrant is later determined to be invalid, the court retains jurisdiction. *Id*. See also *Whiteley v Warden*, *Wyoming State Penitentiary*, 401 US 560, 565 (1971) (where no probable cause supported either the warrant or a warrantless arrest, evidence secured as a result of the illegal arrest should have been suppressed).

A. Persons Who May Issue Arrest Warrants

A judge or district court magistrate may issue arrest warrants for the apprehension of persons charged with felony, misdemeanor, or ordinance violations. MCL 764.1. See also MCL 600.8511(e), which grants a district court magistrate jurisdiction "[t]o issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney[.]"[25] No provision of MCL 761.1 allows a probate judge to issue an arrest warrant.

Although district court "magistrates perform limited judicial functions," they are not judges for purposes of Const 1963, art 6, §19 (requiring "judges of courts" to be licensed attorneys); however, a nonattorney magistrate may issue an arrest warrant. *People v Ferrigan*, 103 Mich App 214, 219 (1981). Additionally, it does not violate the Fourth Amendment for a nonattorney magistrate to issue a warrant. US Const, Am IV.; *Shadwick v City of Tampa*, 407 US 345, 350-353 (1972). In *Shadwick*, the United States Supreme Court established two necessary prerequisites that a magistrate must possess: (1) he or she must be neutral and detached,[26] and (2) he or

[25] MCL 600.8511(e) provides an exception to the requirement of written authorization when the defendant committed a traffic violation in the magistrate's jurisdiction, was issued a citation under MCL 257.728, and subsequently failed to appear.

she must be capable of determining whether probable cause exists for the requested arrest. The Court concluded that there is no reason that a nonattorney could not meet these prerequisites. *Id*. at 352-353.

A district court magistrate, like a judge, is also authorized to issue an arrest warrant "by any electronic or electromagnetic means of communication from any location in this state," if certain conditions are met. MCL 764.1(3); see also MCL 764.1(4)-(5).

B. Determining a Person's Parolee Status

Before an arrest warrant is issued, the law enforcement agency seeking the warrant must use the Law Enforcement Information Network (LEIN) to determine whether the individual for whom the warrant is sought is a parolee under the jurisdiction of the Department of Corrections (DOC). MCL 764.1g(1). If the person is determined to be a parolee under the DOC's jurisdiction, and an arrest warrant is issued, MCL 764.1g(1) requires that the DOC be notified and provided with the following information:[27]

> "(a) The identity of the person named in the warrant.
>
> "(b) The fact that information in databases managed by the [DOC] and accessible by the [LEIN] provides reason to believe the person named in the warrant is a parolee under the jurisdiction of the [DOC].
>
> "(c) The charge or charges stated in the warrant."

The DOC must be notified if there is a delay in the process:

> "If the court has assumed the responsibility for entering arrest warrants into the [LEIN] and delays issuance or entry of a warrant pending a court appearance by the person named in the warrant, the law enforcement agency submitting the sworn complaint to the court shall promptly give to the [DOC], by telephonic or electronic means, notice of the following:
>
> > "(a) The identity of the person named in the sworn complaint.

[26] A *neutral and detached magistrate* is one that is "independent of the police and prosecution." *People v Payne*, 424 Mich 475, 481 (1985) (magistrate who was also a deputy sheriff was not neutral and detached, and therefore the search warrant he issued was invalid).

[27] MCL 764.1g(1) requires the information to be provided by either the investigating law enforcement agency, or the court if the court is entering arrest warrants and learns of the person's parolee status from the law enforcement agency.

> "(b) The fact that a prosecuting attorney has authorized issuance of a warrant.
>
> "(c) The fact that information in databases managed by the [DOC] and accessible by the [LEIN] provides reason to believe the person named in the sworn complaint is a parolee under the jurisdiction of the [DOC].
>
> "(d) The charge or charges stated in the sworn complaint.
>
> "(e) Whether, pending a court appearance by the person named in the sworn complaint, the court has either issued the arrest warrant but delayed entry of the warrant into the [LEIN] or has delayed issuance of the warrant." MCL 764.1g(2).

Transmitting notice to any of the following satisfies the notice requirements of MCL 764.1g:

> "(a) To the [DOC] by a central toll-free telephone number that is designated by the [DOC] for that purpose and that is in operation 24 hours a day and is posted in the [DOC's] database of information concerning the status of parolees.
>
> "(b) To a parole agent serving the county where the warrant is issued or is being sought.
>
> "(c) To the supervisor of the parole office serving the county where the warrant is issued or is being sought." MCL 764.1g(3).

2.7 Substantive Requirements of Arrest Warrants

"A[n arrest warrant] shall recite the substance of the accusation contained in the complaint. Except as permitted in [MCL 764.1c], the warrant shall be directed to a peace officer; shall command the peace officer immediately to arrest the person accused and to take that person, without unnecessary delay, before a magistrate[28] of the judicial district in which the offense is charged to have been committed, to be dealt with according to law; and shall direct that the warrant, with

[28]Under MCL 761.1(f), *magistrate* is defined to include "a judge of the district court or a judge of a municipal court." The term does not generally include district court magistrates, except under certain circumstances. For more information on the authority of district court magistrates to issue arrest warrants, see MCL 600.8511(e) and the Manual for District Court Magistrates, Section 3.

> a proper return noted on the warrant, be delivered to the magistrate before whom the arrested person is to be taken. The warrant may also require the peace officer to summon the witnesses named in the warrant." MCL 764.1b.

See also MCR 6.102(C), which requires a felony arrest warrant to:

> "(1) contain the accused's name, if known, or an identifying name or description;
>
> "(2) describe the offense charged in the complaint;
>
> "(3) command a peace officer or other person authorized by law to arrest and bring the accused before a judicial officer of the judicial district in which the offense allegedly was committed or some other designated court; and
>
> "(4) be signed by the court."

In addition, MCR 6.102(D) allows the court, when permitted by law, to specify on the warrant an amount of interim bail the accused may post to obtain release before arraignment on the warrant.

2.8 Arrest Warrants and Complaints for Juveniles Charged with Specified Juvenile Violations

If a prosecuting attorney has reason to believe that a juvenile at least 14 years old and less than 17 years old has committed a specified juvenile violation, the prosecutor may authorize the filing of a complaint and warrant on the charge in the district court instead of filing a petition in the family division of circuit court. MCL 764.1f. This is called an automatic waiver, and further discussion is beyond the scope of this benchbook. See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information.

Under MCL 764.1f(2), specified juvenile violations are:

- First-degree arson, MCL 750.72.
- Assault with intent to commit murder, MCL 750.83.
- Assault with intent to maim, MCL 750.86.
- Assault with intent to rob while armed, MCL 750.89.
- Attempted murder, MCL 750.91.
- First-degree murder, MCL 750.316.
- Second-degree murder, MCL 750.317.

- Kidnapping, MCL 750.349.
- First-degree criminal sexual conduct, MCL 750.520b.
- Armed robbery, MCL 750.529.
- Carjacking, MCL 750.529a.
- Robbery of a bank, safe, or vault, MCL 750.531.
- Assault with intent to do great bodily harm, or assaulting another person by strangulation or suffocation, MCL 750.84, if armed with a *dangerous weapon*.[29]
- First-degree home invasion, MCL 750.110a(2), if armed with a dangerous weapon.
- Escape or attempted escape from a medium- or high-security juvenile facility operated by the Department of Human Services (DHS)[30] or a county juvenile agency, or a high-security facility operated by a private agency under contract with the DHS or a county juvenile agency, MCL 750.186a.
- Manufacture, creation, or delivery of, or possession with intent to manufacture, create, or deliver 1,000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7401(2)(a)(*i*).
- Possession of 1,000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7403(2)(a)(*i*).
- An attempt, MCL 750.92, to commit any of the above crimes.
- Conspiracy, MCL 750.157a, to commit any of the above crimes.
- Solicitation, MCL 750.157b, to commit any of the above crimes.
- Any lesser-included offense of a specified juvenile violation, if the juvenile is charged with a specified juvenile violation.
- Any other offense arising out of the same transaction as a specified juvenile violation, if the juvenile is charged with a specified juvenile violation.

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[29] See MCL 764.1f(2)(b) for the definition of *dangerous weapon*.

[30] Formerly the Family Independence Agency. See MCL 400.226(A).

2.9 Execution of Arrest Warrants

A. Executing an Arrest Warrant

Unless the accused is already in custody after a warrantless arrest, MCL 764.1b directs that an arrest warrant "command the peace officer immediately to arrest the person accused and to take that person, without unnecessary delay[31], before a magistrate of the judicial district in which the offense is charged to have been committed . . . ." MCR 6.102(E) clarifies that "[o]nly a peace officer or other person authorized by law may execute an arrest warrant." It is not necessary for the arresting officer to personally possess the arrest warrant. MCL 764.18. Rather, it is sufficient for the officer to inform the arrestee of an outstanding warrant for his or her arrest. *Id*. However, the officer must show the arrest warrant to the arrestee as soon as practicable after the arrest. *Id*.

B. Return on an Arrest Warrant

The return on an arrest warrant is a certification by the executing officer that states the manner in which the warrant was executed. The warrant itself should direct the executing officer to note "a proper return" and to deliver the warrant "to the magistrate before whom the arrested person is to be taken." MCL 764.1b. MCR 6.102(E) (applicable only to felonies, MCR 6.001[A]-[B]) similarly provides that "[o]n execution or attempted execution of the warrant, the officer must make a return on the warrant and deliver it to the court before which the arrested person is to be taken."

When an officer makes a warrantless arrest, "[t]he return of the officer making the arrest, endorsed upon the warrant upon which the accused shall be subsequently held, affirming compliance with the provisions herein, shall be prima facie evidence of the fact in the trial of any criminal cause." MCL 764.19.

C. Execution of Warrant by Electronic Device

"The person or department receiving an electronically or electromagnetically issued arrest warrant shall receive proof that the issuing judge or district court magistrate has signed the warrant before the warrant is executed. Proof that the issuing judge or district court magistrate has signed the warrant may consist of an

[31] "A delay of more than 48 hours after arrest is presumptively unreasonable unless there are extraordinary circumstances." *People v Cain (Darryl)*, 299 Mich App 27, 49 (2012), vacated in part on other grounds 495 Mich 874 (2013).

electronically or electromagnetically transmitted facsimile of the signed warrant." MCL 764.1(4).

2.10 Information or Indictment

A. Content

The required content of an information is mandated by statute. MCL 767.45 requires that an information contain: (1) the nature of the offense, stated in language that will fairly apprise the accused and the court of the offense charged; (2) the time of the offense as near as possible; and (3) the location of the offense. MCL 767.45(1)(a), MCL 767.45(1)(b), MCL 767.45(1)(c); MCR 6.112(D).

Except where time is of the essence of the offense, an error in the time stated is not fatal to the information. MCL 767.45(1)(b). Additionally, "'an imprecise time allegation [in a felony information may] be acceptable for sexual offenses involving children, given their difficulty in recalling precise dates.'" *People v Bailey (Ryan)*, 310 Mich App 703, 717 (2015), quoting *People v Naugle*, 152 Mich App 227, 234 n 1 (1986) (internal citation omitted). A felony information "alleg[ing] sexual misconduct [against children] over a period of eight years" gave adequate notice where two of the victims "were 13 years old or younger at the time of the alleged offenses, and each testified that [the] defendant abused them numerous times over multiple years, such that specific dates would not stick out in their minds." *Bailey (Ryan)*, 310 Mich App at 717 (quoting *Naugle*, 152 Mich App at 235, and noting that "because [the] defendant was living with his victims over an extended period of time and the victims alleged that [the] defendant abused them at times when no one else was around, 'it appears that creating a valid alibi defense was not a realistic option[]'").

MCL 767.55 permits allegations in the alternative when an offense "is constituted of 1 or more of several acts, or which may be committed by 1 or more of several means, or with 1 or more of several intents, or which may produce 1 or more of several results . . . ."

M Crim JI 3.19, *Single Defendant—Multiple Counts—Single Wrongful Act*, concerns the situation in which a defendant is charged with one wrongful act in alternative counts, i.e., the defendant is guilty of one count or the other, but not both. The jury should be instructed that it is to consider the alternatives separately in light of all of the evidence. M Crim JI 3.19(2). Further, the jury should be instructed that it may find the defendant not guilty, or guilty of one count, or guilty of the other count. M Crim JI 3.19(3).

Examples of alternative theories are: *Operating While Intoxicated* (M Crim JI 15.1, M Crim JI 15.6, and M Crim JI 15.7); *First-Degree Felony Murder* (M Crim JI 16.4); *Second-Degree Murder* (M Crim JI 16.5); *Voluntary Manslaughter* (M Crim JI 16.8); and *Criminal Sexual Conduct* (M Crim JI 20.1, M Crim JI 20.2, M Crim JI 20.12, and M Crim JI 20.13).

Examples of alternative offenses are: *First-Degree Murder/Felony Murder* (M Crim JI 16.25); *Attempted Murder/Assault with Intent to Murder* (M Crim JI 9.1, M Crim JI 17.3); and *Armed Robbery/Assault with Intent to Rob While Armed* (M Crim JI 18.1, M Crim JI 18.3). It is good practice to inform the jury that it can convict on only one of the alternative charges. *People v Lesperance*, 147 Mich App 379, 386 (1985). But see M Crim JI 16.25(3), *Unanimity of Verdict on Premeditated and Felony Murder*, which provides that if the jury returns a verdict of guilty of first-degree murder, the unanimous verdict must specify whether all of the jurors found the defendant guilty of premeditated murder, felony murder, or both.

B. Amendments

Unless a proposed amendment would unfairly surprise or prejudice the defendant, an amendment to the information is permitted either before, during, or after trial. MCR 6.112(H). "A defendant may establish unfair surprise by articulating how additional time to prepare would have [benefited] the defense." *People v Perry (Rodney)*, ___ Mich App ___, ___ (2016), citing *People v McGee (Keangela)*, 258 Mich App 683, 693 (2003).

Where the prosecution seeks to amend the information to add a criminal charge based on facts or evidence disclosed at the defendant's preliminary examination, a defendant is not unfairly surprised or prejudiced. *People v Fortson*, 202 Mich App 13, 16 (1993). Moreover, even if the proposed amendment is not based on facts elicited at the preliminary examination, the amendment is properly granted if the defendant will suffer no actual prejudice. *McGee (Keangela)*, 258 Mich App at 691-693.

When a defendant is bound over on any charge cognizable in circuit court following a preliminary examination, the circuit court obtains jurisdiction over the defendant and may permit amendment of the information "to correct a variance between the information and the proofs" as long as the amendment does not unduly prejudice the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Unger*, 278 Mich App 210, 221-222 (2008) (amendment of the information to reinstate a previous charge did not unfairly surprise the defendant or deprive him of sufficient notice or opportunity to defend against the charge

at trial). See also *People v Russell (Darwin)*, 266 Mich App 307, 316-317 (2005) (the defendant was not unfairly surprised or deprived of adequate time to prepare a defense against a charge when the charge added to the amended information was a charge presented at the defendant's preliminary examination that had been struck from the information in an earlier amendment).

Where "[the] defendant knew of the prosecution's intent to amend the charges [to add an additional charge] . . . before trial started, he [did] not demonstrate[] that the amendment during the trial itself denied him the opportunity to cross-examine the witnesses on the new charge." *Perry (Rodney)*, ___ Mich App at ___. Additionally, the timing of the prosecutor's decision to request the addition of the new charge was "not evidence of presumptive vindictiveness[]" where the record was devoid of any indication that "the prosecution deliberately penalized [the] defendant for exercising his right to a trial." *Id.* at ___, citing *People v Jones (Stacey)*, 252 Mich App 1, 8 (2002).

The trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion. *Perry (Rodney)*, ___ Mich App at ___; *McGee (Keangela)*, 258 Mich App at 686-687. Any error in amending an information is waived by a party's failure to object to the amendment. *People v Bettistea*, 173 Mich App 106, 120 (1988).

C. Joinder of Counts

1. Single Defendant

MCR 6.120 governs joinder and severance for a single defendant. The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. MCR 6.120(A). Additionally, two or more informations or indictments against a single defendant may be consolidated for a single trial. *Id.*

When appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense, the court may—on its own initiative, the motion of a party, or the stipulation of all parties—join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant. MCR 6.120(B).

Joinder is appropriate if the offenses are related, i.e., they are based on the same conduct or transaction; a series of connected acts; or a series of acts constituting parts of a single scheme or

plan. MCR 6.120(B)(1). See *People v Williams (Carletus)*, 483 Mich 226, 233 n 5 (2009).[32] In *Williams (Carletus)*, 483 Mich at 228-229, the defendant was convicted of two drug charges, stemming from two separate arrests. The Court determined that "the offenses charged were related because the evidence indicated that [the] defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution, and joinder was appropriate." *Id*. at 235. See also *People v Campbell (Michael)*, ___ Mich App ___, ___ (2016) (holding that the trial court did not abuse its discretion or deny the defendant his due process right to a fair trial when it refused to bifurcate the proceedings or hold separate trials as to whether he both committed indecent exposure and was a sexually delinquent person; "[g]iven the substantial overlap in the evidence and that the trial court could adequately protect [the defendant's] rights with a limiting instruction concerning the evidence that was admissible only to prove that [he] was a sexually delinquent person, . . . the trial court's decision to hold a single trial was within the range of reasonable and principled outcomes[]") (citation omitted); *People v Gaines*, 306 Mich App 289, 305 (2014) (cases involving three different victims were "related" for purposes of MCR 6.120(B)(1) and were properly joined for trial where "[the] defendant engaged in ongoing acts related to his scheme of preying upon young, teenage girls from his high school[;] . . . used text messages to communicate with [them] and encouraged them to keep their communications secret[;] . . . requested naked photographs from [at least two of them] and, if they refused, threatened to cut off ties with them[; and] . . . used his parents' basement to isolate two of the young girls and sexually penetrate them[]").

Other relevant factors to consider include: the timeliness of the motion; the drain on the parties' resources; the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence; the potential for harassment; the convenience of witnesses; and the parties' readiness for trial. MCR 6.120(B)(2).

On a defendant's motion, unrelated charges against that defendant must be severed for separate trials. MCR 6.120(C).

2. Multiple Defendants

MCR 6.121 governs joinder and severance with regard to multiple defendants. An information or indictment may

[32] *Williams (Carletus)*, 483 Mich at 238, overruled *People v Tobey*, 401 Mich 141 (1977), because *Tobey* construed MCR 6.120 too narrowly.

charge two or more defendants with the same offense. MCR 6.121(A). An information or indictment may charge two or more defendants with two or more offenses when each defendant is charged with accountability for each offense or when the offenses are related as set out in MCR 6.120(B). MCR 6.121(A). When more than one offense is alleged, each offense must be stated in a separate count. *Id*. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment. *Id*.

On the defendant's motion, the court must sever offenses that are not related as set out in MCR 6.120(B). MCR 6.121(B).

On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to the substantial rights of a defendant. MCR 6.121(C). "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *People v Hana*, 447 Mich 325, 346-347 (1994).

On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. MCR 6.121(D). Relevant factors include the timeliness of the motion; the drain on the parties' resources; the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence; the convenience of the witnesses; and the parties' readiness for trial. *Id*. "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Hana*, 447 Mich at 349. "'[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.'" *Id.* at 349, quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). "The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Hana*, 447 Mich at 349, quoting *Yefsky*, 994 F2d at 897.

3. Standard of Review

"To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." Therefore, a trial court's decision regarding

joinder "is subject to both a clear error and a de novo standard of review." *Williams (Carletus)*, 483 Mich at 231.

4. Defendant's Remedy for Improper Joinder

Improper joinder does not justify quashing the indictment or information. Instead, the proper remedy is either severance of the improperly joined parties or offenses or, in those cases where the indictment is uncertain, amendment of the charging document to cure the defect. MCL 767.75 provides:

> "No indictment[33] shall be quashed, set aside or dismissed for any 1 or more of the following defects: (First) That there is a misjoinder of the parties accused; (Second) That there is a misjoinder of the offenses charged in the indictment, or duplicity therein; (Third) That any uncertainty exists therein. If the court be of the opinion that the first and second defects or either of them exist in any indictment, it may sever such indictment into separate indictments or informations or into separate counts as shall be proper. If the court be of the opinion that the third defect exists in any indictment, it may order that the indictment be amended to cure such defect."

D. Standard of Review

"A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *McGee (Keangela)*, 258 Mich App at 686-687.

2.11 Notice of Intent to Seek Enhanced Sentence[34]

MCR 6.112(F) provides:

> "Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if

[33] The term "indictment" in the Code of Criminal Procedure includes an information. MCL 761.1(d).

[34] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for additional discussion of sentence enhancement based on habitual offender status.

> arraignment is waived or eliminated as allowed under MCR 6.113(E),[35] within 21 days after the filing of the information charging the underlying offense."

Before, during, or after trial, the court may permit the prosecutor to amend the notice of intent to seek an enhanced sentence "unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H).

2.12 Circumstances Allowing Warrantless Arrests

A peace officer may make a warrantless arrest if a felony, misdemeanor, or ordinance violation is committed in the officer's presence. MCL 764.15(1)(a). Under MCL 764.15, a peace officer may also make a warrantless arrest for certain offenses *not* committed in his or her presence when:

- A person has committed a felony outside the presence of the officer, MCL 764.15(1)(b).
- A felony in fact has been committed and the officer has reasonable cause[36] to believe the person committed it, MCL 764.15(1)(c).
- The officer has reasonable cause to believe that a misdemeanor punishable by more than 92 days' imprisonment or a felony has been committed, and reasonable cause to believe the person committed it, MCL 764.15(1)(d).
- The officer receives positive information from a written, telegraphic, teletypic, telephonic, radio, electronic, or other authoritative source that another officer or a court holds a warrant for the person's arrest, MCL 764.15(1)(e).
- The officer receives positive information broadcast from a recognized police or other governmental radio station or teletype, that affords the officer reasonable cause to believe that a misdemeanor punishable by more than 92 days' imprisonment or a felony has been committed and that the person committed it, MCL 764.15(1)(f).

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[35] "A circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information and any notice of intent to seek an enhanced sentence[pursuant to MCL 769.13], as provided in MCR 6.112(F)." MCR 6.113(E). See SCAO Model Local Administrative Order 26—Elimination of Circuit Court Arraignments.

[36] The 1989 Staff Comment to MCR 6.102 states that *reasonable cause* and *probable cause* are equivalent. However, according to the Staff Comment, the preferred term is *probable cause*.

- The officer has reasonable cause to believe that the person is an escaped convict, has violated a condition of parole from a prison, has violated a condition of a pardon, or has violated one or more conditions of a conditional release order or probation order by any court of any state, Indian tribe, or United States territory, MCL 764.15(1)(g).

- The officer has reasonable cause to believe the person was involved in an accident in Michigan while operating a vehicle and (1) while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance, or any combination thereof, (2) with an unlawful bodily alcohol content, (3) while visibly impaired, (4) with any bodily alcohol content if the person is under 21, or (5) while violating certain provisions in MCL 257.625 and having occupants under age 16 in the vehicle. MCL 764.15(1)(h). Warrantless arrest authority also extends to violations of substantially corresponding local ordinances. *Id*.

- The officer has reasonable cause to believe the person was involved in an accident in Michigan while operating a commercial vehicle and with an unlawful bodily alcohol content under MCL 257.625m, or violating a substantially corresponding local ordinance. MCL 764.15(1)(h).

- The person is found in the driver's seat of a stopped or parked vehicle on a highway or street that in any way intrudes into a roadway, and the officer reasonably believes the person was operating the vehicle (1) while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance, or any combination thereof, (2) with an unlawful bodily alcohol content, (3) while visibly impaired, (4) with any bodily alcohol content if the person is under 21, or (5) while violating certain provisions in MCL 257.625 and having occupants under age 16 in the vehicle. MCL 764.15(1)(*i*). Warrantless arrest authority also extends to violations of substantially corresponding local ordinances. *Id*.

- The person is found in the driver's seat of a stopped or parked commercial vehicle on a highway or street that in any way intrudes into a roadway, and the officer reasonably believes the person was operating the vehicle and with an unlawful bodily alcohol content under MCL 257.625m, or violating a substantially corresponding local ordinance. MCL 764.15(1)(i).

- The officer has reasonable cause to believe the person was involved in an accident in Michigan while operating a snowmobile, off-road vehicle (ORV), or vessel (1) while under the influence of intoxicating liquor or a controlled substance, or

both (2) with an unlawful bodily alcohol content, or (3) while visibly impaired. MCL 764.15(1)(j)-(l). Warrantless arrest authority also extends to violations of substantially corresponding local ordinances. Id.

- The officer has reasonable cause to believe retail fraud has occurred, and the person committed the retail fraud, whether or not committed in the officer's presence, MCL 764.15(1)(m).

- The officer has reasonable cause to believe that a misdemeanor has occurred or is occurring on school property,[37] and the person committed or is committing the misdemeanor, whether or not committed in the officer's presence, MCL 764.15(1)(n).

Other statutes also allow a peace officer to make a warrantless arrest when a criminal offense or violation of a court order allegedly occurred:

- MCL 764.15a authorizes a peace officer to make a warrantless arrest in a case involving domestic assault and aggravated domestic assault.[38] The officer may arrest a person regardless of whether the violation takes place in his or her presence, as long as the arresting officer has or receives positive information that another officer has reasonable cause to believe both of the following:

  (1) the violation occurred or is occurring; and

  (2) the individual arrested has had a child in common with the victim, resides or has resided in the same household as the victim, is or has had a dating relationship[39] with the victim, or is a spouse or former spouse of the victim.

- MCL 764.15b authorizes a peace officer to make a warrantless arrest for the violation of a personal protection order (PPO) or a valid foreign protection order (FPO) if the officer has or receives positive information that another officer has reasonable cause to believe all of the following:

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[37] "'School property' means a building, playing field, or property used for school purposes to impart instruction to children in grades kindergarten through 12, when provided by a public, private, denominational, or parochial school, except those buildings used primarily for adult education or college extension courses[,]" MCL 333.7410(8)(b). See MCL 764.15(1)(n).

[38] For a complete discussion of this topic, see the Michigan Judicial Institute's *Domestic Violence Benchbook*.

[39] MCL 764.15a(b) defines *dating relationship* as "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."

- a PPO has been issued under either the domestic or nondomestic PPO statute, or is a valid FPO;
- the individual named in the PPO is violating or has violated the order (the act must be specifically prohibited in the order); and
- the PPO states on its face that a violation of its terms subjects the individual to immediate arrest and either of the following:
  - if the individual is 17 years of age or older, to criminal contempt sanctions of imprisonment for not more than 93 days and to a fine of not more than $500; or
  - if the individual is less than 17 years of age, to the dispositional alternatives in MCL 712A.18 of the Juvenile Code.

- MCL 764.15e allows a peace officer to make a warrantless arrest of a person if the officer has or receives positive information that another officer has reasonable cause to believe that the person is violating or has violated a condition of release imposed under MCL 765.6b or MCL 780.582a (governing pretrial conditional release). See also MCL 764.15(1)(g) (allowing warrantless arrest of person violating postconviction conditional release).

- MCL 764.15f allows a peace officer to make a warrantless arrest of a person if the officer has reasonable cause to believe all of the following:
  - the Family Division issued an order under MCL 712A.13a(4) (requiring certain adults to leave the home pending the outcome of child protective proceedings), and the order specifically stated the time period for which the order was valid;
  - a true copy of the order and proof of service have been filed with the law enforcement agency having jurisdiction of the area where the person who has custody of the child resides;
  - the person named in the order received notice of the order;
  - the person named in the order violated the order;
  - the order specifically states that a violation will subject the person to criminal contempt sanctions, including up to 90 days' imprisonment and a $500 fine.

A private person may make a warrantless arrest of another individual under the following circumstances:

- For a felony regardless of whether the felony is committed in his or her presence. MCL 764.16(a)-MCL 764.16(b).
- If summoned by a peace officer to assist the officer in making an arrest. MCL 764.16(c).
- If the private person is a merchant, agent of a merchant, employee of a merchant, or an independent contractor providing security for a merchant of a store and has reasonable cause to believe the other individual has committed retail fraud, regardless of whether the retail fraud occurred in his or her presence. MCL 764.16(d).

2.13 Alternatives to a Formal Complaint and Arrest Warrant

A. Appearance Tickets for Non-Misdemeanor Traffic Violations

1. Statutory Authority

In lieu of filing a complaint as required by MCL 764.13, a police officer may issue an appearance ticket to a person who is arrested without a warrant "for a misdemeanor or ordinance violation for which the maximum penalty does not exceed 93 days in jail or a fine, or both[.]" MCL 764.9c(1). For purposes of MCL 764.9c–MCL 764.9g, an "appearance ticket" is:

> "[A] complaint or written notice issued and subscribed by a police officer or other public servant authorized by law or ordinance to issue it directing a designated person to appear in a designated local criminal court at a designated future time in connection with his or her alleged commission of a designated violation or violations of state law or local ordinance for which the maximum permissible penalty does not exceed 93 days in jail or a fine, or both." MCL 764.9f(1).

2. Appearance Ticket Requirements

The original appearance ticket serves as the complaint or notice and must be filed with the court. MCL 764.9f(1)(a). The first copy is the abstract of court record; the second copy must

be retained by the local enforcement agency; the third copy must be delivered to the alleged violator. MCL 764.9f(1)(b)–MCL 764.9f(1)(d).

3. Accepting a Plea Based on an Appearance Ticket

A judge can accept a plea of guilty or not guilty based solely on the appearance ticket. However, if the accused pleads not guilty, a sworn complaint must be filed with the magistrate before any further proceedings may be conducted. MCL 764.9g(1). "A warrant for arrest shall not issue for an offense charged in the appearance ticket until a sworn complaint is filed with the magistrate." *Id*.

An appearance ticket must be treated as if made under oath if it constitutes a sworn complaint under MCL 764.1e.[40] See MCL 764.9g. See also *City of Plymouth v McIntosh*, 291 Mich App 152, 161 (2010), which concluded that when a signed appearance ticket is issued for a misdemeanor violation and is in the form of a "Uniform Law Citation" containing language attesting to the truth of the statements made in the citation, it constitutes a sworn complaint under MCL 764.1e, MCL 764.9g, and MCR 6.615. *McIntosh*, 291 Mich App at 161. In such cases, a prosecutor is not required to file a second sworn complaint in order to proceed on a not guilty plea. *Id*. at 163.

A district court magistrate may accept a guilty plea based on an appearance ticket without the necessity of a separate, sworn complaint for those offenses within his or her jurisdiction as prescribed by MCL 600.8511. MCL 764.9g(2).

4. Failure to Appear

If the accused fails to appear at the time and place designated on the appearance ticket, the court may issue a summons or warrant for the arrest of the accused, based on the complaint filed. MCL 764.9e.

5. Restrictions on the Issuance of Appearance Tickets

MCL 764.9c(3)(c) prohibits the issuance of appearance tickets to:

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[40] MCL 764.1e states that a complaint must be treated as made under oath if it meets certain requirements, including "contain[ing] the following statement immediately above the date and signature of the officer:

"I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief."

- A person arrested for assault and battery, MCL 750.81, or aggravated assault and battery, MCL 750.81a, if the victim of the assault is:
  - the offender's spouse;
  - the offender's former spouse;
  - someone who has had a child in common with the offender;
  - someone who has or has had a dating relationship[41] with the offender; or
  - an individual who is residing or has resided in the same household as the offender. MCL 764.9c(3)(a).
- "A person subject to detainment for violating a personal protection order." MCL 764.9c(3)(b).
- "A person subject to a mandatory period of confinement, condition of bond, or other condition of release until he or she has served that period of confinement or meets that requirement of bond or other condition of release."

B. Citations to Appear[42] for Traffic Misdemeanors or Traffic Civil Infractions

1. Statutory Authority

Under the Michigan Vehicle Code (MVC), a police officer *must* issue a citation[43] to a person who is arrested without a warrant for "a violation of [the MVC] punishable as a misdemeanor, or an ordinance substantially corresponding to a provision of [the MVC] and punishable as a misdemeanor, under conditions not referred to in [MCL 257.617, MCL 257.619, or MCL 257.727.]" MCL 257.728(1). However, where no arrest occurs, "[a] police officer *may* issue a citation to a person who is an operator of a

[41] MCL 764.15a(b) defines *dating relationship* as "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."

[42] The terms *complaint*, *appearance ticket*, and *citation to appear* are used interchangeably to discuss the Uniform Law Citation (UC-01a and UC-01b) and refer to "a written notice to appear given to a misdemeanor defendant (by an officer or other official) in lieu of a more immediate presentation of the defendant to a magistrate." *McIntosh*, 291 Mich App at 154 n1.

[43] For purposes of the MVC, "'citation' means a complaint or notice upon which a police officer shall record an occurrence involving 1 or more vehicle law violations by the person cited." MCL 257.727c(1).

motor vehicle involved in an accident if, based upon personal investigation, the officer has reasonable cause to believe that the person has committed a misdemeanor under [the MVC] in connection with the accident." MCL 257.728(8) (emphasis added). See also MCL 257.742(3) (containing substantially similar language with respect to traffic civil infractions). Additionally, an officer may issue a citation to a person he or she witnesses committing a traffic civil infraction or who he or she has reason to believe is committing a traffic civil infraction by violating certain load, weight, height, length, or width requirements. MCL 257.742(1)-257.742(2).

The citation must be filed in the district court in which the appearance is to be made. MCL 257.727c(1)(a); MCR 4.101(A) (civil infractions); MCR 6.615(A)(1)(a) (misdemeanors). There is no prohibition against filing a single citation that lists both a misdemeanor and a civil infraction. See MCL 257.727c(3).

A person arrested without a warrant for a traffic misdemeanor or traffic civil infraction may, in lieu of being issued a citation to appear, demand to be brought to a judge or district court magistrate or to the family division of the circuit court for arraignment. MCL 257.728(1). If a nonresident demands an immediate arraignment, and a judge or district court magistrate is not available to conduct the arraignment or if an immediate trial cannot be held, the nonresident may deposit with the officer a guaranteed appearance certificate or a sum of money not to exceed $100 and be issued a written citation. MCL 257.728(5). However, a nonresident may not be issued a written citation if he or she was arrested for a violation of any offense listed in MCL 257.727(a)-257.727(d). MCL 257.728(5).

2. Citation Requirements

The citation serves as a summons to command the initial appearance of the accused and to command the accused's response regarding his or her guilt of or responsibility for the violation alleged. MCR 4.101(A)(3)(a)-4.101(A)(3)(b) (civil infractions); MCR 6.615(A)(2)(a)-6.615(A)(2)(b) (misdemeanors). The citation must contain "the name and address of the person, the violation charged, and the time and place when and where the person shall appear in court." MCL 257.728(1) (warrantless arrest for alleged misdemeanor violation). See also MCL 257.743 (requiring substantially similar information and additional information for alleged traffic civil infraction); MCL 257.728(8) (requiring substantially similar information for traffic accidents allegedly involving a misdemeanor where no arrest is made). The officer must

complete an original and three copies of the citation. MCL 257.728(1); MCL 257.728(8). The original must be filed with the court in which the appearance is to be made, the first copy is retained by the local traffic enforcement agency, the second copy is delivered to the violator if the violation is a misdemeanor, and the third copy is delivered to the violator if the violation is a civil infraction. MCL 257.727c(1).[44] See also MCL 257.743, which requires additional information pertaining to an accused's right to admit or deny responsibility for a traffic civil infraction citation.

"If the citation is issued to a person who is operating a commercial motor vehicle, the citation shall contain the vehicle group designation and indorsement description of the vehicle operated by the person at the time of the alleged violation." MCL 257.728(9) (misdemeanors). See also MCL 257.743(5) (requiring substantially similar information be provided for alleged traffic civil infraction involving commercial motor vehicle).

3. Accepting a Plea Based on a Citation for a Traffic Misdemeanor or Civil Infraction

A judge or district court magistrate (if authorized to do so)[45] can accept a plea of guilty or not guilty based solely on a citation. MCL 257.728e (applicable to misdemeanors only; see MCL 257.744 for similar provision applicable to civil infractions). However, if the accused pleads not guilty to a misdemeanor or denies responsibility for a civil infraction, a sworn complaint must be filed with the court before any further proceedings may be conducted. MCL 257.728e (misdemeanors); MCL 257.744 (civil infractions). "A warrant for arrest shall not issue for an offense [charged in the citation] until a sworn complaint is filed with the magistrate." MCL 257.728e. See also MCL 257.744 (civil infractions).

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[44] With the approval of certain specified officials, the content or number of copies required by MCL 257.727c(1) may be modified "to accommodate law enforcement and local court and procedures and practices." MCL 257.727c(2).

[45] A district court magistrate has the power "[t]o arraign and sentence upon pleas of guilty or nolo contendere for violations of the Michigan vehicle code . . . or a local ordinance substantially corresponding to a provision of the Michigan vehicle code . . . except for violations of . . . MCL 257.625 and [MCL] 257.625m, or a local ordinance substantially corresponding to . . . MCL 257.625 and [MCL] 257.625m, if authorized by the chief judge of the district court district and if the maximum permissible punishment does not exceed 93 days in jail or a fine, or both. However, the chief judge may authorize the magistrate to arraign defendants and set bond with regard to violations of . . . MCL 257.625 and [MCL] 257.625m, or a local ordinance substantially corresponding to . . . MCL 257.625 and [MCL]257.625m." MCL 600.8511(b).

The requirement for a warrant may be satisfied if the citation contains certain language. A signed citation in the form of a "Uniform Law Citation" containing the language "I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief," constitutes a sworn complaint under MCL 257.727c, MCL 257.728e, and MCR 6.615. *McIntosh*, 291 Mich App at 158. In such cases, the prosecutor is not required to file a second sworn complaint in order to proceed on a not guilty plea. *Id*.

A person who is cited for a civil infraction must either admit responsibility, admit responsibility with explanation, or deny responsibility for the civil infraction violation. MCL 257.744. A person admitting responsibility or admitting responsibility with explanation may appear by mail, in person, or by representation. MCL 257.745(2)-MCL 257.745(3). A person denying responsibility must contact the court to schedule a formal or informal hearing. MCL 257.745(5). An informal hearing is conducted in accordance with MCL 257.746 and a formal hearing, if the person requests one, is conducted in accordance with MCL 257.747.

4. Failure to Appear

a. Traffic Misdemeanor

For Michigan residents who fail to appear or respond to a misdemeanor traffic citation, the court "must initiate the procedures required by MCL 257.321a for the failure to answer a citation[,]"[46] and "may issue a warrant for the defendant's arrest." MCR 6.615(B)(1)(a)-6.615(B)(1)(b).

For nonresidents who fail to appear or respond to a misdemeanor traffic citation, MCR 6.615(B)(2) states:

> "(a) the court may mail a notice to appear to the defendant at the address in the citation;
>
> "(b) the court may issue a warrant for the defendant's arrest; and
>
> "(c) if the court has received the driver's license of a nonresident, pursuant to statute, it may retain the license as allowed by statute. The court need not retain the license past its expiration date."

[46] MCL 257.321a governs the cancellation, suspension, and revocation of a driver's license.

b. Traffic Civil Infraction

If an accused fails to appear or respond to a traffic civil infraction action, the court:

> "(a) must enter a default against the defendant;
>
> "(b) must make a determination of responsibility, if the complaint is sufficient;
>
> "(c) must impose a sanction by entering a default judgment;
>
> "(d) must send the defendant a notice of the entry of the default judgment and the sanctions imposed; []
>
> "(e) may retain the driver's license of a nonresident as permitted by statute, if the court has received that license pursuant to statute. The court need not retain the license past its expiration date[;]
>
> * * *
>
> "(a) must notify the secretary of state of the entry of the default judgment, as required by MCL 257.732, and
>
> "(b) must initiate the procedures required by MCL 257.321a."[47] MCR 4.101(B)(4)(a)-4.101(B)(4)(e) (applicable to all civil infractions); MCR 4.101(B)(5)(a)-4.101(B)(5)(b) (applicable only to traffic civil infractions).

5. Restrictions on the Issuance of Citations

MCL 257.728(1) prohibits the issuance of citations for the following offenses[48]:

- Leaving the scene of an accident resulting in serious impairment of body function or death. MCL 257.617.
- Failing to give the proper information and aid after an accident. MCL 257.619.

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[47] MCL 257.321a governs the cancellation, suspension, and revocation of a driver's license.

[48] Some of the listed offenses are felonies, not punishable as misdemeanors, or may be punishable as felonies if the person has prior convictions.

- Committing a moving violation causing death or serious impairment of a body function to another person under MCL 257.601d. MCL 257.727(a).

- Operating a vehicle while intoxicated, visibly impaired, with any bodily alcohol content if under age 21, or while having a controlled substance in his or her body under MCL 257.625(1), MCL 257.625(3), MCL 257.625(6), or MCL 257.625(8), or a substantially corresponding ordinance. MCL 257.727(b).

- Causing death or serious impairment of a body function by operating a vehicle while intoxicated or visibly impaired, or while having a controlled substance in his or her body, MCL 257.625(4)-257.625(5). MCL 257.727(b).

- Operating a vehicle while intoxicated or visibly impaired, with any bodily alcohol content if under age 21, or while having a controlled substance in his or her body, and having occupants under age 16 in the vehicle, MCL 257.625(7). MCL 257.727(b).

- Reckless driving, MCL 257.626, or a substantially corresponding ordinance, unless the officer deems that issuing a citation and releasing the person will not constitute a public menace. MCL 257.727(c).

- Not having in his or her immediate possession at the time of arrest a valid operator's or chauffeur's license, MCL 257.311, or a receipt for an already surrendered license, MCL 257.311a. However, if the officer can satisfactorily determine the identity of the person and whether the person can be apprehended if he or she fails to appear before the designated magistrate, the officer may issue a citation. MCL 257.727(d).

C. Summons to Appear

The prosecutor may request that the court issue a summons[49] instead of an arrest warrant. MCR 6.103(A). If the court is "presented with a proper complaint and if the court finds probable cause to believe that the accused committed the alleged offense[,]" the court may issue a summons as an alternative to issuing an arrest warrant. MCR 6.102(A).[50] "If an accused fails to appear in response

[49]See SCAO Form MC 256, *Criminal Summons* (felony or misdemeanor). MCR 6.103 is specifically applicable to misdemeanor cases. MCR 6.001(B).

[50] MCR 6.102(A) is not included in the list of court rules specifically applicable to misdemeanor cases, MCR 6.001(B).

to a summons, the court, on request, must issue an arrest warrant." MCR 6.103(A).

The summons must contain the same information required of an arrest warrant: the accused's name, if known, or an identifying name or description; a description of the offense charged in the complaint; and the court's signature. MCR 6.103(B); MCR 6.102(C). However, unlike an arrest warrant, which must command that the identified person be arrested and brought before a judicial officer, a summons "should summon the accused to appear before a designated court at a stated time and place." MCR 6.103(B).

MCR 6.103(C) permits a summons to be served by:

> "(1) delivering a copy to the named individual; or
>
> "(2) leaving a copy with a person of suitable age and discretion at the individual's home or usual place of abode; or
>
> "(3) mailing a copy to the individual's last known address."

"Service should be made promptly to give the accused adequate notice of the appearance date. The person serving the summons must make a return to the court before which the person is summoned to appear." MCR 6.103(C).[51]

MCL 764.9a governs the issuance of a summons as an alternative to filing an order for a warrant after an arrest for a *minor offense*.[52] In such a case, the prosecutor may issue a written order for a summons[53] addressed to the accused person. MCL 764.9a(1).

The summons must direct the person to appear at a designated time "before a magistrate of the judicial district in which the offense is charged to have been committed[.]" MCL 764.9a(1).

"A summons shall designate the name of the issuing court, the offense charged in the underlying complaint, and the name of the defendant to whom it is addressed, and shall be subscribed by the issuing magistrate." MCL 764.9a(2).

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[51] Although corporations are not subject to arrest, they can be charged and held liable for criminal acts of their agents. *People v Lanzo Constr Co*, 272 Mich App 470 (2006); *People v Hock Shop, Inc*, 261 Mich App 521 (2004). Thus, the procedure set out in MCR 6.103 can be applied to a corporate defendant as well as an individual defendant.

[52] "'Minor offense' means a misdemeanor or ordinance violation for which the maximum permissible imprisonment does not exceed 92 days and the maximum permissible fine does not exceed $1,000.00." MCL 761.1(k).

[53] See SCAO Form MC 256, *Criminal Summons* (felony or misdemeanor).

"A summons may be served in the same manner as a warrant." MCL 764.9a(3).

2.14 Interim Bail

In general, a person accused of a criminal offense is entitled to post interim bail to obtain release before arraignment. MCL 765.4; MCL 765.6. However, "[n]o person charged with treason or murder shall be admitted to bail if the proof of his [or her] guilt is evident or the presumption great." MCL 765.5. See also Const 1963, art 1, § 15 (identifying additional offenses precluding bail "when the proof is evident or the presumption great"). The applicable procedures for bail depend on the nature of the offense and whether a magistrate is available to set the amount of bail.[54]

Part B: Issuing a Search Warrant

2.15 Initiating the Search Warrant Process[55]

The United States and Michigan Constitutions protect against unreasonable searches and seizures by providing that no warrant shall issue without probable cause, supported by oath and affirmation. US Const, Am IV; Const 1963, art 1, § 11. The Michigan provision is worded similarly to the Fourth Amendment, and, absent compelling reasons, provides the same protection as the Fourth Amendment. *People v Levine (Brian)*, 461 Mich 172, 178 (1999).

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV.
>
> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable

[54] In large part, the procedures for interim bail are the same as those for post-arraignment, pretrial bail. For a complete discussion of pretrial release, see Chapter 7. For a complete discussion on interim bail, see Section 7.2(D)

[55] For information regarding a motion to suppress evidence based on an illegal search or seizure, see Chapter 9.

cause, supported by oath or affirmation . . . ." Const 1963, art 1, § 11.

The principal statutes concerning search warrants are MCL 780.651–MCL 780.658, and are discussed in more detail below.

A. Drafting and Typing the Documents

The affidavit and search warrant can be drafted by either: (1) the prosecuting official, which may include assistant attorneys general, assistant prosecuting attorneys, or attorneys for the city, village, or township; or (2) the applicable law enforcement agency. Preferably, the affidavit and warrant should be typed on SCAO Form MC 231, which contains "[i]nstructions for [p]reparing [the] [a]ffidavit and [s]earch [w]arrant" on its reverse side.

B. Signature of Prosecuting Official

The signature of a prosecuting official is not legally necessary to issue a search warrant based on an affidavit. MCL 600.8511(g); *People v Brooks*, 75 Mich App 448, 450 (1977).[56]

Committee Tip:

The signature of the prosecutor is not required, but if there are issues regarding the warrant or affidavit, the judge or district court magistrate should tell the police officer that it should be reviewed by the prosecutor.

Although a prosecuting official's signature is not legally necessary to issue a search warrant, the "Affidavit for Search Warrant" in SCAO Form MC 231 contains a rectangular box in the lower left corner for the signature of a reviewing prosecuting official to accommodate local practice.

[56]This is in contrast to the issuance of an arrest warrant, which generally requires the signature of a prosecuting official. See MCL 764.1(2) ("A magistrate shall not issue a warrant for a minor offense unless an authorization in writing . . . is filed with the magistrate and signed by the prosecuting attorney . . . .") and MCL 600.8511(e) (a magistrate has the authority "[t]o issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney . . . .").

C. Neutral and Detached Magistrate

A magistrate who issues a search warrant must be "neutral and detached," a requirement rooted in both the United States and Michigan Constitutions. *Shadwick v City of Tampa*, 407 US 345, 350 (1972); *People v Payne*, 424 Mich 475, 482-483 (1985); Const 1963, art 3, § 2.

Committee Tip:

It is important to maintain neutrality. For example, if either the affidavit or search warrant is defective, the magistrate/judge can tell the police officer that there is a problem with it and can state what the problem is (e.g., insufficient factual basis to establish probable cause). Some judges are of the opinion that they should not tell the police officer how to fix the defect, while other judges are of the opinion that they may indicate what would be required in order for them to sign it. One approach is to refer the police officer to the prosecutor for review of the affidavit/search warrant.

"The probable cause determination must be made by a person whose loyalty is to the judiciary alone, unfettered by professional commitment, and therefore loyalty, to the law enforcement arm of the executive branch." *Payne*, 424 Mich at 483 (magistrate who was also a court officer and a sworn member of the sheriff's department could not issue search warrants). See also *People v Lowenstein*, 118 Mich App 475, 486 (1982) (magistrate who previously had prosecuted and had been sued by the defendant was not neutral and detached). But see *People v Tejeda (On Remand)*, 192 Mich App 635, 638 (1992) (police officers waiting in magistrate's chambers for a phone call to provide them with additional information to complete the affidavit does not necessarily mean magistrate has injected himself or herself into the investigatory process).

A magistrate must disqualify himself or herself from authorizing warrants in the following situations:

> "'[A magistrate] associated in any way with the prosecution of alleged offenders, because of his [or her] allegiance to law enforcement, cannot be allowed to be placed in a position requiring the impartial judgment necessary to shield the citizen from unwarranted intrusions into his [or her] privacy.' . . . In other words,

> an otherwise duly appointed magistrate who just happens to be connected with law enforcement may not constitutionally issue warrants. . . . Next, the magistrate (or judge) must disqualify himself [or herself] if he [or she] had a pecuniary interest in the outcome. . . . A judge must also disqualify himself [or herself] when one of the parties happens to be his [or her] client. . . . He [or she] must also disqualify himself [or herself] where a party happens to be a relative. . . ." [*Lowenstein*, 118 Mich App at 483-484 (citations omitted).]

D. Authority to Issue Search Warrants

1. District or Circuit Court Judges

There is general authority for district and circuit court judges to issue search warrants. MCL 780.651(2)(a) and MCL 780.651(3) specify that "a judge or district court magistrate" may issue a search warrant. MCL 780.651(1) provides:

> "When an affidavit is made on oath to a judge or district court magistrate authorized to issue warrants in criminal cases, and the affidavit establishes grounds for issuing a warrant under this act, the judge or district court magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant to search the house, building, or other location or place where the person, property, or thing to be searched for and seized is situated."

MCL 780.651(3) authorizes "[a] judge or district court magistrate [to] issue a written search warrant in person or by any electronic or electromagnetic means of communication, including by facsimile or over a computer network." Furthermore, "[a] judge or district court magistrate may sign an electronically issued search warrant when he or she is at any location in this state." MCL 780.651(4).

In the event a district court judge knows that he or she may be temporarily unavailable to issue a search warrant, the chief judge of that district can request the chief judge of an adjoining district to direct a district judge within that adjoining district to serve temporarily as a district judge and to review the search warrant. MCL 600.8212 provides:

> "The chief judge of any district upon the request of the chief judge of an adjoining district may direct a

> district judge within the district to serve temporarily as a district judge in the adjoining district from which the request was made."

See also *People v Fiorillo*, 195 Mich App 701, 704 (1992) (a district court may issue a warrant for a search outside its jurisdictional boundaries).[57]

2. District Court Magistrates

A district court magistrate has the jurisdiction and duty "[t]o issue search warrants, if authorized to do so by a district court judge." MCL 600.8511(g). See also MCL 780.651(1); MCL 780.651(3). "Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division." MCR 4.401(B).

A district court judge may grant "blanket authorization" to magistrates to issue search warrants; the authorization need not be on a case-by-case basis. *People v Paul*, 444 Mich 940 (1994).

There is no requirement under MCL 600.8511 that the authorization to issue search warrants be in writing. *People v White*, 167 Mich App 461, 464-466 (1988) ("had the Legislature or Supreme Court intended to require written authorization, they would have done so").

MCL 780.651(3) authorizes "[a] judge or district court magistrate [to] issue a written search warrant in person or by any electronic or electromagnetic means of communication, including by facsimile or over a computer network." Furthermore, "[a] judge or district court magistrate may sign an electronically issued search warrant when he or she is at any location in this state." MCL 780.651(4).

District court magistrates may also issue search warrants in an adjoining district or in other districts within a county if there is a multiple district plan in place. MCL 600.8320.

E. Review of Decision to Issue Search Warrant

In reviewing the issuance of a search warrant, the reviewing court must determine whether a reasonably cautious person could have concluded that there was a substantial basis for finding probable

[57] Whether a magistrate has statewide authority has not been decided.

cause. *People v Russo*, 439 Mich 584, 603 (1992). The reviewing court must afford deference to the magistrate's decision and "insure that there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id.* at 604, quoting *Illinois v Gates*, 462 US 213, 238 (1983). See also *People v Kazmierczak*, 461 Mich 411, 417-418 (2000) ("[p]robable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place") and *United States v Ventresca*, 380 US 102, 108 (1965), where the United States Supreme Court stated:

> "[A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

2.16 Description of the Place to be Searched

A. Specific Description of Premises to be Searched

The United States and Michigan Constitutions require that a search warrant particularly describe the place to be searched. See US Const, Am IV ("no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched . . . .") and Const 1963, art I, § 11 ("No warrant to search any place . . . shall issue without describing [it] . . . ."). See also MCL 780.654(1) ("[e]ach warrant shall designate and describe the house or building or other location or place to be searched . . . .").

The place to be searched must be described with sufficient precision so as to exclude any and all other places. "[W]here a multi-unit dwelling is involved . . . the warrant must specify the particular sub-unit to be searched, unless the multi-unit character of the dwelling is not apparent and the police officers did not know and did not have reason to know of its multi-unit character." *People v Toodle*, 155 Mich App 539, 545 (1986). If a unit number is unavailable, the unit should be described using a precise geographical reference, such as "all rooms accessible from the eastern most exterior door on the

north side of the building," as opposed to an imprecise geographical reference, such as "all rooms accessible from the eastern left-hand door of the building."

Although specific addresses should be used when available, an incorrect address will not always invalidate a search warrant. See *People v Westra*, 445 Mich 284, 285-286 (1994) (warrant not invalid even though the apartment street address and unit number were incorrect, because the police made a reasonable inquiry into the address before executing the search).

B. Scope of Premises Search and Seizure

"A warrant authorizing the search of a premises authorizes the search of containers within the premises that might contain the items named in the warrant." *People v Daughenbaugh*, 193 Mich App 506, 516 (1992), modified on other grounds 441 Mich 867 (1992). See *People Coleman*, 436 Mich 124, 130-134 (1990) (defendant's purse in bedroom of defendant's home was properly searched as a container that fell within the scope of the warrant, and was not an extension of defendant's person). This rule applies to locked and unlocked containers. *Daughenbaugh*, 193 Mich App at 516. "[A] search warrant for 'premises' authorizes the search of all automobiles found on the premises." *People v Jones (Eddie)*, 249 Mich App 131, 136 (2002).

A search warrant authorizing a search of the grounds or outbuildings within a residence's curtilage does not violate the Fourth Amendment or Const 1963, art 1, § 11, if the warrant authorized a search of the residence. See *People v McGhee (Larry A)*, 255 Mich App 623, 625 (2003) (upholding searches of detached garage and fenced-in dog run adjacent to the garage, where warrants were not restricted to a search of the residences only, but also included all "spaces" or "storage areas" accessible from the property addresses).

Committee Tip:

MCL 780.654 requires particularized probable cause for the place and property to be searched. When the police are seeking a warrant to search for multiple objects, the magistrate/judge should verify that there is particularized probable cause for each place and property to be searched.

2.17 Description of the Person to be Searched, Searched For, and/or Seized

A. Persons to be Searched

Although search warrants give authority to search the described premises and any specifically identified persons on the premises, it is sometimes unclear whether the warrant authorizes a search of persons who are present on the premises but who were not specifically identified in the search warrant.

MCL 780.654 requires particularized probable cause for the *place* and *property* to be searched, but it does not expressly provide legal requirements for a *person* to be searched. However, the United States Supreme Court has held that when a search warrant describes persons to be searched, it "must be supported by probable cause particularized with respect to that person." *Ybarra v Illinois*, 444 US 85, 91 (1979) (warrant to search public bar and bartender did not extend to a *Terry*[58] pat-down search of bar patrons present on the premises because the patrons were not described or named in the warrant as persons known to purchase drugs at that location, and because there was no reasonable belief that patrons were armed or dangerous). But see *People v Jackson*, 188 Mich App 117, 121 (1990), where the Court of Appeals distinguished *Ybarra* and upheld a *Terry* pat-down search of a defendant who arrived at an alleged drug-house during the execution of a search warrant ("[*Ybarra*] involved an unjustified cursory search of patrons in a public bar, whereas this case deals with the search of an individual at a residence targeted for drug sales, which was conducted in light of various threats made against the searching officers").

"The places and persons authorized to be searched by a search warrant must be described sufficiently to identify them with reasonable certainty so that the object of the search is not left in the officer's discretion." *People v Kaslowski*, 239 Mich App 320, 323 (2000).

"[U]nless a search of a particularly described person is expressly authorized by a warrant, a full search of a person present on the premises subject to a warrant may not be based upon the warrant." *People v Stewart*, 166 Mich App 263, 268 (1988). However, when a search of private premises pursuant to a warrant reveals controlled substances, police have probable cause to arrest and search incident to arrest occupants of the premises who were not named in the warrant. *People v Arterberry*, 431 Mich 381, 383-385 (1988). See also

[58] *Terry (John) v Ohio*, 392 US 1 (1968).

Michigan v Summers, 452 US 692, 705 (1981)[59] (a warrant to search a residence for contraband implicitly carries with it the limited authority to detain, but not search, occupants of the premises while a proper search of the home is conducted; once evidence to establish probable cause to arrest an occupant is found, that person's arrest and search incident thereto is constitutionally permissible).

A person on the premises at the time of the execution of the warrant may be searched without a warrant if probable cause exists independently of the search warrant to search that particular person. *People v Cook*, 153 Mich App 89, 91-92 (1986). A search may also be made of a person, even though the search warrant does not specifically authorize the search of a person, if the affidavit in support of the search warrant establishes probable cause to support the search. *People v Jones (Henry)*, 162 Mich App 675, 677-678 (1987).

B. Persons to be Searched For and/or Seized

MCL 780.652(2) provides that "[a] warrant may be issued to search for and seize a person who is the subject of either of the following:

> "(a) An arrest warrant for the apprehension of a person charged with a crime.
>
> "(b) A bench warrant issued in a criminal case."

In order to issue a search warrant for a person, the affidavit must establish particularized probable cause to search the location "where the person . . . to be searched for and seized is situated." MCL 780.651(1). Once issued, "[a] search warrant shall be directed to the sheriff or any peace officer, commanding the sheriff or peace officer to search the house, building, or other location or place, where the person . . . for which the sheriff or peace officer is required to search is believed to be concealed. Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized." MCL 780.654(1).

2.18 Description of Property to be Seized

General searches are prohibited under the Fourth Amendment of the United States Constitution, which requires warrants to "particularly describ[e] the . . . things to be seized[,]" and Const 1963, art 1, § 11, which provides that "[n]o warrant to . . . seize any . . . things shall issue without

[59]The rule in *Summers* is limited to a detention in the immediate vicinity of the premises to be searched; it does not apply to a detention at any appreciable distance away from the premises to be searched. *Bailey v United States*, 568 US ___, ___ (2013).

describing them[.]" See also MCL 780.654 ("[e]ach warrant shall designate and describe the . . . property or thing to be seized"), and *People v Collins*, 438 Mich 8, 37-38 (1991) ("the warrant must set forth, with particularity, the items to be seized").

"Under both federal law and Michigan law, the purpose of the particularization requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure." *People v Fetterley*, 229 Mich App 511, 543 (1998).

"The degree of specificity required depends upon the circumstances and types of items involved." *People v Zuccarini*, 172 Mich App 11, 15 (1988).

Descriptions Sufficient

- Descriptions in a warrant of "all money and property acquired through the trafficking of narcotics," and "ledgers, records or paperwork showing trafficking in narcotics," were sufficiently particular because the executing officers' discretion in determining what was subject to seizure was limited to items relating to drug trafficking. *Zuccarini*, 172 Mich App at 15-16.

- Descriptions in warrants of "equipment or written documentation used in the reproduction or storage of the activities and day-to-day operations of the [search location]" "further qualified by [a] reference to the drug trafficking and prostitution activities that were thought to take place there" described with sufficient particularity the items to be seized because they provided reasonable guidance to the officers performing the search. *People v Martin (Bobby)*, 271 Mich App 280, 304-305 (2006).

- A search warrant authorizing the seizure of "any evidence of homicide" met the particularity requirement because the executing officers were limited to searching only for "items that might reasonably be considered 'evidence of homicide[,]'" and because "[a] general description, such as 'evidence of homicide,' is not overly broad if probable cause exists to allow such breadth." *People v Unger*, 278 Mich App 210, 245-246 (2008).

Descriptions Insufficient

- A warrant referring to stolen property of a certain type is insufficient if that property is common, particularly if additional details are available. *Wheeler v City of Lansing*, 660 F3d 931, 941-943 (CA 6, 2011). In *Wheeler*, police officers were

> issued a warrant to search the plaintiff's apartment for personal property pursuant to an investigation of a series of home invasions. *Id*. at 934-935. The property to be seized was identified in the warrant as including "shotguns, long guns, computer and stereo equipment, cameras, DVD players, video game systems, big screen televisions, necklaces, rings, other jewelry, coin collections, music equipment, and car stereo equipment." *Id*. at 935. The United States Court of Appeals for the Sixth Circuit found that this description "provid[ed] no basis to distinguish the stolen items from [the plaintiff's] own personal property." *Id*. at 941. Although the police reports of the break-ins identified "the brand and dimensions of the televisions, the brand of the camera and Playstation and the exact amount of cash reported as stolen," two of the three cameras seized were not of the same brand as those identified as stolen. *Id*. The Court emphasized that the Fourth Amendment does not require "every single fact known" to be stated, but the affidavit supporting the warrant should provide "additional details, if they are available, to help distinguish between contraband and legally possessed property." *Id*. at 942.

The invalidity of a portion of a search warrant does not require suppression of all seized evidence. Instead, trial courts are to sever any tainted portions of the warrant—e.g., those portions that lack probable cause or do not sufficiently describe the place, property, or person—from the valid portions. Severance has been explained as follows:

> "Severance does not ratify the invalid portions of the warrant, but recognizes that we need not completely invalidate a warrant on the basis of issues that are not related to the evidence validly seized. Where items are validly seized, a defect in a severable portion of the warrant should not be used to suppress the validly seized evidence." *People v Kolniak*, 175 Mich App 16, 22-23 (1989).

See also *People v Melotik*, 221 Mich App 190, 202-203 (1997), where the case was remanded to the district court to "consider whether the facts contained in the second affidavit, after redaction of the facts arising solely from defendant's inadmissible statement, established probable cause to issue the second warrant."

2.19 Property Subject to Seizure

In addition to the constitutional "particularity" requirement, Michigan statutory law limits the types of items for which a search warrant may be issued. Under MCL 780.652, a warrant may be issued to search for and seize any property or thing that is one or more of the following:

> "(a) Stolen or embezzled in violation of a law of this state.
>
> "(b) Designed and intended for use, or that is or has been used, as the means of committing a crime.
>
> "(c) Possessed, controlled, or used wholly or partially in violation of a law of this state.
>
> "(d) Evidence of crime or criminal conduct.
>
> "(e) Contraband.
>
> "(f) The body or person of a human being or of an animal that may be the victim of a crime.
>
> "(g) The object of a search warrant under another law of this state providing for the search warrant. If there is a conflict between this act and another search warrant law, this act controls."

Additionally, other Michigan statutes authorize the issuance of search warrants for any of the following property or things:

- Alcoholic liquor and containers, MCL 436.1235.
- Body cavity searches, MCL 764.25b.
- Chop shop materials, MCL 750.535a.
- Controlled substances, MCL 333.7502.
- Gaming implements, MCL 750.308.
- Hair, tissue, blood, or other bodily fluids obtained in criminal sexual conduct crimes (related by blood or affinity), MCL 780.652a.
- Large carnivores, MCL 287.1117.
- Pistols, weapons, and devices unlawfully possessed or carried, MCL 750.238 (penal code); MCL 28.433 (firearms code).
- Sources of ionizing radiation, MCL 333.13517.
- Tortured animals and instruments of torture, MCL 750.54.
- Wild birds, wild animals, and fish, MCL 324.1602.
- Wolf-dogs, MCL 287.1017.

2.20 Probable Cause

A magistrate may only issue a search warrant when there is probable cause to support it. *People v Keller*, 479 Mich 467, 475 (2007); *People v Ulman*, 244 Mich App 500, 509 (2001).

A. Probable Cause Defined

"Probable cause sufficient to support issuing a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched." *People v Brannon*, 194 Mich App 121, 132 (1992).

Regarding the degree of probability required for "probable cause," the Michigan Supreme Court has held that to issue a search warrant a magistrate need not require that the items be "more likely than not" in the place to be searched; rather, a magistrate need only reasonably conclude that there is a "fair probability" that the evidence be in the place indicated in the search warrant. *People v Russo*, 439 Mich 584, 614-615 (1992).

B. Staleness

"A search warrant must be supported on probable cause existing at the time the warrant is issued." *People v Osborn*, 122 Mich App 63, 66 (1982). "Nevertheless, a lapse of time between the occurrence of the underlying facts and the issuance of the warrant does not automatically render the warrant stale." *Id*. "[T]he measure of a search warrant's staleness rests not on whether there is recent information to confirm that a crime is being committed, but whether probable cause is sufficiently fresh to presume that the sought items remain on the premises." *People v Gillam (Vincent)*, 93 Mich App 548, 553 (1980). "Such probable cause is more likely to be 'sufficiently fresh' when a history of criminal activity is involved." *Osborn*, 122 Mich App at 66, quoting *Gillam (Vincent)*, 93 Mich App at 553.

Staleness "is not a separate doctrine in probable cause to search analysis"; instead "[i]t is merely an aspect of the Fourth Amendment inquiry." *Russo*, 439 Mich at 605. "Time as a factor in the determination of probable cause to search is to be weighed and balanced in light of other variables in the equation, such as whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense." *Id*. at 605-606.

Stale information cannot be used in making a probable cause determination. *United States v Frechette*, 583 F3d 374, 377 (CA 6, 2009).[60] In determining whether information is stale, the court should consider the following factors: (1) the character of the crime (is it a chance encounter or recurring conduct?); (2) the criminal (is he or she "nomadic or entrenched?"); (3) the thing to be seized (is it "perishable and easily transferrable or of enduring utility to its holder?"); and (4) the place to be searched (is it a "mere criminal forum of convenience or [a] secure operational base?"). *Id*. at 378. In *Frechette*, the court applied the above-listed factors to conclude that 16-month-old evidence that the defendant subscribed to a child pornography website was not stale, because the crime of child pornography is not fleeting; the defendant lived in the same house for the time period at issue; child pornography images can have an infinite life span; and the place to be searched was the defendant's home. *Id*. at 378-379.

There is no bright-line rule regarding how much time may intervene between obtaining the facts and presenting the affidavit; however, the time should not be too remote. *People v Mushlock*, 226 Mich 600, 602 (1924). "[T]he test of remoteness is a flexible and reasonable one depending on the facts and circumstances of the particular case in question." *People v Smyers*, 47 Mich App 61, 73 (1973).

Evidence Stale

- Affidavit alleging that defendant illegally sold liquor four days earlier, absent evidence of continuing illegal activity. *People v Siemieniec*, 368 Mich 405, 407 (1962).

- Affidavit alleging a single controlled drug buy made three days before warrant issued, because there was no evidence to suggest that defendant would still possess the marijuana at the time the warrant was executed. *People v David*, 119 Mich App 289, 296 (1982).

- Affidavit alleging liquor sales and gambling conducted on premises six days earlier, absent evidence of continuing illegal activity. *People v Wright*, 367 Mich 611, 614 (1962).

- Affidavit alleging drug sales to undercover police officer made more than one month before warrant issued. *People v Broilo*, 58 Mich App 547, 550-552 (1975).

Evidence Not Stale

[60] Though persuasive, Michigan state courts "are not . . . bound by the decisions of lower federal courts[.]" *People v Gillam (Willie)*, 479 Mich 253, 261 (2007).

- Six day delay between issuance of warrant and affiant's visit to defendant's home and observation of stolen dress. *Smyers*, 47 Mich App at 72-73.

- Affidavit alleging that a typewriter used to prepare forged checks had been seen in defendant's apartment several months earlier, because information indicated a continuing criminal enterprise. *People v Berry*, 84 Mich App 604, 608-609 (1978).

Committee Tip:

In operating while intoxicated cases, although M Crim JI 15.5(6) states that the jury "may infer that the defendant's bodily alcohol content at the time of the test was the same as [his / her] bodily alcohol content at the time [he / she] operated the motor vehicle[,]" the affidavit should indicate the time of the stop. It is common for the police officer to fail to indicate the time of the stop in the affidavit.

2.21 Anticipatory Search Warrant

"'An anticipatory search warrant is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.'" *People v Kaslowski*, 239 Mich App 320, 324 (2000), quoting *People v Brake*, 208 Mich App 233, 244 (1994) (Wahls, J., concurring in part and dissenting in part).

In *Kaslowski*, 239 Mich App at 325-329, an anticipatory search warrant permitting police officers to deliver a parcel containing drugs and an electronic monitoring device that would activate when the parcel was opened was deemed valid because the warrant and affidavit established narrow circumstances under which the police were authorized to execute the warrant, the search was subject to the successful delivery of drugs by an undercover police officer, and the affidavit clearly indicated that the execution of the warrant was contingent on the successful delivery of the drugs.

Anticipatory search warrants do not violate the Fourth Amendment's warrant clause. *United States v Grubbs*, 547 US 90, 94-95 (2006). Further, the condition or event that "triggers" execution of an anticipatory search warrant need not be included in the search warrant itself. *Id*. at 99.

2.22 Affidavit

A. Requirements

> "'The affidavit must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or belief. An affidavit made on information and belief is not sufficient. The affidavit should clearly set forth the facts and circumstances within the knowledge of the person making it, which constitute the grounds of the application. The facts should be stated by distinct averments, and must be such as in law would make out a cause of complaint. It is not for the affiant to draw his [or her] own inferences. He [or she] must state matters which justify the drawing of them.'" *People v Rosborough*, 387 Mich 183, 199 (1972), quoting 2 Gillespie, Michigan Crim Law & Proc (2d ed), Search and Seizure, § 868, p 1129.

B. Validity

"In Michigan, there is a presumption that an affidavit supporting a search warrant is valid." *People v Mullen*, 282 Mich App 14, 23 (2008).

"A defendant is entitled to a hearing to challenge the validity of a search warrant if he [or she] 'makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause . . . .'" *People v Martin (Bobby)*, 271 Mich App 280, 311 (2006), quoting *Franks v Delaware*, 438 US 154, 155-156 (1978). "In order to warrant a hearing, the challenge 'must be more than conclusory and must be supported by more than a mere desire to cross-examine.'" *Martin*, 271 Mich App at 311, quoting *Franks*, 438 US at 171.

"In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause." *People v Stumpf*, 196 Mich App 218, 224 (1992). This rule also applies to material omissions from affidavits. *Id*. See *Mullen*, 271 Mich App at 22-27, where the Court of Appeals held that probable cause existed to issue a search warrant despite a police officer's intentional or reckless omission of material information from the affidavit and his intentional or reckless inclusion of false

information in the affidavit. In *Mullen*, the defendant was stopped and arrested for operating a motor vehicle while intoxicated. *Id.* at 20. The arresting police officer filed an affidavit seeking a search warrant to test the defendant's blood alcohol content. *Id.* at 19. The trial court determined that the officer both included false information in and omitted material information from the affidavit. *Id.* at 23. For example, although the officer failed to properly conduct a few of the field sobriety tests, the officer indicated that the defendant performed poorly on the tests. *Id.* at 20. In addition, the officer failed to indicate that the defendant had a piece of paper in his mouth a few minutes before taking a preliminary breath test (PBT). *Id.* The Michigan Court of Appeals agreed with the trial court's factual determinations, but disagreed with its decision to suppress the evidence because

> "the evidence presented . . . did not establish that the 0.15 PBT test result was significantly unreliable so as to preclude the reasonable belief by a police officer or a magistrate that defendant's blood might contain evidence of intoxication. Given the absence of any basis to significantly call into question the 0.15 PBT result, and given the other circumstantial evidence that defendant was intoxicated, we find that the circuit court erred in determining that a reasonable magistrate would not have found probable cause to issue a search warrant." *Mullen*, 271 Mich App at 28.

"Where the defendant challenges the truth of facts alleged in the affidavit, our courts have struck only the challenged portions of the warrant or its affidavit. In those cases, if enough substance remains to support a finding of probable cause the warrant is valid." *People v Kolniak*, 175 Mich App 16, 22 (1989).

C. Affidavits Based upon Hearsay Information

An affidavit may be based on hearsay information supplied to the affiant by a named or unnamed person, subject to the following requirements:

> "(a) If the person is named, affirmative allegations from which the judge or district court magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the judge or district court magistrate may conclude that the person spoke with personal knowledge of the information and either that the

unnamed person is credible or that the information is reliable." MCL 780.653.

1. Informant Must Speak with Personal Knowledge

"In general, the requirement that the informant have personal knowledge seeks to eliminate the use of rumors or reputations to form the basis for the circumstances requiring a search." *Stumpf*, 196 Mich App at 223. "The personal knowledge element should be derived from the information provided or material facts, not merely a recitation of the informant's having personal knowledge." *Id*. "If personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge." *Id*. See also *Martin (Bobby)*, 271 Mich App at 302 ("[p]ersonal knowledge can be inferred from the stated facts").

2. Informant Must Be Credible or Information Must Be Reliable

"MCL 780.653(b) derives from the defunct 'two-pronged test' enunciated by the United States Supreme Court in *Aguilar v Texas*, 378 US 108[](1964), and *Spinelli v United States*, 393 US 410[](1969), for determining whether an anonymous informant's tip established probable cause for issuance of a search warrant." *People v Hawkins*, 468 Mich 488, 501 (2003). "Under the *Aguilar-Spinelli* formulation as it was generally understood, a search warrant affidavit based on information supplied by an anonymous informant was required to contain both (1) some of the underlying circumstances evidencing the informant's basis of knowledge and (2) facts establishing either the veracity or the reliability of the information." *Hawkins*, 468 Mich at 501-502.

In *Illinois v Gates*, 462 US 213 (1983), "the United States Supreme Court abandoned the *Aguilar-Spinelli* two-pronged test in favor of a 'totality of the circumstances' approach." *Hawkins*, 468 Mich at 502 n 11. "Accordingly, in determining whether a search warrant affidavit that is based on hearsay information passes Fourth Amendment muster, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her], . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id*., quoting *Gates*, 462 US at 238.

A statement in the affidavit that the informant is a "credible person" does not satisfy the statutory requirement set out in

MCL 780.653(b). *People v Sherbine*, 421 Mich 502, 511 n 16 (1984), overruled on other grounds 468 Mich 488 (2003).

Examples of factual information that is probative of "informant credibility" include:

- A course of past performance in which the informant has supplied reliable information;
- Admissions against the informant's penal interest; and
- Corroboration of non-innocuous details of the informant's story by reliable, independent sources or police investigation. *Sherbine*, 421 Mich at 510 n 13.

The statutory alternative of "informational reliability" must also be established by factual averments in the affidavit. In most cases, once "informant credibility" is established, it logically follows that the information is reliable, and vice versa. However, a subtle distinction may be drawn in situations where the method of procuring the information is unknown. In *Spinelli*, 393 US at 416, the United States Supreme Court explained:

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Thus, by describing the criminal activity in detail, the reliability of the information can be proven independent of informant credibility.

When, in addition to information obtained from an anonymous informant, an affidavit in support of a search warrant is based on other information sufficient in itself to justify the judge or district court magistrate's finding of probable cause, it is not necessary for purposes of MCL 780.653 to determine whether the informant was credible or whether the information provided was reliable. *People v Keller*, 479 Mich 467, 477 (2007). In *Keller*, marijuana discovered in the defendants' trash was itself sufficient to support the conclusion that there was a fair probability that evidence of illegal activity would be found in the defendants' home. *Id*. at 477. Even

though an anonymous tip prompted the initial investigation into the defendants' possible illegal activity, the marijuana alone supported the probable cause necessary to issue a search warrant and "the statutory requirement that an anonymous tip bear indicia of reliability d[id] not come into play." *Id*. at 483.

Even where a search warrant issued from an affidavit is later found insufficient in light of the requirements of MCL 780.653, the evidence obtained in execution of the faulty warrant may still be admissible against a defendant. In *Hawkins*, 468 Mich at 501, the defendant moved to suppress evidence obtained pursuant to a search warrant based on an affidavit that failed to satisfy the requirements of MCL 780.653(b) for an affiant's reliance on unnamed sources. The Court held that "[n]othing in the plain language of [MCL 780.653] provides us with a sound basis for concluding that the Legislature intended that noncompliance with its affidavit requirements, standing alone, justifies application of the exclusionary rule to evidence obtained by police in reliance on a search warrant." *Hawkins*, 468 Mich at 510. The Court concluded that suppression of the evidence was not required as a remedy for the violation of MCL 780.653(b). *Id*. at 512.

2.23 Verifying and Executing the Affidavit

MCL 780.651(1) provides:

> "When an affidavit is made on oath to a judge or district court magistrate authorized to issue warrants in criminal cases, and the affidavit establishes grounds for issuing a warrant under this act, the judge or district court magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant to search the house, building, or other location or place where the property or thing to be searched for and seized is situated."

Once the judge or district court magistrate is satisfied that the warrant is in proper form and that the affidavit establishes probable cause to believe the items to be seized may be found in the place to be searched, it must swear the affiant and ask him or her to state that the averments in the affidavit are true to the best of his or her information and belief. See MCL 780.651(2).

After the affiant has signed the affidavit, the judge or district court magistrate should sign and date it. This indicates the affidavit was signed and subscribed in the presence of the court on that date. Following this, the court should sign and date the search warrant, thereby "issuing" the warrant. See MCL 780.651(4)-(5).

Committee Tip:

The judge or district court magistrate may want to indicate the time of signature, especially if staleness may be an issue.

The court must retain the original affidavit and warrant for its own records. See SCAO Form MC 231. The retention period is six years. General Records Retention and Disposal Schedule # 16—Michigan Trial Courts, page v; Item Number 16.010 (non-case records, including search warrants that are not placed in case files).

A. Affiant's Signature Requirement

"The affidavit should be signed by the affiant. A warrant based upon an unsigned affidavit is presumed to be invalid, but the prosecutor may rebut the presumption by showing that the affidavit was made on oath to a magistrate." *People v Waclawski*, 286 Mich App 634, 698 (2009). See also MCL 780.651(2)(a).

B. Judge's or District Court Magistrate's Signature Requirement

"[T]he fact that a search warrant has not been signed by a magistrate or judge presents a presumption that the warrant is invalid. However, this presumption may be rebutted with evidence that, in fact, the magistrate or judge did make a determination that the search was warranted and did intend to issue the warrant before the search." *People v Barkley*, 225 Mich App 539, 545 (1997).

C. Information in Affidavit and Supplementation with Oral Statements

There are "dangers inherent in allowing a magistrate to base his [or her] determinations of probable cause on oral statements not embodied in the affidavit." *People v Sloan*, 450 Mich 160, 176 (1995), rev'd on other grounds 468 Mich 488 (2003). "[A]ny additional facts relied on to find probable cause must be incorporated into an affidavit." *Id*. at 177. "What is critical is that the additional information be presented under oath and simultaneously made a permanent part of the record[61]." *Id*. at 178.

[61] "The recording may take various forms, including handwritten notes, video or audio tapes, or formal or informal transcripts of testimony." *Sloan*, 450 Mich at 177.

Committee Tip:

It is important to refrain from discussing the facts of the case with the police officer, so that all the facts relied on are contained in the affidavit. This avoids the issue of facts not contained in the affidavit, which occurs when the police officer verbally augments the facts set out in the affidavit.

If the affiant wants to modify or supplement the affidavit, the affiant may insert additional or corrected information in the affidavit and initial it. The judge or district court magistrate should also initial the changes.

2.24 Submission of Affidavit and Issuance of Search Warrant by Electronic Device

"Under MCL 780.651(2), an affidavit may be made to a judge or district court magistrate via electronic or electromagnetic means of communication if the judge or district court magistrate orally administers the oath or affirmation and the affiant signs the affidavit." *People v Paul*, 203 Mich App 55, 61 (1993), rev'd on other grounds 444 Mich 949 (1994). Specifically, MCL 780.651(2) provides:

> "An affidavit for a search warrant may be made by any electronic or electromagnetic means of communication, including by facsimile or over a computer network, if both of the following occur:
>
> > "(a) The judge or district court magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits an affidavit under this subsection.
> >
> > "(b) The affiant signs the affidavit. Proof that the affiant has signed the affidavit may consist of an electronically or electromagnetically transmitted facsimile of the signed affidavit or an electronic signature on an affidavit transmitted over a computer network."

"A judge or district court magistrate may issue a written search warrant in person or by any electronic or electromagnetic means of communication, including by facsimile or over a computer network." MCL 780.651(3). Furthermore, "[a] judge or district court magistrate may

sign an electronically issued search warrant when he or she is at any location in this state." MCL 780.651(4).

"The peace officer or department receiving an electronically or electromagnetically issued search warrant shall receive proof that the issuing judge or district court magistrate has signed the warrant before the warrant is executed." MCL 780.651(5). "Proof that the issuing judge or district court magistrate has signed the warrant may consist of an electronically or electromagnetically transmitted facsimile of the signed warrant or an electronic signature on a warrant transmitted over a computer network." *Id*.

"If an oath or affirmation is orally administered by electronic or electromagnetic means of communication under [MCL 780.651], the oath or affirmation is considered to be administered before the judge or district court magistrate." MCL 780.651(6).

"If an affidavit for a search warrant is submitted by electronic or electromagnetic means of communication, or a search warrant is issued by electronic or electromagnetic means of communication, the transmitted copies of the affidavit or search warrant are duplicate originals of the affidavit or search warrant and are not required to contain an impression made by an impression seal." MCL 780.651(7).

2.25 Operating While Intoxicated/Operating While Visibly Impaired Cases—Chemical Testing and Implied Consent

"[P]ersons who operate vehicles on public highways are 'considered to have given consent to chemical tests of his or her blood,' rather than requiring the state to first obtain actual consent or a search warrant." *People v Campbell*, 236 Mich App 490, 498 (1999). Specifically, Michigan's implied consent statute, MCL 257.625c, provides:

> "A person who operates a vehicle upon a public highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol or presence of a controlled substance or other intoxicating substance, or any combination of them, in his or her blood or urine or the amount of alcohol in his or her breath [if the person is arrested for certain specified offenses]." MCL 257.625c(1).

The offenses specified in MCL 257.625c(1) are:

- Operating while intoxicated, MCL 257.625(1), or a substantially corresponding local ordinance;
- Operating while visibly impaired, MCL 257.625(3), or a substantially corresponding local ordinance;
- Operating while intoxicated/ while visibly impaired/with any amount of controlled substance in body causing death, MCL 257.625(4);
- Operating while intoxicated/ while visibly impaired/with any amount of controlled substance in body causing serious impairment of a body function, MCL 257.625(5);
- Operating with any bodily alcohol content, if the driver is less than 21 years of age, MCL 257.625(6), or a substantially corresponding local ordinance;
- Operating in violation of MCL 257.625(1), MCL 257.625(3)-(5), or MCL 257.625(8), if committed with a passenger under 16 years of age, MCL 257.625(7);
- Operating with any amount of a controlled substance, MCL 257.625(8), or a substantially corresponding local ordinance;
- Operating a commercial vehicle and refusing to submit to a preliminary chemical breath analysis,[62] MCL 257.625a(5), or a substantially corresponding local ordinance;
- Operating a commercial vehicle with a prohibited alcohol content, MCL 257.625m, or a substantially corresponding local ordinance;
- Committing a moving violation causing death or serious impairment of a body function to another person, MCL 257.601d;
- Reckless driving causing serious impairment of a body function, MCL 257.626(3);
- Reckless driving causing death, MCL 257.626(4);
- Manslaughter resulting from the operation of a motor vehicle, MCL 257.625c(1)(b); or
- Murder resulting from the operation of a motor vehicle, MCL 257.625c(1)(b).

[62] See MCL 257.43a.

MCL 257.625a(6)(b)(*iv*) provides that a person arrested for any of the offenses specified in MCL 257.625c(1) must be advised, among other things, that "[i]f he or she refuses the request of a peace officer to take a [chemical test of his or her blood, urine, or breath], a test shall not be given without a court order, but the peace officer may seek to obtain a court order." "[A] blood test conducted under the direction of police falls within the ambit of the Fourth Amendment." *People v Perlos*, 436 Mich 305, 313 (1990). "[W]hen authorities obtain a search warrant to take a blood sample, the issue of consent is removed, and the implied consent statute is not applicable." *People v Jagotka*, 232 Mich App 346, 353 (1998), rev'd on other grounds 461 Mich 274 (1999).

Constitutionality of Warrantless Breath and Blood Testing. "[T]he Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving[,]" and a state may criminally prosecute a driver for refusing a warrantless breath test;[63] "[t]he impact of breath tests on privacy is slight, and the need for [blood alcohol concentration (BAC)] testing is great." *Birchfield v North Dakota*, 579 US ___, ___ (2016). However, "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, . . . a blood test[] may [not] be administered as a search incident to a lawful arrest for drunk driving[,]" and "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id*. at ___ (concluding that one of the three petitioners in the case "was threatened with an unlawful search" under a state law making it a crime to refuse a warrantless blood draw, and that "the search he refused [could not] be justified as a search incident to his arrest or on the basis of implied consent[]") (emphasis added).

"[T]he natural metabolization of alcohol in the bloodstream [does not] present[] a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *Missouri v McNeely*, 569 US ___, ___ (2013). "[C]onsistent with general Fourth Amendment principles . . . exigency in this context must be determined case by case based on the totality of the circumstances." *Id*. at ___. See also *Birchfield*, 579 US at ___ (citing *McNeely*, 569 US at ___, and noting that "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not[]"). See MCL 257.625d(1).

[63] Note that Michigan does not currently criminalize an individual's refusal to submit to a preliminary chemical breath analysis (PBT); refusal to submit is a civil infraction. See MCL 257.625a(2)(d).

2.26 Issuance of Search Warrants for Electronic Communications

The Electronic Communications Privacy Act, 18 USC § 2510 *et seq.*, consists of three parts. 18 USC 2510–18 USC 2522 is entitled "Wire and Electronic Communications Interception and Interception of Oral Communications," and prohibits the unauthorized interception of wire, oral, or electronic communications. 18 USC 2701– 18 USC 2712 is entitled "Stored Wire and Electronic Communications and Transactional Records Access," and is known as the "Stored Communications Act (SCA)," and concerns stored electronic communications. Finally, 18 USC 3121–18 USC 3127 is entitled "Pen Registers and Trap and Trace Devices," and sets out the procedure for government installation and use of pen registers and trap and trace devices.

"[T]he very fact that information is being passed through a communications network is a paramount Fourth Amendment consideration." *United States v Warshak*, 631 F3d 266, 285 (CA 6, 2010).[64] "[T]he Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish." *Id*. To that end "email requires strong protection under the Fourth Amendment." *Id*. at 286. "[A]gents of the government cannot compel a commercial ISP [(Internet Service Provider)] to turn over the contents of an email without triggering the Fourth Amendment." *Id*. "[I]f government agents compel an ISP to surrender the contents of a subscriber's emails, those agents have thereby conducted a Fourth Amendment search, which necessitates compliance with the warrant requirement absent some exception." *Id*. In *Warshak*, the United States Court of Appeals for the Sixth Circuit stated that "[t]he government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause." *Id*. at 288 (holding that the government violated the Fourth Amendment when it obtained the contents of the defendant's e-mails without a warrant). Further, the Court held that "to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional." *Id*.

Under the current version of the SCA, a warrant is required to obtain the contents of e-mail less than six months old. 18 USC 2703(a). But the SCA also permits the government to gain access to older communications with just a subpoena and no judicial review. 18 USC 2703(a)-(b). In March 2013, SB 607 was introduced in the United States Senate to amend the SCA to require a warrant to obtain the content of electronic communications. In April 2013, the Senate Judiciary Committee

[64] Though persuasive, Michigan state courts "are not . . . bound by the decisions of lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

unanimously passed the measure, which now needs approval of the full Senate.

Committee Tip:

Requests for electronic communications are becoming increasingly prevalent. To stay in line with impending changes in the law, the best practice is to have law enforcement seek a search warrant, instead of signing a subpoena.

2.27 Executing the Search Warrant

A. Knock-and-Announce

Michigan's "knock-and-announce" statute is set out in MCL 780.656:

> "The officer to whom a warrant is directed, or any person assisting him [or her], may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his [or her] authority and purpose, he [or she] is refused admittance, or when necessary to liberate himself [or herself] or any person assisting him [or her] in execution of the warrant."

"The knock-and-announce statute requires that police executing a search warrant give notice of their authority and purpose and be refused entry before forcing their way in." *People v Fetterley*, 229 Mich App 511, 521 (1998). Although it is known as the "knock-and-announce" rule, "[n]either case law nor statute requires that the police physically knock on the door; rather, they need only give proper notice to the occupants of their authority and purpose." *Id*. at 524. "Police must allow a reasonable time for the occupants to answer the door following the announcement." *Id*. at 521.

The exclusionary rule does not apply to violations of the knock-and-announce statute because violation of MCL 780.656 is unrelated to the seizure of a person's property pursuant to a valid search warrant. *Hudson (Booker) v Michigan*, 547 US 586, 594, 599-600 (2006).

B. Required Actions Upon Seizure of Property

MCL 780.655(1) sets out the procedures to be followed after property is seized during the execution of a search warrant:

> "When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things that were seized. The officer taking property or other things under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. The officer is not required to give a copy of the affidavit to that person or to leave a copy of the affidavit at the place from which the property or thing was taken."

"[A] copy of the affidavit becomes part of the 'copy of the warrant' that must be provided or left pursuant to MCL 780.655[.]" *People v Garvin (Demar)*, 235 Mich App 90, 99 (1999). "However, a failure by law enforcement officers to comply with the statutory requirement to attach a copy of the affidavit to the copy of the warrant provided or left does not require suppression of evidence seized pursuant to the warrant." *Id*. See also MCL 780.654(3), which permits a magistrate to order the suppression of an affidavit in circumstances necessitating the protection of an investigation or the privacy or safety of a victim or witness:

> "Upon a showing that it is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness, the magistrate may order that the affidavit be suppressed and not be given to the person whose property was seized or whose premises were searched until that person is charged with a crime or named as a claimant in a civil forfeiture proceeding involving evidence seized as a result of the search."

Additionally, the officer must promptly file the tabulation with the judge or district court magistrate. MCL 780.655(2) provides:

> "The officer shall file the tabulation promptly with the judge or district court magistrate. The tabulation may be suppressed by order of the judge or district court

> magistrate until the final disposition of the case unless otherwise ordered. The property and things that were seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence in any trial."

After the execution of the warrant, seized property must be returned and disposed of in accordance with MCL 780.655(3):

> "As soon as practicable, stolen or embezzled property shall be restored to the owner of the property. Other things seized under the warrant shall be disposed of under direction of the judge or district court magistrate, except that money and other useful property shall be turned over to the state, county or municipality, the officers of which seized the property under the warrant. Money turned over to the state, county, or municipality shall be credited to the general fund of the state, county, or municipality."

A failure to strictly comply with the requirements of MCL 780.655 does not by itself require suppression of seized evidence. In *People v Sobczak-Obetts*, 463 Mich 687, 712-713 (2001), the Supreme Court held that the trial court and Court of Appeals erred by applying the exclusionary rule to conduct that amounted to a technical violation of MCL 780.655, i.e., an officer's failure to provide a copy of the affidavit in support of the warrant to the defendant at the time of the search, because there was no discernable legislative intent that a violation of MCL 780.655 requires suppression, and because there was no police misconduct to necessitate application of the exclusionary rule, which is predicated on deterring such conduct.

2.28 Public Access to Search Warrant Affidavits

MCL 780.651(8) provides that, "[e]xcept as provided in [MCL 780.651(9)], an affidavit for a search warrant contained in any court file or court record retention system is nonpublic information." MCL 780.651(9) provides:

> "On the fifty-sixth day following the issuance of a search warrant, the search warrant affidavit contained in any court file or court record retention system is public information unless, before the fifty-sixth day after the search warrant is issued, a peace officer or prosecuting attorney obtains a suppression order from a judge or district court magistrate upon a showing under oath that suppression of the affidavit is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness. The suppression

order may be obtained ex parte in the same manner that the search warrant was issued. An initial suppression order issued under [MCL 780.651(9)] expires on the fifty-sixth day after the order is issued. A second of subsequent suppression order may be obtained in the same manner as the initial suppression order and shall expire on a date specified in the order. [MCL 780.651(9)] and [MCL 780.651(8)] do not affect a person's right to obtain a copy of a search warrant affidavit from the prosecuting attorney or law enforcement agency under the [Freedom of Information Act, MCL 15.231–MCL 15.246]."

Part C: Grand Jury

2.29 Grand Jury

Criminal prosecutions may be initiated when the prosecuting attorney files a complaint and an information, or by grand jury indictment. MCL 767.1 *et seq.*; *People v Glass (Willie)*, 464 Mich 266, 276 (2001). There is no state constitutional right to indictment by a grand jury. *Glass (Willie)*, 464 Mich at 278. An information shall not be filed until the defendant has had or has waived a preliminary examination. MCL 767.42(1). However, indictees do not have the right to a preliminary examination. *Glass (Willie)*, 464 Mich at 283, overruling *People v Duncan (Pat)*, 388 Mich 489 (1972) (which had granted indictees the right to a preliminary examination). The grand jury indictment is a procedural alternative to the preliminary examination. *Glass (Willie)*, 464 Mich at 278. See also *People v Baugh*, 249 Mich App 125, 129-130 (2002) (where the defendant was indicted by grand jury, the information issued after the defendant's preliminary examination was null and void following the Court's decision in *Glass*).

Grand juries are creatures of statute. Generally, the statutes provide for a one person grand jury, MCL 767.3 and MCL 767.4, a citizen grand jury comprised of 13 to 17 grand jurors, MCL 767.11, and a multi-county grand jury, MCL 767.7c, MCL 767.7d, MCL 767.7e, MCL 767.7f, and MCL 767.7g.

A. One Person Grand Jury

"A 'one person' grand jury may be convened to investigate whether probable cause exists to suspect a crime has been committed." *People v Farquharson*, 274 Mich App 268, 274 (2007). "The 'one person' grand jury is a creation of statute and draws its extraordinary

powers from [MCL 767.3 and MCL 767.4]." *Farquharson*, 274 Mich App at 268. The one person grand jury statute does not violate a defendant's right to due process. *In re Colacasides*, 379 Mich 69, 75 (1967). Whether the judge orders an inquiry "into the matters relating to [the alleged crime]" is discretionary. MCL 767.3.

B. Citizen Grand Jury

Citizen grand juries are drawn and summoned as directed by the court. MCL 767.7. A grand juror's term of service is six months. MCL 767.7a. Not more than 17 persons and not less than 13 shall be sworn on any grand jury. MCL 767.11. A foreperson is appointed by the court. MCL 767.11; MCL 767.12. Witnesses appearing before the grand jury have the right to counsel. MCL 767.19e and MCR 6.005(I). An indictment requires the concurrence of at least nine of the grand jurors. MCL 767.23. The foreperson shall present the indictment to the court in the presence of the grand jury. MCL 767.25(1). The judge presiding over the grand jury proceedings shall then return the indictment to the court having jurisdiction. MCL 767.25(3). An arrest warrant may be issued by the court. MCL 767.30. The statute contemplates that a defendant will be arraigned in the court having jurisdiction over the matter because the statute indicates that the court may properly receive the indictee's plea of guilty if offered. MCL 767.37.

A grand jury is not required to "reflect the precise racial composition of a community." *Glass (Willie)*, 464 Mich at 284. The *Glass (Willie)* Court indicated that the three-step analysis set out in *Castaneda v Partida*, 430 US 482, 494 (1977), should be used to resolve a defendant's claim of racial discrimination in the selection of a grand jury. *Glass (Willie)*, 464 Mich at 284. "[I]n addition to showing discriminatory purpose, [the] defendant must show that the grand jury selection procedure resulted in a 'substantial underrepresentation of his [or her] race.'" *Id*. at 285, quoting *Castaneda*, 430 US at 494. In *Glass (Willie)*, 464 Mich at 285, the Court applied the three steps set out in *Castaneda*, 430 US at 494:

> (1) The defendant must show that he or she belongs to a recognizable and distinct class singled out for different treatment by the law as written or as applied.
>
> (2) The defendant must show that significant underrepresentation of that distinct class existed over a significant period of time.
>
> (3) The defendant must show that the selection procedure was susceptible to abuse or was not racially neutral.

C. Multicounty Grand Jury

The Court of Appeals may convene a multicounty grand jury if the petition establishes: (1) probable cause to believe that a crime, or a portion of a crime, has been committed in two or more of the counties named in the petition, and (2) reason to believe that a grand jury with jurisdiction over two or more of the counties named in the petition could more effectively address the criminal activity referenced in the petition than could a grand jury with jurisdiction over one of those counties. MCL 767.7d. The term of a multicounty grand jury must not exceed six months. MCL 767.7f.

Committee Tip:

In considering a challenge to the creation or scope of a multicounty grand jury, consider reviewing a copy of the petition, order of the Court of Appeals, presiding judge's order, and any order continuing the term of the grand jury. In addition, seek information regarding the number and source of the grand jurors along with the number concurring in any indictment being challenged.

D. Oath for the Grand Jury

The following oath should be used when a grand jury is sworn:

> "You as grand jurors of this inquest do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge; your own counsel and the counsel of the people, and of your fellows, you shall keep secret; you shall present no person for envy, hatred or malice, neither shall you leave any person unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God." MCL 767.9.

E. Right to Counsel

"A witness called before a grand jury or a grand juror is entitled to have a lawyer present in the hearing room while the witness gives testimony. A witness may not refuse to appear for reasons of

unavailability of the lawyer for that witness. Except as otherwise provided by law, the lawyer may not participate in the proceedings other than to advise the witness." MCR 6.005(I)(1); MCL 767.19e. If the witness is financially unable to retain a lawyer, upon request, one will be appointed for the witness at public expense. MCR 6.005(I)(2).

F. Rules of Evidence

With the exception of those rules regarding privilege, the rules of evidence do not apply to grand jury proceedings. MRE 1101(b)(2).

Testimony given before the grand jury may be admissible at trial, subject to the rules of evidence. *People v Chavies*, 234 Mich App 274, 281-284 (1999), overruled on other grounds *People v Williams (Cleveland)*, 475 Mich 245, 254 (2006).

G. Discovery

A defendant is entitled to a transcript of his or her grand jury testimony and other parts of the grand jury record—including other witnesses' testimony—that touch on the issue of the defendant's guilt or innocence. *People v Bellanca*, 386 Mich 708, 715 (1972). This entitlement applies whether the defendant is charged by information or indictment. *People v Fagan (On Remand)*, 213 Mich App 67, 68-70 (1995) (definition of indictment includes information, see, e.g., MCL 750.10, MCL 761.1(d); MCL 767.2.

H. Investigative Subpoenas

In general, MCL 767A.2 permits a prosecuting attorney to petition the court to issue one or more investigative subpoenas to investigate the commission of a felony. MCL 767A.3 authorizes the judge to issue the investigative subpoena.

> "A court may 'authorize the prosecutor to issue an investigative subpoena if the judge determines that there is reasonable cause to believe a felony has been committed and that there is reasonable cause to believe that the person who is the subject of the investigative subpoena may have knowledge concerning the commission of a felony or the items sought are relevant to investigate the commission of a felony.'" *Farquharson*, 274 Mich App at 273, quoting *In re Subpoenas to News Media Petitioners*, 240 Mich App 369, 375 (2000), citing MCL 767A.3(1).

> "Investigative subpoenas must include a statement that a person may have legal counsel present at all times during questioning, MCL 767A.4(g), and a witness must be advised of his or her constitutional rights against compulsory self-incrimination, MCL 767A.5(5); *People v Stevens (James)*, 461 Mich 655, 659 n 1[] (2000). A person served with an investigative subpoena must appear before the prosecuting attorney and answer questions concerning the felony being investigated. MCL 767A.5(1). The prosecuting attorney is authorized to administer oaths, MCL 767A.5(2), and if a witness testifies falsely under oath during an investigative-subpoena proceeding, perjury penalties apply, MCL 767A.9." *Farquharson*, 274 Mich App at 273.
>
> "If a criminal charge is filed by the prosecuting attorney based upon information obtained pursuant to this chapter, upon the defendant's motion made not later than 21 days after the defendant is arraigned on the charge, the trial judge shall direct the prosecuting attorney to furnish to the defendant the testimony the defendant gave regarding the crime with which he or she is charged and may direct the prosecuting attorney to furnish to the defendant the testimony any witness who will testify at the trial gave the prosecuting attorney pursuant to this chapter regarding that crime except those portions that are irrelevant or immaterial, or that are excluded for other good cause shown." MCL 767A.5(6).
>
> "If the defendant requests the testimony of a witness pursuant to this section and the trial judge directs the prosecuting attorney to furnish to the defendant a copy of that witness's testimony, the prosecuting attorney shall furnish a copy of the testimony not later than 14 days before trial. If the prosecuting attorney fails or refuses to furnish a copy of the testimony to the defendant pursuant to this subsection, the prosecuting attorney may be barred from calling that witness to testify at the defendant's trial." MCL 767A.5(6).

"If a person files an objection to, or fails or refuses to answer any question or to produce any record, document, or physical evidence set forth in an investigative subpoena, the prosecuting attorney may file a motion with the judge who authorized the prosecuting attorney to issue the subpoena for an order compelling the person to comply with that subpoena." MCL 767A.6(1). In *People v Seals*, 285 Mich App 1, 8-9 (2009), the defendant argued that the testimony he gave pursuant to an investigative subpoena was involuntary;

however, the Court held that "[t]he fact that [the] defendant did not take advantage of his opportunity [under MCL 767A.6(1)] to have the trial court determine whether he was required to respond to the investigative subpoena d[id] not make his testimony forced." Therefore, admission of his testimony at trial did not violate his right against compulsory self-incrimination. *Seals*, 285 Mich App at 9-10.

Disclosure in a civil action of transcripts of testimony obtained pursuant to the investigative subpoena process, during an investigation of alleged criminal conduct, is not authorized by the statutes governing the disclosure of such information, MCL 767A.1 *et seq*. *Truel v City of Dearborn*, 291 Mich App 125, 131-135 (2010). According to the *Truel* Court, MCL 767A.8 "makes several delineated items related to an investigation confidential, including (1) petitions for immunity, (2) orders granting immunity, (3) 'transcripts of testimony delivered to witnesses pursuant to grants of immunity,' and (4) 'records, documents, and physical evidence obtained by the prosecuting attorney pursuant to an investigation under [the investigative subpoena statutes].'" *Truel*, 291 Mich App at 133. However, "[items delineated] in [MCL 767A.]8 were meant to address those matters not already covered elsewhere in the [investigative subpoena statutes]." *Truel*, 291 Mich App at 135. Because MCL 767A.5(6) specifically "provides for the limited disclosure of testimony to a defendant who has been charged based upon information obtained pursuant to the investigative subpoena statutes[,]" its disclosure under other circumstances is not expressly or impliedly authorized under other provisions of the investigative subpoena statutes. *Truel*, 291 Mich App at 134-135. The plain language of MCL 767A.5(6) states that "transcripts of witness testimony are only available to a criminal defendant when the charges result from information obtained through investigative subpoenas and (a) the testimony is that of the defendant or (b) the testimony is that of witnesses who will testify at trial[.]" *Truel*, 291 Mich App at 135. In *Truel*, 291 Mich App at 131-135, the trial court improperly ruled that transcripts of witness testimony obtained under the investigative subpoena statutes, during an investigation into alleged criminal activity, should be disclosed to the defendants named in the plaintiff's civil action.

The Michigan Supreme Court has held that the exclusionary rule does not apply to statutory violations of MCL 767A.1 *et seq*. *People v Earls*, 477 Mich 1119 (2007).

Chapter 3: Right to Counsel and Waiver of Counsel

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3.1 Introduction

This chapter discusses the general concepts of a defendant's right to counsel and waiver of counsel and is intended to be an overview of these rights. For information on these rights as they pertain to specific criminal proceedings, see the appropriate chapter in this book that discusses that particular type of proceeding.

Part A: Right to Counsel

3.2 Constitutional Rights to Counsel

A criminal defendant has a constitutional right to counsel. *Coleman v Alabama*, 399 US 1, 7 (1970). In Michigan, a criminal defendant's right to counsel has two sources: (1) the Sixth Amendment of the United States Constitution, US Const, Am VI, applicable to the states through the Fourteenth Amendment, US Const, Am XIV, and its Michigan corollary in Const 1963, art 1, § 20, and (2) a prophylactic right found in the Supreme Court's jurisprudence relating to the Fifth Amendment right against compelled self-incrimination and to due process, US Const, Am V, and its Michigan corollary in Const 1963, art 1, § 17. *People v Williams (Kevin)*, 244 Mich App 533, 538 (2001). "The Fifth Amendment right to counsel is distinct and not necessarily coextensive with the right to counsel afforded criminal defendants under the Sixth Amendment," because "the Fifth Amendment right to counsel during a custodial interrogation serves an entirely different purpose than the Sixth Amendment right to counsel at trial." *Id*. at 538-539.

"The right to counsel found in the Fifth Amendment is designed to counteract the inherently compelling pressures of custodial interrogation, and to secure a person's privilege against self-incrimination by allowing a suspect to elect to converse with the police only through counsel." *Williams (Kevin)*, 244 Mich App at 539 (internal quotations and citations omitted). "The procedural safeguards for this right to counsel adopted in *Miranda* [*v Arizona*, 384 US 436 (1966)] require that the police discontinue the questioning of a suspect when a request for counsel is made." *Williams (Kevin)*, 244 Mich App at 539. However, those safeguards only apply when a suspect is in custody and is being interrogated. *Id*.

"The Sixth Amendment right, which is offense-specific and cannot be invoked once for all future prosecutions, attaches only at or after adversarial judicial proceedings have been initiated," *People v Smielewski (Timothy)*, 214 Mich App 55, 60 (1995), i.e., at the first appearance before a

judicial officer at which the defendant is told of the formal accusation against him or her, and restrictions are imposed on his or her liberty (e.g., formal charge, preliminary hearing, indictment, information, or arraignment). *Rothgery v Gillespie Co, Texas*, 554 US 191, 198 (2008). See also *Montejo v Louisiana*, 556 US 778, 797 (2009) (critical stage includes interrogation after a defendant has asserted his or her right to counsel at an arraignment or similar proceeding); *People v Perkins (Floyd)*, ___ Mich App ___, ___ (2016) (holding that where an investigating officer "knew that [the defendant] was in jail on an unrelated offense and was represented by counsel and nevertheless questioned [him] without his attorney[,]" the defendant's confession was properly admitted into evidence; "[b]ecause the Sixth Amendment right to counsel is offense specific and because adversarial judicial proceedings had not been initiated for the offenses [to which the defendant confessed], [his] right to counsel under the Sixth Amendment had not yet attached"); *People v Collins (Jesse)*, 298 Mich App 458, 470 (2012) (bond revocation hearing that has no effect on determination of defendant's guilt or innocence is not a critical stage in the proceeding; therefore, counsel's presence is not constitutionally required); *Duncan (Christopher) v State of Michigan*, 284 Mich App 246, 264 (2009) (critical stages include preliminary examination, pretrial lineup, entry of plea); *Bourne v Curtin*, 666 F 3d 411, 412-414 (CA 6, 2012) ("not all communications between a judge and jury are critical stages[,]" and the trial court's ex parte denial of the jury's request to review trial testimony did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings); *Peoples v Lafler*, 734 F3d 503, 518-519 (CA 6, 2013) (the habeas petitioner was not denied the right to counsel by the trial court's ex parte communication to the jury that a trial transcript was not available; "it was not objectively unreasonable for the state [appellate] court to conclude that communication regarding the transcript was 'administrative' and outside of the class of 'critical stage' jury instructions that subjects a defendant to prejudice if made without counsel[]"). The Sixth Amendment right to counsel attaches without regard to whether a public prosecutor is aware of the initial proceeding or is involved in its conduct. *Rothgery*, 554 US at 194-195.

A. Actual Imprisonment

No person may receive an actual or suspended sentence for any offense—petty, misdemeanor, or felony—unless he or she was represented by counsel at trial or knowingly and intelligently waived representation. *Alabama v Shelton*, 535 US 654, 657-659, 662 (2002) (an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel may not be given a probated or suspended sentence of imprisonment). An indigent defendant's right to counsel applies to the states through the Fourteenth Amendment. *Gideon v Wainwright*, 372 US 335, 340, 344-345 (1963).

No real distinction exists between "actual imprisonment" and probated or "threatened" imprisonment for purposes of an indigent defendant's right to counsel). *Shelton*, 535 US at 659.

B. Counsel of Choice

A criminal defendant has a constitutional right to retain an attorney of his or her choice. *People v Arquette*, 202 Mich App 227, 231 (1993). However, the constitutional right to counsel of choice is not absolute; it only applies to criminal defendants who retain counsel, not to indigent defendants for whom counsel is appointed. *United States v Gonzalez-Lopez*, 548 US 140, 144, 151 (2006).

Where a defendant is wrongly denied his or her Sixth Amendment right to counsel of choice, the constitutional violation is complete and the defendant's conviction must be reversed; the defendant need not show that he or she was denied a fair trial or that his or her actual counsel was ineffective. *Gonzalez-Lopez*, 548 US at 148; *People v Aceval*, 282 Mich App 379, 386 (2009). "However, this right to choice of counsel is limited and may not extend to a defendant under certain circumstances." *Aceval*, 282 Mich App at 386, citing *Gonzalez-Lopez*, 548 US at 151; *Wheat v United States*, 486 US 153, 164 (1988). For example, a defendant may not insist on retaining counsel who is not a member of the bar, or counsel for whom representation of the defendant would constitute a conflict of interest. *Gonzalez-Lopez*, 548 US at 152. Nor may a defendant insist on retaining a specific attorney as a tactic to delay or postpone trial. *People v Akins*, 259 Mich App 545, 557-558 (2003). "'[A] balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated.'" *Aceval*, 282 Mich App at 387, quoting *People v Krysztopaniec*, 170 Mich App 588, 598 (1988).

C. Standard of Review

Violation of a defendant's Sixth Amendment right to counsel of choice is a structural error and is not subject to harmless error analysis. *Gonzalez-Lopez*, 548 US at 150.

Whether to permit the substitution of appointed counsel with retained counsel is reviewed for an abuse of discretion. *Akins*, 259 Mich App at 556; *Arquette*, 202 Mich App at 231. "[A] defendant must be afforded a reasonable time to select his [or her] own retained counsel." *Id.* at 231.

3.3 Multiple Representation of Defendants

MCR 6.005(F) distinguishes between appointed and retained counsel. Joint representation is allowed when counsel is retained, after inquiry by the court. Joint representation is not allowed when counsel is appointed.

"[T]he court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless: (1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests; (2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and (3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding." MCR 6.005(F). The distinction between court-appointed counsel and retained counsel in MCR 6.005(F) was upheld in *People v Portillo*, 241 Mich App 540, 542-543 (2000).

MRPC 1.7(b) provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

MCR 6.005(G) requires the attorney to inform the court if an unanticipated conflict of interest arises.

To show a violation of the Sixth Amendment right to the effective assistance of counsel based on joint representation, a defendant who did not preserve the issue by objection at trial "must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v Sullivan*, 446 US 335, 350 (1980). The mere possibility of a conflict of interest does not constitute ineffective assistance of counsel. *Id.* at 350.

3.4 Indigence—Waiver of Fees and Court-Appointed Counsel

A. Waiver of Fees

MCR 2.002 authorizes a trial court to waive or relieve an indigent person of his or her obligation to pay fees and costs and assures that

a complainant will not be denied access to the courts on the basis of indigence. *Lewis (Man) v Dep't of Corrections*, 232 Mich App 575, 579 (1998). For example, "it is . . . axiomatic that an indigent defendant is entitled to a transcript at public expense." *Arquette*, 202 Mich App at 230. MCR 2.002(D) places the initial burden of establishing indigence on the individual requesting a waiver of fees and costs.

Indigence must be determined on a case-by-case basis by considering the defendant's financial ability, not that of his or her friends or relatives. *Arquette*, 202 Mich App at 230.

Fee waiver issues frequently arise in the context of litigation initiated by prisoners. MCL 600.2963 addresses claims of indigency in connection with prisoners' civil actions. MCL 600.2963(1) requires the prisoner to include a certified copy of his or her institutional account showing the current balance and a 12-month history of deposits and withdrawals. See also MCL 791.268, requiring withdrawal from prisoner accounts if installment payments are ordered under MCL 600.2963. MCL 600.2963(8) provides that "[a] prisoner who has failed to pay outstanding fees and costs as required under this section shall not commence a new civil action or appeal until the outstanding fees and costs have been paid."

"Ordinarily, MCL 600.2963 would preclude [a prisoner] from seeking leave to appeal . . . because of a failure to provide the initial partial [filing] fee, as ordered. However, applying that statutory section to bar review of [a prisoner's] original complaint for habeas corpus . . . would violate the Equal Protection Clause of the Fourteenth Amendment." *Mott v Kinross Correctional Facility Warden*, unpublished order of the Michigan Supreme Court, entered December 12, 2013 (Docket No. 147956), citing *Smith v Bennett*, 365 US 708 (1961). See also *Ward v Carson City Correctional Facility*, unpublished order of the Michigan Supreme Court, entered October 2, 2013 (Docket No. 147785), citing *Smith*, 365 US 708, and holding that although "MCL 600.2963(8) would [ordinarily] preclude [a prisoner] from seeking leave to appeal . . . [if he or she has any] outstanding fees he [or she] owes in other civil case filings[,]" application of MCL 600.2963(8) "to bar review of [a prisoner's] original complaint for habeas corpus . . . . would violate the Equal Protection Clause").

B. Right to Appointed Counsel Under the Michigan Indigent Defense Commission Act

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq.*,[1] created the Michigan Indigent Defense Commission (MIDC) within the judicial branch and established a new system for the appointment of defense counsel for indigent defendants. Under

the MIDCA, the MIDC is required to "[d]evelop[] and oversee[] the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services[2] providing effective assistance of counsel are consistently delivered to all indigent adults[3] in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and [the MIDCA]." MCL 780.989(1)(a).

Following a public hearing, "[a] minimum standard proposed [by the MIDC] shall be submitted to the [Michigan Supreme Court][]" for approval. MCL 780.985(3). "A proposed minimum standard shall be final when it is approved by the [Michigan Supreme Court]." *Id*. "If the [Michigan Supreme Court] neither approves nor disapproves a proposed minimum standard within 180 days of its submission, then the standard is not approved." *Id*.

"No later than 180 days after a standard is approved by the [Michigan Supreme Court], each indigent criminal defense system[4] shall submit a plan to the MIDC for the provision of indigent criminal defense services in a manner as determined by the MIDC and shall submit an annual plan for the following state fiscal year on or before February 1 of each year." MCL 780.993(3). The plan must "include a cost analysis." *Id*. The MIDC must approve or disapprove a system's plan and/or cost analysis within 60 days. MCL 780.993(4).[5]

Within 180 days after receiving grant funding from the MIDC,[6] "an indigent criminal defense system shall comply with the terms of the grant in bringing its system into compliance with the minimum standards established by the MIDC for effective assistance of counsel." MCL 780.993(10); see also MCL 780.997.

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[1] 2013 PA 93, effective July 1, 2013.

[2] "'Indigent criminal defense services' means local legal defense services provided to a defendant and to which both of the following conditions apply:

(*i*) The defendant is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge.

(*ii*) The defendant is determined to be indigent under [MCL 780.991(3)]." MCL 780.983(d). See Section 3.4(B)(2) for discussion of determining indigency.

[3] The MIDCA applies to "individual[s] 17 years of age or older[]" and to juveniles who are charged with felony offenses in traditional waiver, designated, and automatic waiver proceedings. MCL 780.983(a) (defining "'[a]dult'" for purposes of the MIDCA). See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 17, for discussion of the MIDCA as it applies to these juveniles.

[4] An "'[i]ndigent criminal defense system'" is "[t]he local unit of government that funds a trial court combined with each and every trial court funded by the local unit of government." MCL 780.983(f)(*i*). Alternatively, "[i]f a trial court is funded by more than 1 local unit of government," an "'[i]ndigent criminal defense system'" is "those local units of government, collectively, combined with each and every trial court funded by those local units of government." MCL 780.983(f)(*ii*).

Effective June 1, 2016, the Michigan Supreme Court conditionally approved[7] proposed standards submitted by the MIDC to "regulate the manner in which counsel [should] be appointed to represent indigent defendants in criminal cases, and [to] further impose specific training, experience and continuing legal education requirements on attorneys who seek appointment as counsel[.]" Administrative Order No. 2016-2, ___ Mich ___, ___ (2016). Among other things, these standards require defense counsel to "conduct a client interview as soon as practicable after appointment[,]" generally within three business days, and provide for an indigent defendant's right to counsel at every court appearance. *Id*. at ___.

The standards, rules, and procedures established by the MIDC must address the following MIDCA requirements.

1. Advice of the Right to Counsel

The trial court must "assure that each criminal defendant is advised of his or her right to counsel." MCL 780.991(1)(c). See also MCR 6.005(A), which provides:

> "At the arraignment on the warrant or complaint, the court must advise the defendant
>
> > (1) of entitlement to a lawyer's assistance at all subsequent court proceedings, and
> >
> > (2) that the court will appoint a lawyer at public expense if the defendant wants one and is financially unable to retain one."[8]

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[5] See MCL 780.993 for additional requirements for the submission and approval of plans for the provision of indigent criminal defense services. See MCL 780.983(g) and MCL 780.993(6)-(12) for requirements concerning the funding of indigent criminal defense systems. See MCL 780.995 for requirements concerning the resolution of a dispute between the MIDC and an indigent criminal defense system, including the requirement that the parties engage in mediation.

[6] "An indigent criminal defense system shall not be required to provide funds in excess of its local share[as defined by MCL 780.983(g)]." MCL 780.993(7). "The MIDC shall provide grants to indigent criminal defense systems to assist in bringing the systems into compliance with minimum standards established by the MIDC." *Id*. See MCL 780.993(6)-(12) for additional requirements concerning the funding of indigent criminal defense systems.

[7] The Court noted that several provisions of the MIDCA appear to present separation of powers issues and impinge upon the Court's authority to supervise the judicial branch; accordingly, the Court's conditional "approval is subject to and contingent on legislative revision of the [MIDCA] to address provisions that the Court deems to be of uncertain constitutionality." Administrative Order No. 2016-2, ___ Mich ___, ___ (2016). If legislative revisions to address these concerns are not implemented, the conditional approval "will be automatically withdrawn on December 31, 2016." *Id*.

[8] MCR 6.005(A) has not yet been amended following the enactment of the MIDCA.

2. Screening for Eligibility for Appointed Counsel

MCL 780.991(1)(c) provides, in relevant part:

> "All adults,[9] except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under [the MIDCA], and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services."

a. Preliminary Inquiry

MCL 780.991(3)(a) provides, in relevant part:

> "A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. The determination may be reviewed by the court at any other stage of the proceedings."

See also MCR 6.005(A), requiring the court, at arraignment, to "question the defendant to determine whether [he or she] wants a lawyer and, if so, whether [he or she] is financially unable to retain one."[10]

"The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge." Administrative Order No. 2016-2, ___ Mich at ___.

b. Relevant Factors in Determining Eligibility for Appointment of Counsel

MCL 780.991(3)(a) provides, in relevant part:

> "In determining whether a defendant is entitled to the appointment of counsel, the court shall consider whether the defendant is

[9] The MIDCA applies to "individual[s] 17 years of age or older[]" and to juveniles who are charged with felony offenses in traditional waiver, designated, and automatic waiver proceedings. MCL 780.983(a) (defining "'[a]dult'" for purposes of the MIDCA). See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 17, for discussion of the MIDCA as it applies to these juveniles.

[10] MCR 6.005(A) has not yet been amended following the enactment of the MIDCA.

indigent and the extent of his or her ability to pay."

MCL 780.991(3)(b) provides that "[a] defendant is considered to be indigent if he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation on his or her own." See also MCL 780.983(c).

In determining eligibility for appointed counsel under the MIDCA, "[t]he court may consider such factors as":

- "income or funds from employment or any other source, including personal public assistance, to which the defendant is entitled[;]"
- "property owned by the defendant or in which he or she has an economic interest[;]"
- "outstanding obligations[;]"
- "the number and ages of the defendant's dependents[;]"
- "employment and job training history[;]" and
- "[the defendant's] level of education." MCL 780.991(3)(a).[11]

See also MCR 6.005(B), providing that a defendant's "ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer."[12]

c. Rebuttable Presumption of Substantial Financial Hardship

Substantial financial hardship is rebuttably presumed if the defendant:

- "receives personal public assistance, including under the food assistance program, temporary assistance for needy families, medicaid, or disability insurance[;]"
- "resides in public housing[;]"

[11] See also MCR 6.005(B)(1)-(5), setting out similar factors relevant to determining indigency. The continuing relevancy of MCR 6.005(B) following the enactment of the MIDCA is uncertain.

[12] The continuing relevancy of MCR 6.005(B) following the enactment of the MIDCA is uncertain.

- "earns an income less than 140% of the federal poverty guideline[;]"
- "is currently serving a sentence in a correctional institution[;]" or
- "is receiving residential treatment in a mental health or substance abuse facility." MCL 780.991(3)(b).

If the defendant does not "fall[] below [these] presumptive thresholds[,]" he or she "shall be subjected to a more rigorous screening process to determine if his or her particular circumstances[] . . . would result in a substantial hardship if he or she were required to retain private counsel." MCL 780.991(3)(c). Relevant "particular circumstances[]" include:

- "the seriousness of the charges being faced[;]"
- "[the defendant's] monthly expenses[;]" and
- "local private counsel rates[.]" *Id*.

d. Burden of Proof

MCL 780.991(3)(d) provides:

> "A defendant shall be responsible for applying for indigent defense counsel[13] and for establishing his or her indigency and eligibility for appointed counsel under [the MIDCA]. Any oral or written statements made by the defendant in or for use in the criminal proceeding and material to the issue of his or her indigency shall be made under oath or an equivalent affirmation."

3. Appointment of Counsel

Counsel must be assigned "as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c). See also MCR 6.005(D) (requiring the court to "promptly appoint a lawyer and promptly notify the lawyer of the appointment[]" following a determination of indigency).[14]

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[13] Note, however, that MCL 780.991(1)(c) requires the screening of "*[a]ll* adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, . . . for eligibility under [the MIDCA]" (emphasis supplied).

"The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge." Administrative Order No. 2016-2, ___ Mich at ___.

4. Right to Counsel at Every Court Appearance

The MIDC's minimum standards, rules, and procedures must generally ensure that "[t]he same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case." MCL 780.991(2)(d).

"Representation includes but is not limited to the arraignment on the complaint and warrant." Administrative Order No. 2016-2, ___ Mich at ___. "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court." *Id.* at ___. However, the defendant is not prohibited "from making an informed waiver of counsel." *Id.* at ___.

5. Bond and Right to Counsel

"Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment." Administrative Order No. 2016-2, ___ Mich at ___.

6. Review of Determination of Eligibility

The trial court's preliminary determination of indigency "may be reviewed by the court at any other stage of the proceedings." MCL 780.991(3)(a).

7. Effective Assistance of Counsel

"The MIDC shall implement minimum standards, rules, and procedures to guarantee the right of indigent defendants to the [effective] assistance of counsel as provided under" the state and federal constitutions. MCL 780.991(2). In establishing these

[14] MCR 6.005(D) has not yet been amended following the enactment of the MIDCA.

standards, rules, and procedures, the MIDC must "adhere to the following principles[]" concerning defense counsel:

> "(a) Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.
>
> (b) Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.
>
> (c) Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.
>
> (d) The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.
>
> (e) Defense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients.
>
> (f) Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards." MCL 780.991(2).

a. No Expansion of Federal or State Constitutional Law

MCL 780.1003(1) provides:

> "Nothing in [the MIDCA] shall be construed to overrule, expand, or extend, either directly or by analogy, any decisions reached by the United States supreme court or the supreme court of this state regarding the effective assistance of counsel."

b. Prohibition of Civil Remedy

MCL 780.1003(3)-(4) provide:

> "(3) Except as otherwise provided in [the MIDCA], the failure of an indigent criminal defense system[15] to comply with statutory duties imposed under [the MIDCA] does not create a cause of action against the government or a system.
>
> (4) Statutory duties imposed that create a higher standard than that imposed by the United States constitution or the state constitution of 1963 do not create a cause of action against a local unit of government, an indigent criminal defense system, or this state."

c. Prohibition of Remedy in Criminal Cases

MCL 780.1003(5) provides:

> "Violations of MIDC rules that do not constitute ineffective assistance of counsel under the United States constitution or the state constitution of 1963 do not constitute grounds for a conviction to be reversed or a judgment to be modified for ineffective assistance of counsel."

C. Contribution of Costs and Reinstatement of Fees

At the end of litigation, the court may order a person to pay the costs and fees that were waived when the reason for the waiver or suspension no longer exists. MCR 2.002(G).

When the trial court noted that it suspended filing fees to ensure timely review of the prisoner petitioner's complaint, the trial court did not abuse its discretion in reinstating the petitioner's obligations to pay the fees following review of the petitioner's complaint because the reason for suspension no longer existed. *Langworthy v Dep't of Corrections*, 192 Mich App 443, 445-446 (1992).

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[15] An "'[i]ndigent criminal defense system'" is "[t]he local unit of government that funds a trial court combined with each and every trial court funded by the local unit of government." MCL 780.983(f)(*i*). Alternatively, "[i]f a trial court is funded by more than 1 local unit of government," an "'[i]ndigent criminal defense system'" is "those local units of government, collectively, combined with each and every trial court funded by those local units of government." MCL 780.983(f)(*ii*).

"If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution." MCR 6.005(C).[16] For information on establishing a payment plan, see the State Court Administrative Office's *Trial Court Collections Best Practices Manual*.

Under MCL 768.34,[17] a defendant may not be ordered to repay the cost of appointed counsel if the prosecution enters an order of nolle prosequi. *People v Jose*, ___ Mich App ___, ___ (2016). "MCL 768.34 precludes a trial court from ordering reimbursement of any costs—including the cost of appointed counsel—for a defendant whose prosecution is suspended or abandoned." *Jose*, ___ Mich App at ___ (additionally holding that MCR 6.005(C) did not provide authority for the trial court to order reimbursement for the work appointed counsel performed before trial where "[t]he court never determined that [the] defendant was 'able to pay part of the cost of a lawyer' and never 'require[d] contribution[]'" under MCR 6.005(C)) (third alteration in original).

D. Standard of Review

A trial court's determination of a defendant's indigence is reviewed for an abuse of discretion. *People v Gillespie*, 42 Mich App 679, 681-682 (1972).

3.5 Substitution or Withdrawal of Counsel

While an indigent defendant is entitled to have counsel appointed at public expense, he or she is not entitled to choose the lawyer. *People v Ginther*, 390 Mich 436, 441 (1973). An indigent defendant may be entitled to have his or her assigned lawyer replaced on a showing of adequate cause. *Id.* at 441. An indigent defendant who seeks substitution of assigned counsel must show good cause for substitution. *Id.*; *People v Buie (On Remand) (Buie IV)*, 298 Mich App 50, 67 (2012).

A defendant is not entitled to replace his or her assigned counsel whenever he or she is dissatisfied with the attorney for some reason. *People v Bradley*, 54 Mich App 89, 95 (1974). If there is good cause to discharge a defendant's first appointed attorney and to do so would not disrupt the judicial process, substitution of counsel may be proper. *Buie*

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[16] The continuing relevancy of MCR 6.005 following the enactment of the MIDCA is uncertain.

[17] MCL 768.34 provides:

> "No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment has been found against him[or her], or for want of prosecution, shall be liable for any costs or fees of office or for any charge for subsistence while he [or she] was in custody."

IV, 298 Mich App at 67; *Bradley*, 54 Mich App at 95. A defendant has no right to continuously threaten and then replace a court-appointed attorney. *People v Harlan*, 129 Mich App 769, 778 (1983).

A defendant does not have an absolute right to be represented at sentencing by the same attorney who represented him or her at trial. *People v Davis (Keith)*, 277 Mich App 676, 679-680 (2008), vacated in part on other grounds, lv den in part 482 Mich 978 (2008). However, see MCL 780.991(2)(d), requiring representation by "[t]he same [appointed] defense counsel . . . at every court appearance throughout the pendency of the case[,]" with the permissible exception of "ministerial, nonsubstantive tasks[] and hearings[.]"[18]

A defendant's Sixth Amendment right to counsel was not violated when a trial court denied the defendant's timely request to admit *pro hac vice* an attorney licensed out-of-state to assist the defendant's local attorney at trial. *People v Fett*, 469 Mich 913 (2003).

An attorney may only withdraw as counsel upon order of the court. MCR 2.117(C)(2). MRPC 1.16 outlines situations when an attorney *must* or *may* move to withdraw as counsel. However, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." MRPC 1.16(c).

A. Good Cause

What constitutes good cause for substitution of counsel depends on the facts and circumstances of each case. *Buie IV*, 298 Mich App at 67; *People v Hernandez (Louis)*, 84 Mich App 1, 7 (1978). Lack of preparation and failure to call or investigate witnesses do not generally constitute good cause without a showing of prejudice. *Id.* at 7-8 n 1. A valid and reasonable disagreement between counsel and the defendant regarding a fundamental trial tactic (such as whether to call alibi witnesses) satisfies the good cause requirement. *People v Jones (Edward)*, 168 Mich App 191, 194 (1988), citing *People v Williams (Charles)*, 386 Mich 565, 578 (1972). The fact that a defendant filed a grievance against his or her counsel or expressed a lack of confidence in his or her counsel does not establish the good cause necessary to warrant substitution of counsel. *People v Strickland*, 293 Mich App 393, 397-399 (2011); *People v Traylor*, 245 Mich App 460, 463 (2001); see also *Buie IV*, 298 Mich at 69 (although the defendant and counsel "did not have a completely amicable relationship[,]" the trial court did not abuse its discretion "when it did not either appoint substitute counsel or hold an evidentiary

[18] See Section 3.4(B) for additional discussion of MCL 780.991 and other provisions of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*.

hearing when [the] defendant sought substitute counsel[,]" because "'the record [did] not show that [the defendant's attorney] was in fact inattentive to [her] responsibilities,' inadequate, or disinterested[]").

B. Procedure

A trial court is obligated to take testimony and make findings of fact when a factual dispute exists with regard to a defendant's assertion that his or her assigned attorney "is not adequate or diligent or . . . is disinterested[.]" *Ginther*, 390 Mich at 441-442. A full adversarial proceeding is not required, and in some circumstances, questioning the attorney alone may be sufficient. *People v Ceteways*, 156 Mich App 108, 119 (1986). In fact, "*Ginther*[, 390 Mich at 442,] explicitly says that failure to explore defendant's claim does not always require that the conviction be set aside." *Ceteways*, 156 Mich App at 119.

C. Standard of Review

The trial court's decision on a request for substitution of counsel is reviewed for an abuse of discretion. *Traylor*, 245 Mich App at 462.

The trial court's decision on a motion for a continuance to retain new counsel is reviewed for an abuse of discretion. *Akins*, 259 Mich App at 556.

3.6 Removal of Counsel

"A court may remove a defendant's attorney on the basis of gross incompetence, physical incapacity, or contumacious conduct." *People v Durfee*, 215 Mich App 677, 681 (1996) (court had no authority to remove the defendant's court-appointed counsel for "conduct allegedly committed in other cases or outside the courtroom").

3.7 Withdrawal of Assigned Appellate Counsel

"A court-appointed appellate attorney for an indigent appellant may file a motion to withdraw [in the Court of Appeals] if the attorney determines, after a conscientious and thorough review of the trial court record, that the appeal is wholly frivolous." MCR 7.211(C)(5); *Anders v California*, 386 US 738, 744-745 (1967). **Note:** MCR 7.211(C)(5) and *Anders* are only applicable to appeals as of right, not to appeals by leave. *In re Withdrawal of Attorney*, 231 Mich App 504, 505 (1998). "Where counsel has been appointed to assist a defendant [in an appeal by leave, such as where he or she is] convicted by a plea of guilty or nolo contendere, a

motion to withdraw is properly addressed to the appointing authority, the trial court." *Id*. at 507.

Part B: Waiver of Counsel

3.8 Right of Self-Representation

A defendant has a constitutional right of self-representation. US Const, Am VI; *Faretta v California*, 422 US 806, 807 (1975). The defendant's right to self-representation is explicitly guaranteed by the Michigan Constitution and by statutory law. Const 1963, art 1, § 13; MCL 763.1. However, the right to proceed to trial without counsel is not absolute. *People v Dennany*, 445 Mich 412, 427 (1994). If a defendant wishes to proceed to trial without the assistance of an attorney, the court is required to safeguard the defendant's waiver by communicating some specific information to the defendant.

> "First, the court may not permit the defendant to waive the right to be represented by a lawyer without advising the defendant of (a) the charge, (b) the maximum possible prison sentence for the offense, (c) any mandatory minimum sentence required by law, and (d) the risk involved in self-representation.[19]
>
> Second, a defendant who wishes to proceed pro se must be offered the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.[20]
>
> Third, even though a defendant has waived the assistance of a lawyer, the waiver must be reaffirmed at each subsequent proceeding.
>
> In addition, pursuant to [*People v*] *Anderson* [*(Donny)*, [398 Mich 361 (1976),] the court must, upon a defendant's initial request to proceed pro se, determine three things: (1) that the request is unequivocal; (2) that the right has been asserted knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the disadvantages of self-representation; and (3) that self-representation will not

[19] See MCR 6.005(D)(2).

[20] See MCR 6.005(D)(1).

> disrupt, unduly inconvenience, or burden the court." *Dennany*, 445 Mich at 438-439.

A defendant's refusal to cooperate with his or her appointed counsel and his or her unequivocal request to be provided with a different defense attorney at trial does not constitute a waiver of counsel or operate as the defendant's request to proceed in *propria persona* (in pro per or pro se) where the record shows that "[the] defendant clearly and unequivocally declined self-representation." *People v Russell (Lord)*, 471 Mich 182, 184 (2004).

In *Russell (Lord)*, the defendant informed the trial court at the beginning of trial that he wanted the trial court to appoint a substitute for the defendant's *second* court-appointed attorney. *Russell (Lord)*, 471 Mich at 184. The court refused to appoint different counsel unless the defendant offered "some valid reason" other than "personality difficulties" to justify the appointment of a third defense attorney. *Id.* at 184. The defendant failed to provide any such explanation, and the court explained to the defendant his options: (1) the defendant could retain the counsel of his choice; (2) the defendant could continue with the present attorney's representation; (3) the defendant could represent himself without any legal assistance; or (4) the defendant could represent himself with the assistance of his present attorney. *Id.* at 184-185. The defendant continued to express his dissatisfaction with his present attorney's defense at the same time that he clearly indicated that he did not wish to conduct his own defense, that he "need[ed]" to be provided with "competent counsel." *Id.* at 185-186.

The *Russell* (*Lord)* Court reaffirmed the "requirements regarding the judicial inquest necessary to effectuate a valid waiver and permit a defendant to represent himself" as set out in *Faretta*, 422 US 806, and first adopted by the Michigan Supreme Court in *Anderson (Donny)*, 398 Mich 361. *Russell (Lord)*, 471 Mich at 190. Applying those requirements to the facts in *Russell (Lord)*, the Court concluded:

> "In this case, a review of the record indicates two key facts: first, that defendant expressly rejected self-representation and, second, that defendant never voluntarily waived his Sixth Amendment right to the assistance of counsel at trial. Indeed, defendant clearly sought appointment of *another* trial counsel, and defendant and the trial court engaged in a lengthy dialogue over defendant's desire to have substitute counsel appointed.
>
> While defendant was given clear choices, defendant consistently denied that *his* choice was self-representation. Throughout his colloquy with the trial court, defendant steadfastly rejected the option of proceeding to trial without

> the assistance of counsel. Therefore, it cannot be said, as the Court of Appeals and dissenting opinions maintain, that defendant *unequivocally* chose self-representation and voluntarily waived his Sixth Amendment right to counsel.
>
> We believe that defendant's repudiation of self-representation was unmistakable in this case. However, to the degree that defendant's refusal to explicitly choose between continued representation by appointed counsel and self-representation created any ambiguity regarding plaintiff's desire to unequivocally waive his right to trial counsel, any ambiguity should have been resolved in favor of representation because, consistently with [*People v*] *Adkins* [*(Kenneth Ray)*, 452 Mich 702 (1996),] and United States Supreme Court precedent, courts *must* indulge every reasonable presumption against the waiver of the right to counsel." *Russell (Lord)*, 471 Mich at 192-193.

See also *People v Kammeraad*, 307 Mich App 98, 100, 130 (2014) (holding that, "[d]espite[] . . . the [defendant's] ineffective *waiver* of counsel," he had "forfeited his constitutional rights to counsel, self-representation, and to be present in the courtroom during his trial, given the severity of his misconduct and his absolute refusal to participate in any manner in the proceedings[]").[21]

A criminal defendant may be found competent to stand trial but not competent to act as his or her own counsel at trial. *Indiana v Edwards*, 554 US 164, 174 (2008). According to the United States Supreme Court, when a trial judge, after finding a defendant competent to stand trial, concludes that the defendant "still suffer[s] from severe mental illness to the point where [he or she is] not competent to conduct trial proceedings by [him- or herself]," the trial judge may limit the defendant's Sixth Amendment right to self-representation by appointing counsel to represent the defendant at trial. *Id.* at 178.

Even where the defendant "appeared to condition his initial waiver of counsel on the trial court's agreement to allow him to recall and cross-examine two excused witnesses," the defendant "subsequently made an intelligent, knowing, and voluntary waiver of this right to counsel after the trial court rejected [the] defendant's request to recall and cross-examine the witnesses." *People v Williams (Rodney)*, 470 Mich 634, 647 (2004).

During the trial in *Williams (Rodney)*, 470 Mich at 637, the defendant expressed his desire to represent himself and asked to be permitted to question two witnesses who had already been excused. After the trial

[21] See Part C for discussion of forfeiture of counsel.

court clearly advised the defendant that the witnesses would not be recalled and he would not have the opportunity to question them, the defendant stated that he still wished to proceed with self-representation. *Id*. at 637-638. The defendant then asserted that the witnesses' testimony at his preliminary examination would rebut the unfavorable testimony given by the witnesses at trial and asked to have their preliminary examination testimony read at trial. *Id*. at 638. The court denied this request and the defendant's subsequent request to be allowed time to review the preliminary examination transcript himself. *Id*. at 638-639. Despite the trial court's denial of all his requests, the defendant again expressed an unequivocal desire to represent himself and waive counsel. *Id*. at 639. According to the Court, the "[d]efendant's unrealistic 'hopes of introducing evidence' in contravention of the court's explicit ruling do not render invalid defendant's unequivocal invocation of his right to self-representation." *Id*. at 644.

"'[A] defendant may forfeit his [or her] self-representation right if he [or she] does not assert it "in a timely manner."'" *People v Richards (Kyle)*, ___ Mich App ___, ___ (2016) (citations omitted). Although "'*Faretta*[, 422 US 806,] did not establish a bright-line rule for timeliness,'" the timeliness of a motion for self-representation "is established, at least in part, by the date of trial relative to the date of the request." *Richards (Kyle)*, ___ Mich App at ___ (citations omitted). Accordingly, "the trial court's decision denying [the] defendant's request [for] self-representation [as untimely] was well within the range of reasonable and principled outcomes and was not an abuse of discretion[]" where "[i]t was not until after the jury had been sworn that [the] defendant, through counsel, made the request to proceed in proper personia [sic]." *Id*. at ___ (noting that "[the] defendant never made a [pretrial] request for self-representation[]" and that he filed multiple motions for new counsel) (citations omitted). Additionally, case law does not require "that a trial court *must* conduct a *Faretta* inquiry prior to denying a request as untimely[;]" nor must the court "engage[] in the findings set forth in MCR 6.005(D)[]" regarding waiver of counsel.[22] *Richards (Kyle)*, ___ Mich App at ___ (citations omitted). "[B]ecause the underlying rationale for a trial court to conduct an inquiry pursuant to MCR 6.005(D) 'is to inform the defendant of the hazards of self-representation, not to determine whether a request is timely[,]'" it is "unnecessary for the trial court to engage in an inquiry pursuant to MCR 6.005(D)[]" when the dispositive issue is "whether [the] defendant asserted his [or her] right to self-representation in a timely manner." *Richards*, ___ Mich App at ___ (citations omitted).

Where the defendant never expressly stated that he wished to represent himself, the trial court denied the defendant's request for substitute counsel or the opportunity to retain counsel, the defendant represented

[22] See Section 3.9 for discussion of MCR 6.005(D).

himself with standby counsel at important pretrial hearings and during jury voir dire, and the defendant did not expressly waive his right to counsel until immediately before trial, the defendant was effectively denied counsel at critical stages of the criminal proceedings against him, and his conviction was reversed. *People v Willing*, 267 Mich App 208, 220-229 (2005).

A defendant's waiver of counsel may be voluntary and unequivocal even when the defendant admitted "[he] would rather not represent [him]self" but decided to do so because pro se representation provided him with greater access to police reports and other information not otherwise available to him when he was represented by counsel. *Jones (Emmett) v Jamrog*, 414 F3d 585, 589, 592-594 (CA 6, 2005).

Even where the defendant "went from certainty when he stated that he 'could defend [him]self with the truth' to a probability that he 'could probably effectively handle [him]self' during trial . . . then finally concluded, at the close of the exchange with the trial court, '[w]ell, I don't know what to do,'" *People v Chaaban*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2005 (Docket No. 253513) at slip op p 3, the Michigan Supreme Court found that the defendant unequivocally requested to represent himself at trial, and that the trial court erroneously refused to permit the defendant to do so. *People v Chaaban*, 474 Mich 917 (2005) (case remanded for a new trial).

There is no *federal* constitutional right to self-representation on direct appeal from a criminal conviction. *Martinez v California*, 528 US 152, 163 (2000). The United States Supreme Court clearly stated, however, that nothing in its *Martinez* holding prevented any state from recognizing a right to self-representation in appellate proceedings under the state's constitution. *Id.* at 163.

"The trial court did not unconstitutionally 'nullify' the defendant's right to self-representation by declining to remove the defendant's leg shackles[; t]hat the defendant elected to relinquish his right of self-representation rather than exercise that right while seated behind the defense table does not amount to a denial of the defendant's right of self-representation." *People v Arthur (Charles)*, 495 Mich 861, 862 (2013) (citation omitted). "While a defendant's right to self-representation encompasses certain specific core rights, including the right to be heard, to control the organization and content of his [or her] own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at times, the right to self-representation is not unfettered." *Id.* (citing *McKaskle v Wiggins*, 465 US 168, 174, 176-178 (1984), and holding that the trial court was "justified in imposing . . . . limited restraints" in light of the defendant's reported escape attempt and history of physical violence).

Under MRE 611(a), "'a trial court, in certain circumstances, may prohibit a defendant who is exercising his [or her] right to self-representation from personally questioning the victim.'" *People v Daniels (Daniel)*, 311 Mich App 257, 268 (2015) (citation omitted). "MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault[; t]he court must balance the criminal defendant's right to self-representation with 'the State's important interest in protecting child sexual abuse victims from further trauma.'" *Daniels (Daniel)*, 311 Mich App at 269 (citation omitted). "[T]he trial court wisely and properly prevented [the] defendant from personally cross-examining [his children regarding their testimony that he sexually abused them] to stop the children from suffering 'harassment or undue embarrassment[,]'" following "a motion hearing at which [the court] heard considerable evidence that [the] defendant's personal cross-examination would cause [the children] significant trauma and emotional stress." *Id*. at 270-271, quoting MRE 611(a) (additional citations omitted). The defendant's right to self-representation was not violated under these circumstances where the defendant was instructed "to formulate questions for his [children], which his advisory attorney then used to cross-examine them." *Daniels (Daniel)*, 311 Mich App at 270.

3.9 Procedures for Establishing Valid Waiver of Right to Counsel

A defendant who wishes to waive his or her right to counsel must do so knowingly, intelligently, and voluntarily. See *People v Brooks (Anthony)*, 293 Mich App 525, 537 (2011), vacated in part on other grounds 490 Mich 993 (2012).

Before a trial court may grant a defendant's request to proceed pro se, it must determine whether:

> (1) the defendant's request for self-representation was unequivocal;
>
> (2) the defendant's request was made knowingly, intelligently, and voluntarily; and
>
> (3) the court would be unduly burdened, inconvenienced, or disrupted if the defendant's request was granted. [*People v Anderson (Donny)*, 398 Mich 361, 367-368 (1976).]

The United States Supreme Court has held that there is no specific list of questions that must be used; rather, the inquiry should be tailored to the particular case and stage of the proceedings. *Iowa v Tovar*, 541 US 77, 88-92 (2004).

A defendant is not required to personally assert his or her constitutional right to self-representation for the request to be valid; the request may be made through counsel. *People v Hill (Thomas)*, 485 Mich 912 (2009).

A valid waiver of counsel requires substantial compliance with MCR 6.005(D).[23] *People v Adkins (Kenneth Ray)*, 452 Mich 702, 721 (1996), overruled in part on other grounds by *People v Williams (Rodney)*, 470 Mich 634, 641 n 7 (2004). To ensure that the defendant's choice is made knowingly and intelligently, the trial court must advise the defendant of the dangers and disadvantages of self-representation. MCR 6.005(D). MCR 6.005(D) requires the trial court to advise the defendant of the charges, the maximum penalty upon conviction, and the risks associated with self-representation. MCR 6.005(D)(1). The court rule also requires the trial court to provide the defendant with an opportunity to consult with counsel—appointed counsel, if the defendant is indigent. MCR 6.005(D)(2); *People v Hicks (Rodney)*, 259 Mich App 518, 523 (2003).

The trial court substantially complied with the requirements of MCR 6.005(D) and *Anderson (Donny)*, 398 Mich 361, where "[b]oth the prosecutor and the trial court asked [the defendant] a series of questions to ascertain whether he fully understood the dangers of self-representation[;]" "the trial court could properly consider the prosecutor's questions and [the defendant's] responses as part of its 'short colloquy' to determine whether [the defendant] fully understood the import of his waiver." *People v Campbell (Michael)*, ___ Mich App ___, ___ (2016), citing *Adkins (Kenneth Ray)*, 452 Mich at 726-727. Furthermore, although the trial court failed to specifically list the charges against the defendant and "never explicitly found that his waiver request was unequivocal, knowing, and voluntary[,]" these errors were harmless; "there [was] record support that [the defendant] was fully aware of the charges against him[]" and that the trial court "endeavored to make the requisite determinations and . . . actually found that [the] waiver was unequivocal, knowing, and voluntary." *Campbell (Michael)*, ___ Mich App at ___ (citations omitted).

"Compliance with MCR 6.005(D) and [MCR 6.005](E) goes *part of the way* toward establishing that a defendant has knowingly and voluntarily waived counsel." *Brooks (Anthony)*, 293 Mich App at 538 (emphasis added). In addition to substantially complying with the court rules, a court must also find that "(1) the defendant's waiver of counsel is unequivocal . . . ; (2) the defendant actually does understand the significance and consequences of self-representation . . . ; and (3) self-representation will not 'disrupt, unduly inconvenience, and burden the court and the administration of the court's business.'" *Id.* at 538. See also *People v Kammeraad*, 307 Mich App 98, 129-130 (2014) (although "the

[23] A form and script for a defendant's waiver of counsel is located in the Appendix.

circuit court attempted to obtain a formal waiver of counsel by [the] defendant, along with the attendant invocation of the right to self-representation, carefully imparting the information encompassed by MCR 6.005(D) and then directly querying [the] defendant with respect to whether he wished to represent himself[, the d]efendant[] . . . vigorously voiced a refusal to represent himself, and he refused to expressly acknowledge, let alone accept, the right-to-counsel and waiver-related information conveyed to him by the court[;]" therefore, because "[t]he circuit court was unable to make an express finding that [the] defendant fully understood, recognized, and agreed to abide by the waiver of counsel procedures[,]" there was no effective waiver of counsel) (citations omitted).[24]

A juvenile defendant may waive the assistance of counsel according to the requirements of MCR 6.905(C). These requirements mandate that the court appoint standby counsel to assist the juvenile at trial and sentencing. MCR 6.905(C)(5).

Standard of Review. A trial court's factual determination whether a waiver was knowing and intelligent is reviewed for clear error, while the meaning of "knowing and intelligent" is a question of law reviewed de novo on appeal. *Williams (Rodney)*, 470 Mich at 640.

3.10 Advice at Subsequent Proceedings

Once a defendant has waived the assistance of a lawyer, a record must be made at each subsequent proceeding to show that the court advised the defendant of the continuing right to a lawyer (at public expense if the defendant is indigent) and that the defendant has waived the right. MCR 6.005(E). At the beginning of any proceeding following the defendant's initial waiver of counsel, the record should reflect the defendant's continued waiver of counsel or the defendant's request for the assistance of counsel. *Id*. If the defendant requests an attorney and can afford to retain one, arrangements must be made to permit the defendant to do so. MCR 6.005(E)(3). If the defendant requests an attorney and is indigent, the court must appoint an attorney to represent the defendant. MCR 6.005(E)(2). If the prosecution would be significantly prejudiced by an adjournment and a defendant has not been reasonably diligent in seeking counsel, the court may refuse to grant an adjournment to appoint counsel or to permit the defendant to retain counsel. MCR 6.005(E).

"Unlike the rules relating to an initial waiver of counsel, the procedure outlined in MCR 6.005(E) does not stem from any constitutional requirement[,]" and "a trial court's failure to strictly comply with these

[24] The *Kammeraad* Court nevertheless concluded that the defendant had *forfeited* his right to counsel. *Kammeraad*, 307 Mich App at 136. See Part C for discussion of forfeiture of counsel.

requirements can be harmless error." *People v Campbell (Michael)*, ___ Mich App ___, ___ (2016) (citing *People v Lane (Raymond)*, 453 Mich 132, 139-142 (1996), and concluding that "[a]lthough the trial court did not explicitly remind" the defendant, at several hearings following his initial waiver and at trial, "that he had the continued right to the assistance of counsel, it [was] evident [from the record] that the court operated on that assumption and that [the defendant] was aware of that right and continued to assert his right to represent himself[]").

3.11 Standby Counsel

A plurality[25] of the Michigan Supreme Court has held that "a request to proceed pro se with standby counsel—be it to help with either procedural or trial issues—can never be deemed to be an unequivocal assertion of the defendant's rights." *Dennany*, 445 Mich at 446.

In contrast, the Court of Appeals has held that a defendant's request for standby counsel does not make that same defendant's request for self-representation invalid as a matter of law, and that a defendant's request for self-representation can be accompanied by a request for standby counsel without affecting the unequivocal nature of the defendant's request to proceed in *propria persona*. *Hicks (Rodney)*, 259 Mich App at 526-528. According to the *Hicks (Rodney)* Court, the trial court should evaluate the defendant's credibility to determine the vacillation or unequivocal nature of a defendant's request. *Id.* at 528-529.

The presence of standby counsel alone does not legitimize a waiver of counsel inquiry when the inquiry does not satisfy legal requirements. *Dennany*, 445 Mich at 448 n 26.

Part C: Forfeiture of Counsel

3.12 Doctrine of Forfeiture of Counsel

"While the right to counsel is constitutionally protected, this constitutional right can be relinquished by waiver *or* forfeiture." *People v Kammeraad*, 307 Mich App 98, 130 (2014) (formally "recogniz[ing], adopt[ing], and employ[ing] the principle or doctrine of forfeiture of counsel[]") (citations omitted).

[25] "Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on this Court under the doctrine of stare decisis." *Negri v Slotkin*, 397 Mich 105, 109 (1976).

In *Kammeraad*, 307 Mich App at 126, the defendant "indisputably and defiantly refused to participate in the trial and other judicial proceedings, indisputably and defiantly refused to accept the services of appointed counsel or to communicate with counsel, regardless of counsel's identity, indisputably and defiantly refused to engage in self-representation, indisputably and defiantly refused to promise not to be disruptive during trial, and indisputably and defiantly refused to remain in the courtroom for his jury trial." The trial court "attempted to obtain a formal waiver of counsel by [the] defendant, along with the attendant invocation of the right to self-representation, carefully imparting the information encompassed by MCR 6.005(D) and then directly querying [the] defendant with respect to whether he wished to represent himself[; the d]efendant, however, vigorously voiced a refusal to represent himself, and he refused to expressly acknowledge, let alone accept, the right-to-counsel and waiver-related information conveyed to him by the court." *Kammeraad*, 307 Mich App at 129. Accordingly, because the trial court "was unable to make an express finding that [the] defendant fully understood, recognized, and agreed to abide by the waiver of counsel procedures[,]" there was no effective waiver of counsel. *Id*. at 129-130 (citations omitted).

The *Kammeraad* Court held that, "[d]espite[] . . . the ineffective *waiver* of counsel," the defendant, "being competent, [had] forfeited his constitutional rights to counsel, self-representation, and to be present in the courtroom during his trial, given the severity of his misconduct and his absolute refusal to participate in any manner in the proceedings[,]" and "there was no constitutional obligation to impose a court-appointed attorney upon the unwilling defendant." *Kammeraad*, 307 Mich App at 127. The Court explained:

> "[The] defendant lost his right to counsel as a result of his conduct and statements.
>
> Honoring a defendant's wishes within reason with respect to declining counsel is a principle that was accepted in *Faretta v California*, [422 US 806, 817 (1975)], wherein the Supreme Court acknowledged the 'nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.' . . .
>
> * * *
>
> [The d]efendant had the free choice to refuse the services of appointed counsel, but, as opposed to the circumstances in *Faretta*, he also refused self-representation. Nevertheless, we conclude that [the] defendant had the free choice to refuse both appointed counsel and self-representation, forfeiting

these constitutional rights." *Kammeraad*, 307 Mich App at 134-135.

The Court emphasized, however, that "a finding of forfeiture of [counsel] . . . should only be made in the rarest of circumstances and as necessary to address exceptionally egregious conduct." *Kammeraad*, 307 Mich App at 136-137 (additionally noting that "[the] defendant was competent for purposes of finding forfeiture[]" and that *Indiana v Edwards*, 554 US 164, 177-178 (2008), "might suggest that if [the] defendant were not competent because of severe mental illness, forfeiture of the constitutional rights at issue cannot be recognized and imposing or forcing counsel upon [the] defendant . . . [might have been] constitutionally permissible or even necessary[]").

3.13 Forfeiture of Right to Counsel and Presumption of Prejudice

"[In *United States v Cronic*, 466 US 648, 659 (1984), the United States Supreme Court] identified certain 'rare situations in which the attorney's performance is so deficient that prejudice is presumed.'" *People v Kammeraad*, 307 Mich App 98, 125 (2014), quoting *People v Frazier (Corey)*, 478 Mich 231, 243 (2007). One such example is when "'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing[.]'" *Kammeraad*, 307 Mich App at 125, quoting *Cronic*, 466 US at 659.

However, even "assum[ing] that defense counsel failed entirely to subject the prosecution's case to any meaningful adversarial testing[,]" this assumption is "irrelevant[,]" and "*Cronic*[, 466 US at 659], "is not implicated[,]" where the defendant has forfeited his or her right to counsel. *Kammeraad*, 307 Mich App at 125-127, 136 (noting that "[b]y appointed counsel's assumed complete failure to subject the prosecution's case to meaningful adversarial testing, [the] defendant received exactly what he desired, and . . . [the] defendant [could not be rewarded] with a new trial on the basis of an alleged constitutional deficiency that was of [his] own making[]").

Chapter 4: Preliminary Examinations

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SPECIAL NOTE:

Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district or municipal court on or after January 1, 2015,[1] 2014 PA 123 and 2014 PA 124 amended several provisions in the Code of Criminal Procedure and the Revised Judicature Act related to preliminary examinations, probable cause conferences, and the jurisdiction and duties of district court judges and magistrates with respect to pretrial proceedings in felony cases. Effective January 1, 2015, ADM File No. 2014-42 amended MCR 6.104 (governing arraignment on the warrant or complaint), MCR 6.110 (governing preliminary examinations), and MCR 6.111 (governing circuit court arraignment in district court), and added MCR 6.108 (governing probable cause conferences), to correspond to these statutory changes.

This revised version of Chapter 4 incorporates 2014 PA 123 and 2014 PA 124 and the corresponding court rule amendments. The contents of this chapter are applicable to cases in which the defendant is arraigned in district or municipal court on or after January 1, 2015.

See the Appendix for a chart including information on the jurisdiction of district court judges and magistrates over preliminary matters in criminal proceedings.

[1] See 2014 PA 123, enacting section 1; 2014 PA 124, enacting section 2.

For a chart outlining the differences in procedures before and after January 1, 2015, as a result of statutory reforms concerning probable cause conferences, preliminary examinations, and felony pleas, see SCAO Memorandum, July 23, 2014. For additional information, see the SCAO's *Best Practices for Probable Cause Conferences and Preliminary Examinations*.

4.1 District Court Jurisdiction in Felony Pretrial Proceedings

A. Introduction

A district court has the same power to hear and determine matters within its jurisdiction as does a circuit court over matters within the circuit court's jurisdiction. MCL 600.8317.

Although the district court does not have trial jurisdiction over felony offenses, the district court has jurisdiction over certain pretrial proceedings in felony cases, including initial (district court) arraignments,[2] probable cause conferences,[3] and preliminary examinations. MCL 600.8311(c)-(e). Following a finding of probable cause at the preliminary examination, a district court judge "may conduct the circuit court arraignment as provided by court rule." MCL 766.13[4]; see also MCR 6.111; MCL 600.8311(f). Additionally, "[a] district judge has the authority to accept a felony plea[and s]hall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties." MCL 766.4(3);[5] see also MCR 6.111(A) ("[a] district court judge shall take a felony plea as provided by court rule if a plea agreement is reached between the parties[]").

MCL 600.8311 provides, in relevant part:

> "The district court has jurisdiction of all of the following:
>
> * * *
>
> (c) Arraignments, the fixing of bail and the accepting of bonds.
>
> (d) Probable cause conferences in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the probable cause conference under . . . MCL 766.4.[6]
>
> (e) Preliminary examinations in all felony cases and misdemeanor cases not cognizable by the

[2] See Chapter 6 for discussion of district court felony arraignments.

[3] See Section 4.4.

[4] See Chapter 6 for discussion of circuit court arraignments.

[5] See Chapter 6 for discussion of felony pleas.

[6] See Section 4.4 for discussion of probable cause conferences.

> district court and all matters allowed at the preliminary examination under . . . MCL 766.1[*et seq*]. There shall not be a preliminary examination for any misdemeanor to be tried in a district court.
>
> (f) Circuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under . . . MCL 766.13. Sentencing for felony cases and misdemeanor cases not cognizable by the district court shall be conducted by a circuit judge."

The Michigan Code of Criminal Procedure, MCL 760.1 *et seq.*, defines *felony* as a violation of Michigan's penal law for which a person, if convicted of the offense, may be punished by death or by imprisonment for more than one year or an offense specified by law to be a felony. MCL 761.1(g); see also MCL 750.7, defining *felony*, for purposes of the Michigan Penal Code, as "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison." The Code of Criminal Procedure defines *misdemeanor* as "a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(h); see also MCL 750.8 (Penal Code), defining *misdemeanor* as "any act or omission, not a felony, [that] is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court[.]" Generally, misdemeanors are offenses punishable by not more than one year of imprisonment or violations of a state agency's orders, rules, or regulations punishable by imprisonment or a fine other than a civil fine. MCL 761.1(h). Some misdemeanors are classified as *minor offenses*, violations for which the maximum permissible imprisonment does not exceed 92 days, and the maximum fine does not exceed $1,000.00. MCL 761.1(k).

See the Appendix for a table including information on the jurisdiction of district court judges and magistrates over preliminary matters in criminal proceedings.

B. Jurisdiction of District Court Following Bindover

The circuit court acquires jurisdiction over the case and the defendant upon the filing of the magistrate's return[7] binding the defendant over to circuit court following the preliminary examination or the defendant's waiver of preliminary examination.

[7] See MCL 767.40.

People v Goecke, 457 Mich 442, 458 (1998) (citations omitted). "And just as the filing of the magistrate's return confers jurisdiction on the circuit court, . . . it has the effect of *divesting* the district court of jurisdiction[.]" *People v Taylor (Robbie)*, ___ Mich App ___, ___ (2016), citing *People v McGee (Keangela)*, 258 Mich App 683, 695 (2003); *People v Sherrod*, 32 Mich App 183, 186 (1971) (emphasis added). "Having once vested in the circuit court, personal jurisdiction is not lost even when a void or improper information is filed." *Goecke*, 457 Mich at 458-459, citing *In re Elliott*, 315 Mich 662, 675 (1946).

"Once a criminal case has been bound over and jurisdiction has been vested in the circuit court, there are only limited circumstances in which the circuit court may properly remand the case for a new or continued preliminary examination." *Taylor (Robbie)*, ___ Mich App at ___ (citations omitted). See Section 4.35(A) for discussion of motions to quash following bindover.

C. Jurisdiction and Duties of District Court Magistrates in Pre-Bindover Proceedings

In the context of felony pretrial proceedings, a district court magistrate generally has the authority, subject to the chief district judge's approval, to issue arrest warrants and search warrants, conduct arraignments for a limited number of enumerated offenses, and conduct probable cause conferences. MCL 600.8511. "Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division." MCR 4.401(B).

In addition to setting out certain offenses for which a district court magistrate may be granted arraignment authority,[8] MCL 600.8511 provides, in relevant part:

> "A district court magistrate has the following jurisdiction and duties:
>
> * * *
>
> (e) To issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney[.] . . .
>
> (f) To fix bail and accept bond in all cases.
>
> (g) To issue search warrants, if authorized to do so by a district court judge.

[8] See MCL 600.8511(b)-(c). See Chapter 6 for discussion of district court felony arraignments.

> (h) To conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge."

See also MCL 766.1, which provides, in relevant part:

> "A district court magistrate . . . shall not preside at a preliminary examination or accept a plea of guilty or nolo contendere to an offense or impose a sentence except as otherwise authorized by . . . [MCL 600.8511(a)-(c)]."

Accordingly, a district court magistrate, if authorized by the chief judge, may conduct probable cause conferences; however, a district court judge must conduct all preliminary examinations. See MCL 766.1; MCL 600.8511.[9]

"A district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006." MCR 4.401(E).

4.2 Scheduling the Probable Cause Conference and Preliminary Examination

Unless waived by agreement of the parties, at a felony arraignment, the court must schedule a probable cause conference. MCL 766.4(1); MCL 766.4(2); see also MCR 6.104(E)(4); MCR 6.108(A). Additionally, defendants charged with a felony offense or a misdemeanor offense punishable by more than one year of imprisonment are statutorily entitled to a prompt, fair, and impartial preliminary examination, MCL 766.1, which, unless waived by the defendant with the consent of the prosecuting attorney, must also be scheduled at arraignment, MCL 766.4(1); MCL 766.7.

MCL 766.4(1) provides, in relevant part:

> "Except as provided in . . . MCL 712A.4,[10] the [judge] before whom any person is arraigned on a charge of having

[9] However, "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination and acceptance of any written demand or waiver of jury trial." MCL 600.8513(1).

[10] MCL 712A.4 governs traditional waiver of Family Division jurisdiction over a juvenile between the ages of 14 and 17 who is accused of an act that if committed by an adult would be a felony. For discussion of traditional waiver proceedings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 14.

> committed a felony shall set a date for a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, and a date for a preliminary examination of not less than 5 days or more than 7 days after the date of the probable cause conference. The dates for the probable cause conference and preliminary examination shall be set at the time of arraignment."

However, "[t]he parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference." MCL 766.4(4). Additionally, "[u]pon the request of the prosecuting attorney, . . . the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present." *Id.*; see also MCR 6.110(B)(2) (adding that "the defendant [must either be] present in the courtroom or [have] waived the right to be present[]").[11]

MCR 1.108(1) governs the method of computing the relevant time periods under MCL 766.4:

> "The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order."

4.3 Joint Probable Cause Conference and/or Preliminary Examination for Codefendants

MCL 766.4(5) provides:

> "If 1 or more defendants have been charged on complaints listing codefendants with a felony or felonies, the probable cause conference and preliminary examination for those defendants who have been arrested and arraigned at least 72 hours before that conference on those charges shall be consolidated, and only 1 joint conference or 1 joint preliminary examination shall be held unless the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the [judge] finds severance to be required by

[11] See Section 4.12(A) for discussion of the immediate commencement of the preliminary examination for purposes of taking a victim's testimony.

law, or 1 of the defendants is unavailable and does not appear at the hearing."

See also MCR 6.108(E); MCR 6.110(A).

4.4 Probable Cause Conference[12]

"The state and the defendant are entitled to a probable cause conference, unless waived by both parties." MCR 6.108(A).

MCL 766.4(1) provides, in relevant part:

> "The probable cause conference shall include the following:
>
> (a) Discussions as to a possible plea agreement among the prosecuting attorney, the defendant, and the attorney for the defendant.
>
> (b) Discussions regarding bail and the opportunity for the defendant to petition the [judge] for a bond modification.
>
> (c) Discussions regarding stipulations and procedural aspects of the case.
>
> (d) Discussions regarding any other matters relevant to the case as agreed upon by both parties."

See also MCR 6.108(C) ("[t]he probable cause conference shall include discussions regarding a possible plea agreement and other pretrial matters, including bail and bond modification[]").

Two-way interactive video technology may be used to conduct the probable cause conference. MCR 6.006(A); see also MCR 4.401(E) ("[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006[]").

District court magistrates have jurisdiction "[t]o conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge." MCL 600.8511(h); see also MCR 6.108(B) ("[a] district court magistrate may conduct probable cause conferences when authorized to do so by the chief district judge and may conduct all matters allowed at the probable cause conference, except taking pleas and imposing sentences unless

[12] For additional information, see the SCAO's *Best Practices for Probable Cause Conferences and Preliminary Examinations*.

permitted by statute to take pleas or impose sentences[]"). However, "[t]he district court judge must be available during the probable cause conference to take pleas, consider requests for modification of bond, and if requested by the prosecutor, take the testimony of a victim." MCR 6.108(D).

The parties may agree to waive the probable cause conference. MCL 766.4(2) provides:

> "The probable cause conference may be waived by agreement between the prosecuting attorney and the attorney for the defendant. The parties shall notify the court of the waiver agreement and whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea."

See also MCR 6.108(A).

4.5 Pleas

MCL 766.4(3) provides:

> "A district judge has the authority to accept a felony plea. A district judge shall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. Sentencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken."[13]

4.6 Purpose and Scope of a Preliminary Examination

"The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it." *People v Perkins (Mark)*, 468 Mich 448, 452 (2003). "The prosecution need not establish guilt beyond a reasonable doubt, but must present 'evidence sufficient to make a person of ordinary caution and prudence [] conscientiously entertain a reasonable belief of the defendant's guilt.'" *People v Waterstone*, 296 Mich App 121, 152 (2012), quoting *People v Hill (Brian)*, 269 Mich App 505, 514 (2006). "'[T]he probable cause required for a bindover is "greater" than that required for an arrest [in] that it imposes a different standard of proof . . . . [T]he arrest standard looks only to the probability that the person committed the crime as

[13] See Chapter 6 for discussion of felony pleas.

established at the time of arrest, while the preliminary hearing looks both to that probability at the time of the preliminary hearing *and* to the probability that the government will be able to establish guilt at trial.'" *People v Cohen*, 294 Mich App 70, 76 (2011), quoting LaFave & Israel, Criminal Procedure (2d ed), § 14.3, pp 668-669.

"'A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.'" *People v Drake*, 246 Mich App 637, 640 (2001), quoting *Barber v Page*, 390 US 719, 725 (1968).

"The district court's [probable cause] inquiry is not limited to whether the prosecution has presented sufficient evidence on each element of . . . the offense, but extends to whether probable cause exists after an examination of the entire matter based on legally admissible evidence." *People v Crippen*, 242 Mich App 278, 282 (2000).[14] In determining whether a crime has been committed, a judge has a duty "to pass judgment on the credibility of the witnesses." *People v Yost*, 468 Mich 122, 127-128 (2003). "If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the [judge] must let the factfinder at trial resolve those questions of fact. This requires binding the defendant over for trial." *People v Hudson*, 241 Mich App 268, 278 (2000).

4.7 Authority Governing Preliminary Examinations

"There is no federal constitutional right to a preliminary examination or hearing—the procedure is one left to the Legislature[.]" *People v Johnson (Henry)*, 427 Mich 98, 103 (1986). "In Michigan, the preliminary examination is solely a creation of the Legislature—it is a statutory right." *Id.*

MCL 766.1 provides, in relevant part:

> "The state and the defendant are entitled to a prompt examination and determination by the examining [judge] in all criminal causes and it is the duty of all courts and public officers having duties to perform in connection with an examination, to bring it to a final determination without delay except as necessary to secure to the defendant a fair and impartial examination."

[14]However, it is unnecessary, in indictments or informations related to murder or manslaughter, to "set forth the manner in which nor the means by which the death of the deceased was caused." MCL 767.71. Instead, MCL 767.71 requires only a showing that the defendant murdered or killed the deceased.

MCL 766.4(4) provides, in part, that "[i]f a plea agreement is not reached and if the preliminary examination is not waived by the defendant with the consent of the prosecuting attorney, a preliminary examination shall be held as scheduled unless adjourned or waived under [MCL 766.7]."[15] See also MCR 6.110(A), which provides, in part:

> "Where a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination. . . . Upon waiver of the preliminary examination, the court must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint."

4.8 Jurisdiction of Preliminary Examinations

The district court has jurisdiction of "[p]reliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the preliminary examination under . . . MCL 766.1[*et seq*]." MCL 600.8311(e). *Felony* is defined in the Code of Criminal Procedure as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g). Accordingly, a defendant charged with a two-year misdemeanor, known as a *high court* or *circuit court* misdemeanor, is entitled to a preliminary examination under MCL 600.8311(e). See, generally, *People v Smith (Timothy)*, 423 Mich 427 (1985).

The district court may conduct a due process hearing before or during a preliminary examination, or before a defendant is bound over for trial. *People v Laws*, 218 Mich App 447, 453 (1996). "Certain due process hearings, such as *Miranda*[16], *Tucker*[17], and *Walker*[18] hearings, are at times necessary to a proper preliminary examination." *Laws*, 218 Mich App at 453. "[T]he district court may rule on such allegations of due process violations where the facts warrant." *Id*.

Under MCL 766.7, "[a]n action on the part of the magistrate in adjourning or continuing any case does not cause the magistrate to lose jurisdiction of the case." See also *People v Dunson*, 139 Mich App 511, 513 (1985) ("[t]he defect of not bringing [a] defendant to a timely preliminary examination is not . . . jurisdictional").

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[15] See Section 4.12(B) for discussion of adjournment of the preliminary examination.

[16] *Miranda v Arizona*, 384 US 436 (1966).

[17] *United States v Tucker*, 404 US 443 (1972).

[18] *People v Walker (On Rehearing)*, 374 Mich 331 (1965).

4.9 Persons Who May Conduct Preliminary Examinations

A preliminary examination must be conducted before an *examining magistrate*. MCL 766.1; MCL 767.42(1). A *magistrate* is defined in the Code of Criminal Procedure as "a judge of the district court or a judge of a municipal court." MCL 761.1(f). The term does not include district court magistrates, unless statutory authority explicitly provides them with authority to act as a *magistrate*. *Id.* District court magistrates are not authorized to conduct preliminary examinations under MCL 600.8511, the statute governing the duties and jurisdiction of district court magistrates.[19]

"[H]aving the [judge] who issued the arrest warrant preside at the preliminary examination" is not prejudicial to a defendant where "the affidavit presented to the [judge] was in conclusory form and did not state any of the underlying or operative facts and no witnesses were examined[.]" *People v Burrill*, 391 Mich 124, 137 (1974). However, "if witnesses had been examined . . . [i]t is arguable that the [judge], having been persuaded through such testimony at the time he [or she] issued the arrest warrant that there was probable cause, might not be wholly objective when asked to reconsider the question at the more formal preliminary examination at which the defendant is entitled to be represented by counsel and has an opportunity to cross-examine the [P]eople's witnesses and to present his [or her] own witnesses." *Id*. There is no bar to a judge who has heard evidence in connection with the issuance of an arrest warrant from presiding at a preliminary examination because such a requirement may be impractical in some jurisdictions. *Id*. "However, if a defendant requests a [judge] other than a [judge] who has already heard witnesses *ex parte*, such a request should be regarded as reasonable and reasonable efforts exerted toward compliance." *Id*. at 137-138.

In some situations, a judge should disqualify himself or herself from hearing a preliminary examination. See MCR 2.003(C)(1)(a), which provides that disqualification of a judge is warranted if "[t]he judge is biased or prejudiced for or against a party or attorney."

Committee Tip:

[19] However, "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination[.]" MCL 600.8513(1).

A common situation calling for the disqualification of a judge is when the judge has issued a search warrant. It is recommended that when the validity of a search warrant is (or will be) challenged at the preliminary examination, the judge who issued the search warrant should disqualify himself or herself from hearing the examination.

In cases where an initial preliminary examination is held and probable cause is not found, MCR 6.110(F) provides for a subsequent preliminary examination and states that "[e]xcept as provided in MCR 8.111(C)[20], the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge."[21] "MCR 6.110(F) prevents 'judge shopping' by requiring that a subsequent examination be before the same [judge], if available, and that additional evidence be presented." *People v Robbins*, 223 Mich App 355, 362 (1997).

4.10 Defendant's Right to a Preliminary Examination

A. General Provisions

The defendant is entitled to a prompt examination and determination by an examining judge. MCL 766.1; MCR 6.110(A).[22] "An information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining [judge], unless that person waives his statutory right to an examination." MCL 767.42(1).

B. Right to Preliminary Examination on New Charges Added Following Arraignment in Circuit Court

"An amendment to an information which charges a different offense may . . . violate [a] defendant's statutory right to receive a preliminary examination." *People v Price*, 126 Mich App 647, 653 (1983). Where a "defendant [i]s not given a preliminary examination on [an] added offense[,] . . . the trial court ha[s] no jurisdiction over that offense." *Id*. at 655. However, amendment of an information without an additional preliminary examination may be permissible

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[20] MCR 8.111(C) provides that "[i]f a judge is disqualified or for other good cause cannot undertake an assigned case, the chief judge may reassign it to another judge by a written order stating the reason."

[21] See Section 5.33 for more information on the discharge of a defendant and subsequent preliminary examinations.

[22] Note that both provisions also provide the prosecutor with the right to a prompt examination.

where the proofs presented at the initial preliminary examination would have supported a bindover on the charge sought to be added, and the amendment does not prejudice a defendant "because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt (Arthur)*, 442 Mich 359, 364-365 (1993). See also *People v McGee (Keangela*), 258 Mich App 683, 693, 696-697 (2003) (in the absence of unfair surprise or prejudice, a defendant has no right to a preliminary examination on a new charge added to the prosecutor's motion to amend an information filed after the defendant waived preliminary examination on the original offense); *People v Fortson*, 202 Mich App 13, 16-17 (1993) (trial court did not err in allowing prosecutor to amend information to add a count even though the defendant was never bound over on that charge because the proofs adduced at the preliminary examination supported the charge and the trial court's refusal to remand the case for a preliminary examination regarding the new charge did not result in unfair surprise, inadequate notice, or an insufficient opportunity to defend).

C. No Right to Preliminary Examination Following Grand Jury Indictment

A defendant does not have a substantive right to a preliminary examination following a grand jury indictment. *People v Glass (After Remand)*, 464 Mich 266, 271 (2001). See also MCR 6.112(B) ("[a]n indictment is returned and filed without a preliminary examination").

D. No Right to Preliminary Examination for Fugitive From Justice

"An information may be filed without a preliminary examination against a fugitive from justice[.]" MCL 767.42(2). See also MCR 6.112(B), which states that "[u]nless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives a preliminary examination."

4.11 Juvenile's Right to a Preliminary Examination[23]

A. Right to a Preliminary Examination in Automatic Waiver Cases

A prosecutor who "has reason to believe that a juvenile 14 years of age or older but less than 17 years of age has committed a specified juvenile violation may file a complaint and warrant" in district court, which divests the family division of the circuit court of jurisdiction and constitutes an automatic waiver case. MCL 764.1f(1); MCL 712A.2(a)(1). A juvenile has a right to a preliminary examination in an automatic waiver case, and the prosecutor must follow the same preliminary examination procedures as are applicable for adult defendants charged with criminal offenses. See MCR 6.901(A) (the rules in subchapter 6.900 governing automatic waiver cases "take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders"). See also MCR 6.911, governing waivers of preliminary examinations by juveniles represented by lawyers, and transfers of cases to juvenile court.

Specified juvenile violations are:

- First-degree arson, MCL 750.72;
- Assault with intent to commit murder, MCL 750.83;
- Assault with intent to maim, MCL 750.86;
- Assault with intent to rob and steal while armed, MCL 750.89;
- Attempted murder, MCL 750.91;
- First-degree murder, MCL 750.316;
- Second-degree murder, MCL 750.317;
- Kidnapping, MCL 750.349;
- First-degree criminal sexual conduct, MCL 750.520b;
- Armed robbery, MCL 750.529;
- Carjacking, MCL 750.529a;

[23] The scope of this section is limited to discussing whether a juvenile has the right to a preliminary examination. Preliminary examination rules specific to cases involving a juvenile are beyond the scope of this benchbook. For a full discussion of preliminary examination requirements in proceedings involving a juvenile, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

- Bank, safe, or vault robbery, MCL 750.531;
- Assault with intent to do great bodily harm less than murder, or assault by strangulation or suffocation, if armed with a *dangerous weapon*[24], MCL 750.84;
- First-degree home invasion if armed with a *dangerous weapon*[25], MCL 750.110a(2);
- Escape or attempted escape from a juvenile facility or from the custody of an employee of the juvenile facility, MCL 750.186a;
- Manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver, MCL 333.7401(2)(a)(*i*); or possession, MCL 333.7403(2)(a)(*i*), of 1,000 grams or more of a Schedule 1 or 2 narcotic or cocaine;
- Any attempt, solicitation, or conspiracy to commit any of the above-listed violations;
- Any lesser-included offense of an above-listed violation if the individual is charged with a *specified juvenile violation*; and
- Any other violation arising out of the same transaction as an above-listed violation if the juvenile is charged with one of the above-listed violations. MCL 600.606(2)(a)-(i); MCL 712A.2(a)(1)(A)-(I); MCL 764.1f(2)(a)-(i).

B. Right to a Preliminary Examination in Designated Cases

A designated proceeding is "a proceeding in which the prosecuting attorney has designated, or has requested the [Family Division] to designate, the case for trial in the [Family Division] in the same manner as an adult." MCR 3.903(A)(6).[26]

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[24]As used in the context of a *specified juvenile violation*, a *dangerous weapon* means one or more of the following: "(*i*) [a] loaded or unloaded firearm, whether operable or inoperable[;] (*ii*) [a] knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon[;] (*iii*) [a]n object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon[;] (*iv*) [a]n object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*)." MCL 600.606(2)(b); MCL 712A.2(a)(1)(B); MCL 764.1f(2)(b).

[25]As used in the context of a *specified juvenile violation*, a *dangerous weapon* means one or more of the following: a loaded or unloaded firearm, whether operable or inoperable; a knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon; an object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon; an object or device that is used or fashioned in a manner to lead a person to believe the object or device is a weapon. MCL 600.606(2)(b); MCL 712A.2(a)(1)(B); MCL 764.1f(2)(b).

Pursuant to MCL 712A.2d(4), a juvenile has the right to a preliminary examination in some designated cases:

> "If the petition in a case designated under this section alleges an offense that if committed by an adult would be a felony or punishable by imprisonment for more than 1 year, the court shall conduct a probable cause hearing not later than 14 days after the case is designated to determine whether there is probable cause to believe the offense was committed and whether there is probable cause to believe the juvenile committed the offense. . . . A probable cause hearing under this section is the equivalent of the preliminary examination in a court of general criminal jurisdiction and satisfies the requirement for that hearing. A probable cause hearing shall be conducted by a judge other than the judge who will try the case if the juvenile is tried in the same manner as an adult."

The Michigan Court Rules refer to the probable cause hearing required under MCL 712A.2d(4) as the "preliminary examination." See MCR 3.903(D)(5); MCR 3.953(A).[27]

C. Preliminary Examinations in Traditional Waiver Cases

"If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the family division of circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction under [MCL 712A.4] upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense." MCL 712A.4(1).[28] The probable cause determination made pursuant to MCL 712A.4(3) "satisfies the requirements of, and is the equivalent of, the preliminary examination[.]" MCL 712A.4(10).[29]

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[26] See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 15, for more information on designated proceedings, including the procedures and rules regarding preliminary examinations.

[27] The probable cause hearing (preliminary examination) required under MCL 712A.2d(4) should not be confused with the *probable cause conference* that is required, in addition to the preliminary examination, in courts of general criminal jurisdiction under MCL 766.4(1). Additionally, the preliminary examination should be distinguished from the probable cause hearing required under MCR 3.935(D), MCR 3.951(A)(2)(d), and MCR 3.951(B)(2)(d) for the pretrial detention of a juvenile. See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information on these hearings.

[28] For a complete discussion of traditional waiver proceedings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 14.

4.12 Timing of Preliminary Examinations

"The state and the defendant are entitled to a prompt examination and determination by the examining [judge] in all criminal causes[.]" MCL 766.1. See also MCR 6.110(A), which states, in part, that "[w]here a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination."

The preliminary examination, unless waived or adjourned, must be scheduled for "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1);[30] see also MCR 6.104(E)(4). However, "[t]he parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference." MCL 766.4(4).

When computing the relevant time periods, the day of the arraignment is not included. See MCR 1.108(1). "The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order." *Id*.

"Unless adjourned by the court, the preliminary examination must be held on the date specified by the court at the arraignment on the warrant or complaint." MCR 6.110(B)(1). A violation of MCR 6.110(B)(1) "is deemed to be harmless error unless the defendant demonstrates actual prejudice." *Id*.

A. Immediate Commencement of Preliminary Examination for Purpose of Taking Victim Testimony

MCL 766.4(4) provides, in relevant part:

> "Upon the request of the prosecuting attorney, . . . the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present. For purposes of this subdivision, 'victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the

[29] Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015, 2014 PA 123 amended MCL 766.4 to require the court, "*[e]xcept as provided in . . . MCL 712A.4*," to schedule, at arraignment for a felony charge, "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1) (emphasis supplied); see also 2014 PA 123, enacting section 1; MCR 6.104(E)(4).

[30] See Section 4.4 for discussion of probable cause conferences.

> commission of a crime. If that testimony is insufficient to establish probable cause to believe that the defendant committed the charged crime or crimes, the [judge] shall adjourn the preliminary examination to the date set at arraignment. A victim who testifies under this subdivision shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause."

See also MCR 6.110(B)(2) (adding that "the defendant [must either be] present in the courtroom or [have] waived the right to be present[]").

B. Adjournment, Continuance, or Delay of Preliminary Examination

1. Good Cause and/or Consent

The judge may adjourn, continue, or delay the preliminary examination for a reasonable time with the consent of the defendant and prosecuting attorney without a showing of good cause. MCR 6.110(B)(1); see also MCL 766.7. Additionally, the preliminary examination may be adjourned, continued, or delayed without the consent of the defendant or the prosecuting attorney for good cause shown. MCR 6.110(B)(1); MCL 766.7. "If a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment." MCR 6.110(B)(1).

The following are examples of good cause to adjourn a preliminary examination:

- Because of docket congestion due to unusual circumstances, *People v Crawford (David)*, 429 Mich 151, 159 n 8 (1987); *People v Twomey*, 173 Mich App 247, 249 (1988).

- To accommodate the absence of a material witness, where it appears probable that the witness will be produced and testify, *People v Den Uyl*, 320 Mich 477, 488, 494 (1948). See also *People v Horne*, 147 Mich App 375, 377-378 (1985) (material witnesses had a conflicting court appearance and a scheduled vacation); *Buckner*, 144 Mich App at 694 (victim was hospitalized until the day before the preliminary examination).

- Because defense counsel had previous appointments that he was required to attend, and due to illnesses affecting the prosecutor's wife and the judge, *People v Lewis (James)*, 160 Mich App 20, 32 (1987).

- To appoint counsel and allow appointed counsel to gain familiarity with the case before the preliminary examination, *People v Eddington*, 77 Mich App 177, 186-190 (1977); *People v Brown (James)*, 19 Mich App 66, 68 (1969).[31]

2. Procedure

MCL 766.7 provides, in part:

> "A [judge] may adjourn a preliminary examination for a felony to a place in the county as the [judge] determines is necessary. The defendant may in the meantime be committed either to the county jail or to the custody of the officer by whom he or she was arrested or to any other officer; or, unless the defendant is charged with treason or murder, the defendant may be admitted to bail."

A judge who adjourns or continues a preliminary examination does not lose jurisdiction of the case. MCL 766.7.

3. Use of Two-Way Interactive Video Technology

"District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: . . . adjournments of preliminary examinations." MCR 6.006(A). "The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).[32]

4. Harmless Error

A violation of MCR 6.110(B)[33] "is deemed to be harmless error unless the defendant demonstrates actual prejudice." See also *Buckner*, 144 Mich App at 694-695 (a preliminary examination

[31] "The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel." MCR 6.005(E).

timely scheduled then adjourned with no explanation on the record may amount to harmless error if good cause can be established by the record).

4.13 Right to Counsel at Preliminary Examinations

A. Authorities Establishing Right to Counsel

At the preliminary examination, the defendant "may be assisted by counsel in [the] examination [of defense witnesses] and in the cross-examination of the witnesses in support of the prosecution." MCL 766.12. "At the arraignment on the warrant or complaint, the court must advise the defendant of entitlement to a lawyer's assistance at all subsequent court proceedings." MCR 6.005(A)(1). See also MCL 780.991(1)(c), requiring trial courts to "assure that each criminal defendant is advised of his or her right to counsel[,]" and MCL 780.991(3)(a), requiring the court to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant . . . not later than at the defendant's first appearance in court."[34]

The preliminary examination is a critical stage of criminal proceedings, which entitles an indigent defendant to an appointed attorney. *Coleman v Alabama*, 399 US 1, 10 (1970); *People v Thomas (Billie)*, 96 Mich App 210, 218 (1980).

B. Advice by Court at Preliminary Examination of Defendant's Right to Counsel

"When a person charged with having committed a crime appears before a [judge] without counsel, the person shall be advised of his

[32]Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

[33] MCR 6.110(B)(1) provides that "[i]f the parties consent, for good cause shown, the court may adjourn the preliminary examination for a reasonable time[; i]f a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment."

[34] See Section 3.4(B) for discussion of MCL 780.991 and other provisions of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*.

or her right to have counsel appointed." MCL 775.16. See also MCL 780.991(1)(c) (requiring trial courts to "assure that each criminal defendant is advised of his or her right to counsel[]")[35]; MCR 6.005(E) (if a defendant waived assistance of counsel during arraignment, the record from the preliminary examination and other subsequent proceedings "need only show that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right").[36]

C. Appointment of Counsel at Preliminary Examination

"If the person states that he or she is unable to procure counsel, the [judge] shall appoint counsel, if the person is eligible for appointed counsel under the [Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981—MCL 780.1003[37]]." MCL 775.16.

The MIDCA requires the trial court to "assure that each criminal defendant[] is advised of his or her right to counsel[,]" MCL 780.991(1)(c), and to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant . . . not later than at the defendant's first appearance in court[,]" MCL 780.991(3)(a).[38] See also MCR 6.005(E) (requiring the court, at the preliminary examination, to appoint an attorney for a defendant who "requests a lawyer and is financially unable to retain one[]").[39]

4.14 Waiver of Right to Counsel[40]

"The right of self-representation under Michigan law is secured by Const 1963, art 1, § 13 and by statute, MCL 763.1." *People v Williams (Rodney)*, 470 Mich 634, 642 (2004).

"The court may not permit the defendant to make an *initial* waiver of the right to be represented by a lawyer without first (1) advising the

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[35] See Section 3.4(B) for discussion of MCL 780.991 and other provisions of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*.

[36] The continuing relevancy of MCR 6.005(E) following the enactment of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*. (2013 PA 93, effective July 1, 2013), is uncertain.

[37] The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA).

[38] See Section 3.4(B) for discussion of the appointment of counsel under the MIDCA.

[39] The continuing relevancy of MCR 6.005(E) following the enactment of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*. (2013 PA 93, effective July 1, 2013), is uncertain.

[40] For more information on the waiver of right to counsel, see Chapter 3.

defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer." MCR 6.005(D) (emphasis added). "This court rule embodies the notion that explicit elucidation of a defendant's comprehension of the risks he or she faces by representing himself or herself and the defendant's willingness to undertake those risks reduces the likelihood that a court will inaccurately presume an effective waiver of the right to counsel." *People v Brooks*, 293 Mich App 525, 537 (2011), vacated in part on other grounds 490 Mich 993 (2012).

MCR 6.005(E) states, in part, what a court must do in subsequent proceedings, such as the preliminary examination:

> "If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination . . .) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
>
> > (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
> >
> > (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
> >
> > (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one."

"Compliance with MCR 6.005(D) and [MCR 6.005](E) goes part of the way toward establishing that a defendant has knowingly and voluntarily waived counsel." *Brooks*, 293 Mich App at 538. Before a trial court may grant a defendant's request to proceed in propria persona, it must determine whether:

- the defendant's request for self-representation was unequivocal;
- the defendant's request was made knowingly, intelligently, and voluntarily; and

- the court would be unduly burdened, inconvenienced, or disrupted if the defendant's request was granted. *People v Anderson (Donny)*, 398 Mich 361, 367-368 (1976).

4.15 Waiver of Preliminary Examination

"The defendant may waive the preliminary examination with the consent of the prosecuting attorney." MCL 766.7; MCR 6.110(A).

An individual charged with a *felony*[41] must either proceed with or waive a preliminary examination before an information can be filed.[42] MCL 767.42(1); MCR 6.112(B).

"District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: . . . waivers . . . of preliminary examinations." MCR 6.006(A). "The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).[43]

"Upon waiver of the preliminary examination, the court must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint." MCR 6.110(A). A written waiver is not required. *People v Losinger*, 331 Mich 490, 497 (1951).

A district court magistrate, "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available," may "conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any

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[41]For purposes of the Code of Criminal Procedure, a *felony* is "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g).

[42] However, an information may be filed without a preliminary examination against a fugitive from justice. MCL 767.42(2); MCR 6.112(B).

[43]Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

written demand or waiver of preliminary examination[.]" MCL 600.8513(1). "A defendant neither demanding nor waiving preliminary examination in writing is deemed to have demanded preliminary examination[.]" *Id*.

A. Waiver of Examination Without Counsel and Remand for Examination

"If any person waives his statutory right to a preliminary examination without having had the benefit of counsel at the time and place of the waiver, upon proper and timely application by the person or his counsel, before trial or plea of guilty, the court having jurisdiction of the cause, in its discretion, may remand the case to a [judge] for a preliminary examination." MCL 767.42(1).

Denial of a defendant's motion to remand for a preliminary examination under MCL 767.42(1) where defendant waived the examination without benefit of counsel may constitute an abuse of discretion. *People v Wiggins*, 6 Mich App 340, 343 (1967) (trial court's stated reason for denying the motion because of previous adjournments was insufficient to deny the defendant a preliminary examination where it appeared that the adjournments were due to the defendant not being afforded counsel). But see *People v Johnson (Van)*, 57 Mich App 117, 121-122 (1974) (no abuse of discretion in denying the defendant's motion to remand where the defendant did not demonstrate prejudice resulting from the denial and where the defendant had previous experience with the criminal justice system).

B. Waiving the Right to Preliminary Examination by Entering a Plea to the Information

"[A] plea of guilty upon arraignment to an information in the circuit court waives a preliminary examination." *Losinger*, 331 Mich at 497. See also *People v McKinley*, 32 Mich App 178, 179 (1971) ("[d]efendant's plea of guilty . . . constituted a waiver of the statutory right to a preliminary examination").

C. Waiver of Examination in Specialized Treatment Courts[44]

If an individual being considered for admission to a drug treatment court, mental health court, or veterans treatment court is charged in a criminal case,[45] his or her admission is subject to, among other

[44] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for discussion of specialized treatment courts.

things, written waiver of the right to a preliminary examination, with the prosecutor's agreement. MCL 600.1068(1)(c); MCL 600.1094(1)(b); MCL 600.1205(1)(c). An individual who has waived his or her right to a preliminary examination and has pled guilty as part of his or her application to a drug treatment court, mental health court, or veterans treatment court and who is not admitted to that court shall be permitted to withdraw his or her plea and is entitled to a preliminary examination.[46] MCL 600.1068(5); MCL 600.1094(3); MCL 600.1205(5).

4.16 Discovery Before or at Preliminary Examination[47]

Discovery in felony cases is governed by MCR 6.200 *et seq*. See MCR 6.001(A).

"The district court may order discovery in carrying out its duty to conduct preliminary examinations." *People v Laws*, 218 Mich App 447, 451 (1996). "Discovery may be ordered before the preliminary examination." *Id*. "Discovery should be granted where the information sought is necessary to a fair trial and a proper preparation of a defense." *Id*. at 452. An in camera review may be used to determine whether the requested evidence is discoverable. See *id*. "Even inadmissible evidence is discoverable if it will aid the defendant in trial preparation." *Id*. "Defendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or innocence." *Id*. See also MCR 6.201(B)(1).

"[A] district court, before the preliminary examination of an individual charged with a felony, possesses the authority to compel discovery of [certain] witnesses' statements given to the prosecution pursuant to an investigative subpoena." *People v Pruitt*, 229 Mich App 82, 83-84 (1998). Specifically, "in felony cases, a district court has the authority to order the production of statements made by a defendant, codefendant, or accomplice in response to an investigative subpoena, along with any exculpatory information obtained from any witness in response to an investigative subpoena; it does not have the authority in felony prosecutions to order the production of nonexculpatory statements made by other subpoenaed individuals." *Id*. at 84.

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[45] Or, in the case of a juvenile who is being considered for admission to a juvenile drug court or juvenile mental health court, the juvenile "is alleged to have engaged in activity that would constitute a criminal act if committed by an adult[.]" MCL 600.1068(1); MCL 600.1094(1).

[46] Or, in the case of a juvenile who "has admitted responsibility[] as part of his or her referral process to a drug treatment court[]" or "mental health court," the juvenile "may withdraw his or her admission of responsibility." MCL 600.1068(5); MCL 600.1094(3).

[47] For more information on discovery, see Chapter 8.

4.17 Venue for Preliminary Examination

A. Venue Generally

Venue for preliminary examinations is determined by statute. For criminal actions in *first-class districts*, the proper venue is the county where the violation took place. MCL 600.8312(1). A *first-class district* is "a district consisting of 1 or more counties and in which each county comprising the district is responsible for maintaining, financing and operating the district court within its respective county[.]" MCL 600.8103(1).

For criminal actions in *second-class districts*, the proper venue is in the district where the violation took place. MCL 600.8312(2). A *second-class district* is "a district consisting of a group of political subdivisions within a county and in which the county where such political subdivisions are situated is responsible for maintaining, financing and operating the district court[.]" MCL 600.8103(2).

For criminal actions in *third-class districts*, the proper venue is "in the political subdivision where the violation took place, except that when the violation is alleged to have taken place within a political subdivision where the court is not required to sit, the action may be tried in any political subdivision within the district where the court is required to sit." MCL 600.8312(3). A *third class district* is "a district consisting of 1 or more political subdivisions within a county and in which each political subdivision comprising the district is responsible for maintaining, financing and operating the district court within its respective political subdivision[.]" MCL 600.8103(3).

Special provisions apply to preliminary examinations where a criminal action occurs on a political boundary, or in transit across borders. MCL 762.3(3)(a)-(b) provides:

> (a) If an offense is committed on the boundary of 2 or more counties, districts or political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned.
>
> (b) If an offense is committed in or upon any railroad train, automobile, aircraft, vessel or other conveyance in transit, and it cannot readily be determined in which county, district or political subdivision the offense was committed, venue is proper in any county, district or political subdivision through or over which the conveyance passed in the course of its journey.

Except as provided in MCL 762.3(3)(b), under MCL 762.3(3)(c), the attorney general may designate venue where it appears to the

attorney general that an alleged state offense was committed within the state but its locality is otherwise impossible to determine.

Certain statutes establish venue for offenses that may involve more than one location. See, e.g., MCL 762.8 (felony consisting of two or more acts), MCL 762.10 (embezzlement), and MCL 762.10c (identity theft).

B. Failure to Establish Venue

"No verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury." MCL 767.45(1)(c).

C. Sufficiency of Evidence to Prove Venue

"In general, a court may take judicial notice of the locations of political subdivisions of the state." *People v Smith (Roy)*, 28 Mich App 656, 657 (1974). "Venue has been held to be established when the crime has been shown to have been committed in a township located within a particular county, even though no mention of the county was made." *Id*. at 658. In *Smith (Roy)*, the trial court properly denied the defendant's motion to quash the information "on the ground that the prosecution failed to prove venue in Wayne County at the preliminary examination" where the evidence introduced at the preliminary examination "indicated that the offense took place in the city of Taylor[,] . . . [and] the trial court took judicial notice of the fact that Taylor is a city in Wayne County." *Id*. at 657.

D. Change of Venue

A district court has no authority to grant a motion for change of venue before a preliminary examination is held. *In re Attorney General*, 129 Mich App 128, 132 (1983). MCL 762.7, the statute granting courts of record authority to change venue in criminal cases, is only applicable to circuit courts in felony cases. *In re Attorney General*, 129 Mich App at 131.

4.18 Order for Competency Evaluation at Preliminary Examination[48]

"The issue of the defendant's competence to stand trial or to participate in other criminal proceedings may be raised [by the court before which

[48] For more information on issues involving competency, see Chapter 8.

such proceedings are pending or being held, or by motion of a party,] at any time during the proceedings against the defendant." MCR 6.125(B). This "includ[es] proceedings in the district court." 1989 Staff Comment to MCR 6.125.

"On a showing that the defendant may be incompetent to stand trial, the court must order the defendant to undergo an examination by a certified or licensed examiner of the center for forensic psychiatry or other facility officially certified by the department of mental health to perform examinations relating to the issue of competence to stand trial." MCR 6.125(C)(1). See MCR 6.125(C)(2)-(5) for rules regarding the defendant's appearance at the examination and regarding the court's authority to detain or commit the defendant in certain circumstances.

"[W]here there is evidence of incompetency prior to the preliminary examination and counsel for defendant requests a determination of competency to stand trial, the examining [judge] should halt preliminary proceedings against a defendant and refer the defendant to the Center for Forensic Psychiatry for evaluation and recommendation. Upon receipt of the written report and recommendation, the district judge should conduct a hearing and make a determination of competency." *People v Thomas (Billie)*, 96 Mich App 210, 218 (1980). See also MCR 6.125(C)(1); MCR 6.125(E).

"A defendant who is determined incompetent to stand trial shall not be proceeded against while he [or she] is incompetent." MCL 330.2022(1).

4.19 Closure of Preliminary Examination to Members of the Public[49]

Upon the motion of any party and satisfaction of certain conditions, a judge has the discretion to close to members of the general public the preliminary examination of a person charged with any of the following offenses:

- Criminal sexual conduct in any degree;
- Assault with intent to commit criminal sexual conduct;
- Sodomy;
- Gross indecency;
- Any other offense involving sexual misconduct. MCL 766.9(1).

[49]For more information on issues involving closure of the courtroom, see Chapter 8.

To close a preliminary examination to the public, the following conditions must be met:

> (a) The judge determines that the need for protection of a victim, a witness, or the defendant outweighs the public's right of access to the examination.
>
> (b) The denial of access to the examination is narrowly tailored to accommodate the interest being protected.
>
> (c) The judge states on the record the specific reasons for his or her decision to close the examination to members of the general public. [MCL 766.9(1).]

To determine whether closure of the preliminary examination is necessary to protect a victim or witness, the judge must consider:

> (a) The psychological condition of the victim or witness.
>
> (b) The nature of the offense charged against the defendant.
>
> (c) The desire of the victim or witness to have the examination closed to the public. [MCL 766.9(2).]

The judge may close a preliminary examination to protect a party's right to a fair trial only if:

> (a) There is a substantial probability that the party's right to a fair trial will be prejudiced by publicity that closure would prevent.
>
> (b) Reasonable alternatives to closure cannot adequately protect the party's right to a fair trial. [MCL 766.9(3).]

In narrowly tailoring closure to accommodate the interests of a victim testifying about sensitive matters, the judge should only close those portions of the examination in which such matters are discussed. *In re Closure of Preliminary Examination*, 200 Mich App 566, 569-570 (1993).

4.20 Sequestration of Witnesses

"The [judge] while conducting [the preliminary] examination may exclude from the place of the examination all the witnesses who have not been examined; and he may also, if requested or if he sees cause, direct the witnesses whether for or against the prisoner, to be kept separate so that they cannot converse with each other until they shall have been examined." MCL 766.10. In addition, the judge may also "exclude from the place of the [preliminary] examination any or all minors during the examination of such witnesses. Although sequestration of witnesses is

discretionary, "[a] request to sequester a witness, reasonably made, should not be denied." *People v Hayden*, 125 Mich App 650, 659 (1983).

Crime victims have a constitutional right to attend all proceedings the accused has a right to attend. Const 1963, art 1, § 24. The Crime Victim's Rights Act provides that "[t]he victim has the right to be present throughout the entire *trial* of the defendant, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies." MCL 780.761 (emphasis added). Because of its use of the word *trial*, MCL 780.761 presumably does not apply to preliminary examinations.

However, the court has general authority to sequester *witnesses*, which presumably includes the authority to sequester *victims* before or after testifying at preliminary examinations. See MCL 600.1420 ("[t]he sittings of every court within this state shall be public except that a court may, for good cause shown, exclude from the courtroom other witnesses in the case when they are not testifying"). See also MRE 615 ("[a]t the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion"). Accordingly, under MCL 600.1420 and MRE 615, the court likely retains discretion to sequester a victim after he or she first testifies. However, MRE 615 "does not authorize exclusion of . . . a person whose presence is shown by a party to be essential to the presentation of the party's cause."

4.21 Victims' Rights at Preliminary Examination[50]

A. Notice Requirements

Crime victims in Michigan have a constitutional right to notification of court proceedings. Const 1963, art 1, § 24. The Crime Victim's Rights Act, MCL 780.751 *et seq.*, contains several provisions concerning a victim's rights relating to the early stages of a case, including preliminary examinations. Providing notice to the victim about the preliminary examination is the prosecuting attorney's responsibility. See MCL 780.756(2) ("If the victim requests, the prosecuting attorney shall give the victim notice of any scheduled court proceedings and any changes in that schedule.")

[50] For more information on crime victim's rights, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

B. Separate Waiting Areas

"The court shall provide a waiting area for the victim separate from the defendant, defendant's relatives, and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court shall provide other safeguards to minimize the victim's contact with defendant, defendant's relatives, and defense witnesses during court proceedings." MCL 780.757.

C. Limitations on Testimony Identifying a Victim's Address, Place of Employment, or Other Information

MCR 6.201(A)(1) allows disclosure to the opposing party of the names and addresses of all lay witnesses that a party may call as witnesses at trial, including victims. "[I]n the alternative, a party may provide the name of the witness and make the witness available to the other party for interview[.]" *Id*.

In certain circumstances, the prosecuting attorney may request that a victim's identifying information be protected from disclosure in pretrial proceedings. MCL 780.758(1) provides:

> Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion shall be in camera.

D. Immediate Commencement of Preliminary Examination for Purpose of Taking Victim Testimony

MCL 766.4(4) provides, in relevant part:

> "Upon the request of the prosecuting attorney, . . . the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present. For purposes of this subdivision, 'victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. If that testimony is insufficient to establish probable cause to believe that the defendant

> committed the charged crime or crimes, the [judge] shall adjourn the preliminary examination to the date set at arraignment. A victim who testifies under this subdivision shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause."

See also MCR 6.110(B)(2), which provides:

> "Upon the request of the prosecuting attorney, the preliminary examination shall commence immediately at the date and time set for the probable cause conference for the sole purpose of taking and preserving the testimony of the victim, if the victim is present, as long as the defendant is either present in the courtroom or has waived the right to be present. If victim testimony is taken as provided under this rule, the preliminary examination will be continued at the date originally set for that event."

See also MCR 6.108(D), which provides in part that "[t]he district judge must be available during the probable cause conference to[,] . . . if requested by the prosecutor, take the testimony of a victim."

4.22 Communicable Disease Testing and Examination[51]

A. Mandatory Testing or Examination

MCL 333.5129(3) provides that if the district court determines there is reason to believe a violation involved sexual penetration or exposure to the body fluid of the defendant, the district court must order[52] the defendant to be examined or tested for sexually transmitted infection,[53] hepatitis B infection, and hepatitis C infection and for the presence of HIV or an HIV antibody if he or she is bound over to circuit court for any of the enumerated offenses listed below. Additionally, the *circuit* court must "order the examination or testing if the defendant is brought before it by way of indictment for any of the [enumerated offenses]." *Id*. This testing is required for any of the following offenses:

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[51] A thorough discussion of communicable disease testing requirements is beyond the scope of this benchbook. For more information concerning these requirements, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 6.

[52] See SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

[53] "'Sexually transmitted infection' means syphilis, gonorrhea, chancroid, lymphogranuloma venereum, granuloma inguinale, and other sexually transmitted infections that the [Department of Health and Human Services] may designate and require to be reported under [MCL 333.5111]." MCL 333.5101(1)(h).

- Accosting, enticing, or soliciting a child for an immoral purpose, MCL 750.145a.
- Gross indecency between males, MCL 750.338.
- Gross indecency between females, MCL 750.338a.
- Gross indecency between males and females, MCL 750.338b.
- Aiding and abetting certain prostitution offenses, MCL 750.450.[54]
- Keeping a house of prostitution, MCL 750.452.
- Pandering, MCL 750.455.
- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Fourth-degree criminal sexual conduct, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

With some exceptions, "the examinations and tests must be confidentially administered by a licensed physician, the [Department of Health and Human Services[55]], or a local health department." MCL 333.5129(3). Additionally, the court must "order the defendant to receive counseling regarding sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and acquired immunodeficiency syndrome, including, at a minimum, information regarding treatment, transmission, and protective measures." *Id*.[56]

B. Expedited Examination or Testing for Criminal Sexual Conduct Offenses

Expedited testing and follow-up testing are required under certain circumstances if the defendant is charged with first-, second-, third-, or fourth-degree criminal sexual conduct or with assault with intent

[54] MCL 750.450 is a 93-day/$500 misdemeanor, for which no preliminary examination is required. For the penalty provisions of this crime, which also include first-, second-, and third-offense provisions, see MCL 750.451.

[55] See MCL 333.1104(5).

[56] See SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

to commit criminal sexual conduct. MCL 333.5129(3) provides, in relevant part:

> "If a defendant is bound over to or brought before the circuit court for violating . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [or MCL] 750.520g, the court shall, upon the victim's request, order the examination or testing [required by MCL 333.5129(3)] to be done not later than 48 hours after the date that the information or indictment is presented and the defendant is in custody or has been served with the information or indictment. The court shall include in its order for expedited examination or testing at the victim's request under this subsection a provision that requires follow-up examination or testing that is considered medically appropriate based on the results of the initial examination or testing."

With some exceptions, "the examinations and tests must be confidentially administered by a licensed physician, the [Department of Health and Human Services[57]], or a local health department." MCL 333.5129(3). Additionally, the court must "order the defendant to receive counseling regarding sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and acquired immunodeficiency syndrome, including, at a minimum, information regarding treatment, transmission, and protective measures." *Id*.

4.23 Subpoenas to Compel Attendance at Preliminary Examination

"Witnesses may be compelled to appear before the [judge] by subpoenas issued by the [judge], or by an officer of the court authorized to issue subpoenas,[58] in the same manner and with the same effect and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials in the circuit court." MCL 766.11(1). "Each party may subpoena witnesses . . . at the preliminary examination." MCR 6.110(C). A "[judge] ha[s] a clear legal duty to compel the appearance of a witness whose testimony [i]s necessary to achieve the ends of justice." *People v Recorder's Court Judge*, 110 Mich App 739, 745 (1981) (judge's refusal to compel the attendance of a witness necessary for the prosecution to establish probable cause for a bindover constituted an abuse of discretion).

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[57] See MCL 333.1104(5).

[58] Courts of record, which include district courts, have the power "[t]o issue process of subpoena, requiring the attendance of any witness in accordance with court rules, to testify in any matter or cause pending or triable in such courts[.]" MCL 600.1455(1).

A judge may certify that a witness who is located outside of Michigan is material to a pending criminal matter and recommend that the witness be taken into custody and brought to testify in a prosecution within this state. MCL 767.93(1) states:

> "If a person in a state, which by law provides for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found."

A defendant requesting the presence of an out-of-state witness under MCL 767.93 must "(1) designate the proposed witness' location with a reasonable degree of certainty; (2) file a timely petition; and (3) make out a prima facie case that the witness' testimony is material." *People v McFall*, 224 Mich App 403, 409 (1997). "[T]he party seeking the presence of an out-of-state witness . . . should present evidence in the form of an affidavit of the witness or other competent evidence." *Id*. at 410.

See also MCL 766.11b(2), providing that "[t]he [judge] shall allow the prosecuting attorney or the defense to subpoena and call a witness from whom hearsay testimony was introduced under [MCL 766.11b[59]] on a satisfactory showing to the [judge] that live testimony will be relevant to the [judge's] decision whether there is probable cause to believe that a felony has been committed and probable cause to believe that the defendant committed the felony."[60]

4.24 Admission of Evidence in Preliminary Examination[61]

MCL 766.11b provides that, with the exception of certain hearsay records and reports enumerated in MCL 766.11b(1)(a)-(d), "[t]he rules of

[59] MCL 766.11b(1) provides that certain reports "are not excluded by the rule against hearsay and shall be admissible at the preliminary examination without requiring the testimony of the author of the report, keeper of the records, or any additional foundation or authentication[.]" See Section 4.24(C) for more information.

[60] See Section 4.24 for discussion of MCL 766.11b.

[61] For information on evidentiary hearings in preliminary examinations, see Section 5.23.

evidence apply at the preliminary examination." See also MCR 6.110(C). However, under the harmless error rule, "an evidentiary deficiency [such as admission of hearsay testimony] at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error." *People v Hall (Lisa)*, 435 Mich 599, 600-601 (1990). See also MCL 769.26 ("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 . . . improper admission or rejection of evidence . . . 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[]").

"A verbatim record must be made of the preliminary examination. Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. The court must conduct the examination in accordance with the Michigan Rules of Evidence." MCR 6.110(C).

A. Scope of Examination

"At the preliminary examination, [the judge] shall examine the complainant and the witnesses in support of the prosecution[] . . . in regard to the offense charged and concerning any other matters connected with the charge that the [judge] considers pertinent." MCL 766.4(6). See also *People v Hunt*, 442 Mich 359, 363 (1993), citing *People v Dochstader*, 274 Mich 238, 243 (1936) (examining judge "may examine not only the truth of the charge in the complaint, but also other pertinent matters related to the charge[]"); *People v Crippen*, 242 Mich App 278, 282 (2000) (court's inquiry at preliminary examination "is not limited to whether the prosecution has presented sufficient evidence on each element of the offense, but extends to whether probable cause exists after an examination of the entire matter based on legally admissible evidence[]").

B. Testimony by Telephonic, Voice, or Video Conferencing

MCL 766.11a provides:

> "On motion of either party, the [judge] shall permit the testimony of any witness, except the complaining witness, an alleged eyewitness, or a law enforcement officer to whom the defendant is alleged to have made an incriminating statement, to be conducted by means of telephonic, voice, or video conferencing. The testimony taken by video conferencing shall be admissible in any subsequent trial or hearing as otherwise permitted by law."

C. Rules of Evidence and Admissible Hearsay

"The court must conduct the [preliminary] examination in accordance with the Michigan Rules of Evidence." MCR 6.110(C).

MCL 766.11b provides:

> "(1) The rules of evidence apply at the preliminary examination except that the following are not excluded by the rule against hearsay and shall be admissible at the preliminary examination without requiring the testimony of the author of the report, keeper of the records, or any additional foundation or authentication:
>
> > (a) A report of the results of properly performed drug analysis field testing to establish that the substance tested is a controlled substance.
> >
> > (b) A certified copy of any written or electronic order, judgment, decree, docket entry, register of actions, or other record of any court or governmental agency of this state.
> >
> > (c) A report other than a law enforcement report that is made or kept in the ordinary course of business.
> >
> > (d) Except for the police investigative report, a report prepared by a law enforcement officer or other public agency. Reports permitted under this subdivision include, but are not limited to, a report of the findings of a technician of the division of the department of state police concerned with forensic science, a laboratory report, a medical report, a report of an arson investigator, and an autopsy report.
>
> (2) The [judge] shall allow the prosecuting attorney or the defense to subpoena and call a witness from whom hearsay testimony was introduced under [MCL 766.11b] on a satisfactory showing to the [judge] that live testimony will be relevant to the [judge's] decision whether there is probable cause to believe that a felony has been committed and probable cause to believe that the defendant committed the felony.[62]

[62] See also MCR 6.110(D)(1).

> (3) As used in this section, 'controlled substance' means that term as defined under . . . MCL 333.7104."

See also MRE 1101(b)(8), providing that "[a]t preliminary examinations in criminal cases, hearsay is admissible to prove, with regard to property, the ownership, authority to use, value, possession and entry."

MCR 6.110(D)(2) provides:

> "If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of
>
> > (a) a prior evidentiary hearing, or
> >
> > (b) a prior evidentiary hearing supplemented with a hearing before the trial court, or
> >
> > (c) if there was no prior evidentiary hearing, a new evidentiary hearing."

MCR 6.202 governs the admissibility of forensic laboratory reports and certificates.[63]

D. Examination of Witnesses

1. Generally

"Each party may . . . examine and cross-examine witnesses at the preliminary examination." MCR 6.110(C). "Th[e] right to a preliminary examination does not mean [the right to] an entire trial; there is no right to parade witness after witness before the [judge] merely creating one fact issue after another." *People v Springer*, 64 Mich App 260, 262 (1975). "After the crime and its elements are established and the identity of the person *probably* committing it is established, the rest of the testimony becomes

[63] MCR 6.202 has not been amended to reflect the statutory changes adopted by 2014 PA 123. See the Michigan Judicial Institute's *Evidence Benchbook* for more information on forensic laboratory reports and certificates.

a question of fact and credibility for the trier of the facts to determine; namely the jury or trial judge." *Id*.

2. Procedure

"At the preliminary examination, a [judge] shall examine the complainant and the witnesses in support of the prosecution, on oath and, except as provided in [MCL 766.11a and MCL 766.11b],[64] in the presence of the defendant, concerning the offense charged and in regard to any other matters connected with the charge that the [judge] considers pertinent." MCL 766.4(6).

"After the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he [or she] have any, shall be sworn, examined and cross-examined and he [or she] may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution." MCL 766.12.

"On motion of either party, the [judge] shall permit the testimony of any witness, except the complaining witness, an alleged eyewitness, or a law enforcement officer to whom the defendant is alleged to have made an incriminating statement, to be conducted by means of telephonic, voice, or video conferencing. The testimony taken by video conferencing shall be admissible in any subsequent trial or hearing as otherwise permitted by law." MCL 766.11a.

"As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon an showing of good cause, any person at another location in a preliminary examination." MCR 6.006(B). "The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).[65]

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[64] MCL 766.11a governs the use of telephonic, voice, or video conferencing at the preliminary examination. See Section 4.24(B). MCL 766.11b governs admission of certain hearsay reports and documents. See Section 4.24(C).

Committee Tip:

The trial court should allow the defendant to effectively cross-examine the prosecution witnesses, so that even if a prosecution witness becomes unavailable to testify at trial, MRE 804(a)(5), the prior testimony would still be admissible and not violate the defendant's right to confrontation.

4.25 Corpus Delicti Rule

"Under the *corpus delicti* rule, 'a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury.'" *People v Schumacher*, 276 Mich App 165, 180 (2007), quoting *People v Konrad*, 449 Mich 263, 269-270 (1995). "In a criminal prosecution, proof of the *corpus delicti* of a crime is required before the prosecution may introduce a defendant's inculpatory statements." *Schumacher*, 276 Mich App at 180. "It is . . . well-accepted that th[e] [*corpus delicti*] rule applies to a preliminary examination." *People v Randall*, 42 Mich App 187, 190 (1972).

4.26 Record of Preliminary Examination

"A verbatim record must be made of the preliminary examination." MCR 6.110(C). See also MCR 6.006(D). "All proceedings in the district court, except as otherwise provided by law or supreme court rule, shall be recorded." MCL 600.8331.

[65]Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

4.27 Transcript of Testimony

"The court reporter shall transcribe and file the record of the preliminary examination if such is demanded or ordered pursuant to MCL 766.15." MCR 6.113(D).

MCL 766.15 provides, in part:

> (2) A written transcript of the testimony of a preliminary examination need not be prepared or filed except upon written demand of the prosecuting attorney, defense attorney, or defendant if the defendant is not represented by an attorney, or as ordered sua sponte by the trial court. A written demand to prepare and file a written transcript is timely made if filed within 2 weeks following the arraignment on the information or indictment. A copy of a demand to prepare and file a written transcript shall be filed with the trial court, all attorneys of record, and the court which held the preliminary examination. Upon sua sponte order of the trial court or timely written demand of an attorney, a written transcript of the preliminary examination or a portion thereof shall be prepared and filed with the trial court.
>
> (3) If a written demand is not timely made as provided in subsection (2), a written transcript need not be prepared or filed except upon motion of an attorney or a defendant who is not represented by an attorney, upon cause shown, and when granting of the motion would not delay the start of the trial. When the start of the trial would otherwise be delayed, upon good cause shown to the trial court, in lieu of preparation of the transcript or a portion thereof, the trial court may direct that the defense and prosecution shall have an opportunity before trial to listen to any electronically recorded testimony, a copy of the recording tape or disc, or a stenographer's notes being read back.

"The court may hold the arraignment before the preliminary examination transcript has been prepared and filed." MCR 6.113(A).

4.28 Bindover Following Preliminary Examination

MCL 766.13 provides:

> "If the [judge] determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the [judge] shall

either discharge the defendant or reduce the charge to an offense that is not a felony. If the [judge] determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the [judge] shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the [judge] may conduct the circuit court arraignment as provided by court rule."

A. Bindover After Waiver

"Upon waiver of the preliminary examination, the court must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint." MCR 6.110(A).

B. Bindover After Finding of Probable Cause

"If the [judge] determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the [judge] shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the [judge] may conduct the circuit court arraignment as provided by court rule." MCL 766.13.[66]

C. Bindover on a Greater Offense

A judge may grant a prosecutor's motion to amend a complaint to include a greater offense where the evidence at the preliminary examination supports probable cause as to the elements of the greater offense and the amendment does not cause unacceptable prejudice to the defendant. *People v Hunt (Arthur)*, 442 Mich 359, 364-365 (1993) (trial court should have allowed amendment of complaint to charge third-degree criminal sexual conduct instead of gross indecency between males where the greater offense was supported by the evidence).

In addition, a judge may, sua sponte, bind a defendant over for trial on a greater offense where the evidence presented at the preliminary examination supports the higher charge. *People v Gonzalez*, 214 Mich App 513, 517 (1995) ("[a] [judge] ha[s] the authority to bind [a] defendant over [for trial] on [a] charge without a motion by the prosecutor and d[oes] not violate the separation of powers clause").

[66] See Chapter 6 for discussion of circuit court arraignments.

D. Bindover on a Lesser Offense

"If the [judge] determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the [judge] shall either discharge the defendant or reduce the charge to an offense that is not a felony." MCL 766.13; see also MCR 6.110(F). "[I]f upon examination of the whole matter the evidence is insufficient to satisfy the [judge] that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he [or she] should not bind the defendant over on the offense charged but may bind him [or her] over on a lesser offense as to which he is so satisfied." *People v King (Russell)*, 412 Mich 145, 154 (1981) (district court properly bound the defendant over on the offense of manslaughter instead of first- or second-degree murder because malice and premeditation were lacking). See also *People v Neal*, 201 Mich App 650, 651, 653-656 (1993) (district court properly bound the defendant over on the offense of voluntary manslaughter instead of second-degree murder because malice was lacking).

"An examining [judge] has the obligation to consider binding a defendant over on lesser included offenses where such offenses are supported by the evidence offered at the preliminary examination." *People v Harris*, 159 Mich App 401, 405 (1987). "[E]ven where the charged offense has not been established, if a lesser included offense is established, then [the] defendant should be bound over for trial on that charge." *Id* (although judge properly refused to bind the defendant over for trial on open murder charge where the evidence established that the shooting was accidental, judge erred in dismissing the case where the evidence supported a charge of involuntary manslaughter because the evidence established that the defendant was grossly negligent).

E. Bindover When Defendant Is Charged With Open Murder

"[T]he elements of premeditation and deliberation are not required elements for which evidence must be presented at a preliminary examination in order to bind a defendant over for trial on open murder charges." *People v Coddington*, 188 Mich App 584, 593-594 (1991).

4.29 Setting Case for Trial When There Is Probable Cause to Believe That Defendant Committed a Misdemeanor

"If the court determines at the conclusion of the preliminary examination of a person charged with a felony that the offense charged is not a felony

or that an included offense that is not a felony has been committed, the accused shall not be dismissed but the [judge] shall proceed in the same manner as if the accused had initially been charged with an offense that is not a felony." MCL 766.14(1). See also MCR 6.110(E) ("If the court finds probable cause to believe that the defendant has committed an offense cognizable by the district court, it must proceed thereafter as if the defendant initially had been charged with that offense.").

4.30 Discharge of Defendant and Prosecutor's Right to Bring New Charges

MCR 6.110(F) provides:

> "If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense or reduce the charge to an offense that is not a felony. Except as provided in MCR 8.111(C),[67] the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge."

"[D]ismissal of a prosecution at a preliminary examination raises no res judicata or collateral estoppel bar to a subsequent prosecution." *People v Hayden*, 205 Mich App 412, 414 (1994). "[T]he prosecution may reinstate the charges against a defendant where it seeks to present 'additional evidence' at the second examination to the same [judge] who presided over the defendant's preliminary examination." *People v Robbins*, 223 Mich App 355, 361 (1997). The "additional evidence" need not be "newly discovered evidence." *Id*.

"'[S]ubjecting a defendant to repeated preliminary examinations violates due process if the prosecutor attempts to harass the defendant or engage in "judge-shopping."'" *People v Dunbar*, 463 Mich 606, 614 (2001) (finding no due process violation under the facts of the case), quoting *Robbins*, 223 Mich App at 363. "Among the factors to be considered in determining whether a due process violation has occurred are the reinstitution of charges without additional, noncumulative evidence not introduced at the first preliminary examination, the reinstitution of charges to harass, and judge-shopping to obtain a favorable ruling." *Dunbar*, 463 Mich at 613.

[67] MCR 8.111(C) provides for the reassignment of judges due to disqualification or based upon good cause.

4.31 Ordering Pretrial Release at the Conclusion of Preliminary Examination

MCL 766.5 provides:

> If it appears that a felony has been committed and that there is probable cause to believe that the accused is guilty thereof, and if the offense is bailable by the [judge] and the accused offers sufficient bail, it shall be taken and the prisoner discharged until trial.[68] If sufficient bail is not offered or the offense is not bailable by the [judge], the accused shall be committed to jail for trial. This section shall not prevent the [judge] from releasing the accused on his [or her] own recognizance where authorized by law.

See also MCR 6.106(A). For detailed information about ordering pretrial release, see **Chapter 7**.

4.32 Circuit Court Arraignment and Plea in District Court Following Conclusion of Preliminary Examination

MCL 766.13 provides, in relevant part:

> "If the [district court judge] determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the [judge] shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, *or the [district court judge] may conduct the circuit court arraignment as provided by court rule*." MCL 766.13 (emphasis supplied).

MCL 766.4(3)[69] provides:

> "A district judge has the authority to accept a felony plea. A district judge shall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. Sentencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken."

See also MCR 6.111(A),[70] which provides:

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[68] "Except as otherwise provided by law, a person accuse of a criminal offense is entitled to bail." MCL 765.6(1). See also Const 1963, art 1, §15.

[69] See Chapter 6 for discussion of felony pleas.

> "The circuit court arraignment may be conducted by a district judge in criminal cases cognizable in the circuit court immediately after the bindover of the defendant. A district court judge shall take a felony plea as provided by court rule if a plea agreement is reached between the parties. Following a plea, the case shall be transferred to the circuit court where the circuit judge shall preside over further proceedings, including sentencing. The circuit court judge's name shall be available to the litigants before the plea is taken."

4.33 Bindover Certificate and Return

"[A]ll examinations and recognizances taken by a [judge] . . . shall be immediately certified and returned by the [judge] to the clerk of the court before which the party charged is bound to appear." MCL 766.15(1). "If that [judge] refuses or neglects to return the same, the [judge] may be compelled immediately by order of the court, and in case of disobedience may be proceeded against as for a contempt by an order to show cause or a bench warrant." *Id*.

"Immediately on concluding the [preliminary] examination, the court must certify and transmit to the court before which the defendant is bound to appear the prosecutor's authorization for a warrant application, the complaint, a copy of the register of actions, the examination return, and any recognizances received." MCR 6.110(G). MCR 6.110(G) "is consistent with the procedure set forth in MCL 766.15." 1989 Staff Comment to MCR 6.110.

4.34 Scheduling the Arraignment on the Information

"Unless the trial court does the scheduling of the arraignment on the information, the district court must do so in accordance with the administrative orders of the trial court." MCR 6.110(I). MCR 6.110(I) contemplates the prompt scheduling of an arraignment on an information but also recognizes that practices may vary throughout the state depending on local circumstances. Nonetheless, the subrule appears to require that trial courts establish a local practice by administrative order. The administrative order, of course, is subject to Supreme Court review. See MCR 8.112(B)(3).

MCR 6.113(C) states:

> "A defendant represented by a lawyer may, as a matter of right, enter a plea of not guilty or stand mute without

[70] See Chapter 6 for discussion of circuit court arraignments.

> arraignment by filing, at or before the time set for the arraignment, a written statement signed by the defendant and the defendant's lawyer acknowledging that the defendant has received a copy of the information, has read or had it read or explained, understands the substance of the charge, waives arraignment in open court, and pleads not guilty to the charge or stands mute."

"A circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information and any notice of intent to seek an enhanced sentence[pursuant to MCL 769.13], as provided in MCR 6.112(F)[71]." MCR 6.113(E). See SCAO Model Local Administrative Order 26—Elimination of Circuit Court Arraignments.[72]

4.35 Circuit Court Review of Errors at Preliminary Examination

A. Motion to Quash Information—Improper Bindover

"If, on proper motion, the trial court finds a violation of [MCR 6.110(C) (conduct of examination)], [MCR 6.110(D) (exclusionary rules)], [MCR 6.110(E) (probable cause finding)], or [MCR 6.110(F) (discharge of defendant)], it must either dismiss the information or remand the case to the district court for further proceedings." MCR 6.110(H). MCR 6.110(H) "does not address, and leaves to case law, what effect a violation of these rules or an error in ruling on a motion filed in the trial court may have when raised following conviction." 1989 Staff Comment to MCR 6.110.

The district court has a duty to bind the defendant over to circuit court for trial if the court finds that a felony has been committed and probable cause that the defendant committed it. *People v Stone*, 463 Mich 558, 561 (2001), and *People v Goecke*, 457 Mich 442, 469 (1998). Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious person to believe that the defendant is guilty of the charged offense. *People v Orzame*, 224 Mich App 551, 558 (1997), and *People v Reigle*, 223 Mich App 34, 37 (1997). Guilt beyond a reasonable doubt need not be proved at the

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[71] MCR 6.112(F) provides that "[a] notice of intent to seek an enhanced sentence pursuant to MCL 769.13 . . . must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense."

[72] Available at http://courts.mi.gov/Administration/SCAO/Resources/LAOs/LAO26-model.rtf.

preliminary examination. *Id*. To justify bindover, there must be some evidence from which each element of the charged offense may be inferred. If the credible evidence conflicts and raises a reasonable doubt as to the defendant's guilt, the issue of guilt or innocence should be left to the trier of fact. *People v King*, 412 Mich 145, 153–54 (1981), *Goecke*, 457 Mich at 469-470, and *Reigle*, 223 Mich App at 37. In determining whether to bind the defendant over to circuit court, the examining magistrate must determine the weight and competency of the evidence and the credibility of witnesses. *People v Paille #2*, 383 Mich 621, 627 (1970), *People v Talley*, 410 Mich 378, 386 (1981), overruled in part on other grounds 457 Mich 266, 276 (1998), and *King*, 412 Mich at 153. The magistrate must make his or her determination after examination of the whole matter and may consider evidence offered in defense. *Id*. at 153-154. Only legally admissible evidence may be considered. *People v Kubasiak*, 98 Mich App 529, 536 (1980).

"Because distinctly different probable-cause standards distinguish . . . arrest and bind-over decisions," evidence of an additional crime gathered following a constitutionally valid arrest need not be suppressed as "fruit of the poisonous tree" based solely on a determination that probable cause is lacking to support a bindover on the charge for which the defendant was originally arrested. *People v Cohen*, 294 Mich App 70, 72 (2011) (circuit court erred in granting the defendant's motion to quash information; circuit court erroneously concluded that in the absence of probable cause to bind the defendant over on charge of possession of cocaine, police lacked probable cause for the arrest for that offense, and that evidence of a second crime obtained following the arrest therefore must be suppressed).

"Once a criminal case has been bound over and jurisdiction has been vested in the circuit court,[73] there are only limited circumstances in which the circuit court may properly remand the case for a new or continued preliminary examination." *People v Taylor (Robbie)*, ___ Mich App ___, ___ (2016), citing MCR 6.110(H) (additional citations omitted).

- "If a motion to quash is filed and the circuit court determines that the evidence is insufficient to support the bindover, the circuit court is permitted to remand the case for a further examination at which the prosecutor may seek to remedy the shortcoming in the proofs needed to establish probable cause." *Taylor (Robbie)*, ___ Mich App at ___ (citations omitted).

[73] See Section 4.1(B) for discussion of jurisdiction following bindover.

- "[A] circuit court may remand the case if the defendant waived the right to a preliminary examination and a defect in the waiver existed, if for example the waiver was made without the benefit of counsel." *Taylor (Robbie)*, ___ Mich App at ___ (citations omitted).

- "The circuit court may . . . remand the case if the prosecutor adds a new charge on which the defendant did not have a preliminary examination." *Taylor (Robbie)*, ___ Mich App at ___ (citations omitted).

However, if the defendant "[does] not establish any of the appropriate grounds for remanding the case[]" following bindover, the circuit court may not remand the case to the district court. *Taylor (Robbie)*, ___ Mich App at ___. In *Taylor (Robbie)*, ___ Mich App at ___, following preliminary examination and bindover, the circuit court denied the defendants' motions to quash the information; however, the circuit court subsequently granted the defendants' motions to remand the case to the district court on the ground that a "ballistics report prepared after the preliminary examination" was potentially exculpatory. The Court of Appeals reversed the remand order, holding that "[t]he circuit court erred when it remanded the case for a continued preliminary examination[]" where "[the d]efendants did not establish any of the appropriate grounds for remanding the case." *Id.* at ___ (noting that "the circuit court denied [the] defendants' motions to quash and thereby upheld the district court's finding of probable cause[,]" "there [was no] waiver by [the] defendants of the right to a preliminary examination that could be deemed defective[,]" "[t]he prosecutor did not seek to add new charges[,]" and "[t]he circuit court did not find a violation of any of the relevant rules related to the conduct of the preliminary examination or the probable cause determination[]"). Because "the circuit court [had] already denied the motions to quash, it was then unnecessary for either the circuit court or the district court to revisit the probable cause determination." *Id.* at ___ (citations omitted). Furthermore, "[t]he emergence . . . of potentially favorable evidence after the preliminary examination does not by itself entitle a defendant to a second or continued preliminary examination[; i]nstead, the trial is generally the appropriate forum in which to present such evidence." *Id.* at ___, ___ n 2 (noting that "the record indisputably establishe[d] that [the] defendants' attorneys were well aware at the preliminary examination of the key underlying fact referenced in the ballistics report that comprised the basis of their subsequent request to remand the case for a continued preliminary examination[]") (citations omitted).

"'A district court magistrate's decision to bind over a defendant and a trial court's decision on a motion to quash an information are reviewed for an abuse of discretion.'" *People v Bass*, ___ Mich App ___, ___ (2016), quoting *People v Dowdy*, 489 Mich 373, 379 (2011). "However, '[t]o the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo.'" *Bass*, ___ Mich App at ___, quoting *People v Miller (Marvin)*, 288 Mich App 207, 209 (2010) (alteration in original). "[E]rror at the preliminary examination stage should be examined under a harmless error analysis." *People v Hall (Lisa)*, 435 Mich 593, 602 (1990) (a defendant bound over for trial to face felony charges on the basis of hearsay testimony erroneously admitted at the preliminary examination did not constitute a ground for vacating her subsequent conviction where she received a fair trial and was not otherwise prejudiced by the error). However, "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson (Donald)*, 469 Mich 1018 (2004). See also *People v Bennett*, 290 Mich App 465, 481 (2010) ("the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless").

B. Prosecutor's Appeal to Circuit Court

"'[I]f the prosecutor is of the opinion that the examining [judge] erred in not binding the defendant over for trial, [he or she should] appeal to the circuit court.'" *People v Robbins*, 223 Mich App 355, 361-362 (1997), quoting *People v Nevitt*, 76 Mich App 402, 404 (1977).

A reviewing court may not reverse a judge's bindover decision absent an abuse of discretion. *People v Yost*, 468 Mich 122, 126 (2003). In *Yost*, after a seven-day preliminary exam, the district court refused to bind the defendant over for trial on charges of open murder and felony murder, based on its determination that there was lack of credible evidence of a homicide. *Id*. at 123-124. The prosecutor appealed to the circuit court, which determined that the record established a sufficient basis for finding that a homicide was committed and probable cause to believe that the defendant committed it. *Id*. at 124. The circuit court held that the district court abused its discretion in refusing to bind the defendant over for trial. *Id*. On leave granted, the Supreme Court upheld the circuit court's decision, agreeing with the circuit court that the evidence was sufficient to warrant a bindover and that the district court abused its discretion when concluding that probable cause to bind the defendant over for trial did not exist. *Id*. at 133.

Chapter 5: Misdemeanor Arraignments and Pleas

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SPECIAL NOTE:

Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district or municipal court on or after January 1, 2015,[1] 2014 PA 123 and 2014 PA 124 amended several provisions in the Code of Criminal Procedure and the Revised Judicature Act related to preliminary examinations, probable cause conferences, and the jurisdiction and duties of district court judges and magistrates with respect to pretrial proceedings in felony cases. Effective January 1, 2015, ADM File No. 2014-42 amended MCR 6.104 (governing arraignment on the warrant or complaint), MCR 6.110 (governing preliminary examinations), and MCR 6.111 (governing circuit court arraignment in district court), and added MCR 6.108 (governing probable cause conferences), to correspond to these statutory changes.

This revised version of Chapter 5 incorporates 2014 PA 123 and 2014 PA 124. The contents of this chapter are applicable to cases in which the defendant is arraigned in district or municipal court on or after January 1, 2015.

See the Appendix for a chart including information on the jurisdiction of district court judges and magistrates over preliminary matters in criminal

[1] See 2014 PA 123, enacting section 1; 2014 PA 124, enacting section 2.

proceedings. For a chart outlining the differences in procedures before and after January 1, 2015, as a result of statutory reforms concerning probable cause conferences, preliminary examinations, and felony pleas, see SCAO Memorandum, July 23, 2014. For additional information, see the SCAO's *Best Practices for Probable Cause Conferences and Preliminary Examinations*.

Part A: Commentary on Misdemeanor Arraignments

5.1 Applicable Court Rules

MCR 6.001(B) lists the court rules that govern the procedure by which criminal cases cognizable in district court should be conducted:

- MCR 6.001—MCR 6.004 (scope, purpose and construction, definitions, speedy trial);
- MCR 6.005(B)-(C) (indigent defendants)
- MCR 6.006 (video and audio proceedings);
- MCR 6.102(D) and MCR 6.102(F) (arrest on a warrant);
- MCR 6.103 (issuance of summons instead of arrest warrant);
- MCR 6.104(A) (arraignment without unnecessary delay before a court or by use of two-way interactive video technology);
- MCR 6.106 (pretrial release);
- MCR 6.125 (competency hearing);
- MCR 6.202 (disclosure of forensic laboratory report or certificate);
- MCR 6.425(E)(3) (incarceration for nonpayment of court-ordered financial obligations);
- MCR 6.427 (judgment);
- MCR 6.435 (correcting mistakes);
- MCR 6.440 (disability of judge);
- MCR 6.445(A)-(G) (probation revocation);
- MCR 6.610 (district court criminal procedure);
- MCR 6.615 (misdemeanor traffic cases);
- MCR 6.620 (jury impaneling); and
- MCR 6.625 (appeal and appointment of appellate counsel).

MCR 6.001(B) specifically indicates that the court rules listed above "govern matters of procedure in criminal cases cognizable in the district

courts." Because a district court's jurisdiction is limited by statute to misdemeanors punishable by not more than one year of imprisonment, the rules included in MCR 6.001(B) do not refer to "serious" or "high court" misdemeanors for which two years of imprisonment may be imposed. Although MJI has made every effort to eliminate any confusion that could be caused by unqualified use of the term "misdemeanor," a cautionary reminder to the reader is appropriate. Because not all misdemeanors are cognizable in district court, this chapter will repeatedly distinguish between those misdemeanor offenses cognizable in district court and misdemeanor offenses in general.

Several court rules in Chapter 6 (the chapter containing court rules governing criminal procedure, in general) are not expressly noted in MCR 6.001(B) as applicable to proceedings that involve misdemeanor offenses cognizable in district court. However, rules not specifically mentioned in MCR 6.001(B) may be instructive in situations when no court rule specific to district court procedure is supplied elsewhere. For example, MCR 6.104(B) discusses the place of arraignment and, although the rule is not specifically cited by MCR 6.001(B), it may be helpful in handling misdemeanor cases cognizable in district court. In addition to those "Chapter 6" rules not expressly noted in MCR 6.001(B), the rules of civil procedure apply to criminal cases unless a statute or court rule provides a similar or different procedure applicable to the circumstances. MCR 6.001(D).

MCR 6.001(E) addresses and resolves any conflict that may exist or arise between the criminal procedure outlined in Chapter 6 of the court rules and any statutory provisions concerning the same procedure:

> "The rules in [Chapter 6] supersede all prior court rules in this chapter and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter."

5.2 Jurisdiction and Venue in District Court

A. Jurisdiction

A district court has the same power to hear and determine matters within its jurisdiction as does a circuit court over matters within the circuit court's jurisdiction. MCL 600.8317.

> "The district court has jurisdiction of all of the following:
>
> > (a) Misdemeanors punishable by a fine or imprisonment not exceeding 1 year, or both.

> (b) Ordinance and charter violations punishable by a fine or imprisonment, or both.
>
> (c) Arraignments, the fixing of bail and the accepting of bonds.
>
> (d) Probable cause conferences in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the probable cause conference under . . . MCL 766.4.[2]
>
> (e) Preliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the preliminary examination under . . . MCL 766.1[*et seq*]. There shall not be a preliminary examination for any misdemeanor to be tried in a district court.[3]
>
> (f) Circuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under . . . MCL 766.13. Sentencing for felony cases and misdemeanor cases not cognizable by the district court shall be conducted by a circuit judge." MCL 600.8311.

The Michigan Code of Criminal Procedure, MCL 760.1 *et seq.*, defines *felony* as a violation of Michigan's penal law for which a person, if convicted of the offense, may be punished by death or by imprisonment for more than one year or an offense specified by law to be a felony. MCL 761.1(g); see also MCL 750.7, defining *felony*, for purposes of the Michigan Penal Code, as "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison." The Code of Criminal Procedure defines *misdemeanor* as "a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(h); see also MCL 750.8 (Penal Code), defining *misdemeanor* as "any act or omission, not a felony, [that] is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court[.]" Generally, misdemeanors are offenses punishable by not more than one year of imprisonment or violations of a state agency's orders, rules, or regulations punishable by imprisonment or a fine other than a civil fine. MCL 761.1(h). Some misdemeanors are classified as *minor*

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[2] See Chapter 4 for discussion of probable cause conferences.

[3] See Chapter 4 for discussion of preliminary examinations.

offenses, violations for which the maximum permissible imprisonment does not exceed 92 days, and the maximum fine does not exceed $1,000.00. MCL 761.1(k).

Criminal conduct near county boundary lines. When an offense is committed within one mile of the boundary line between two counties, jurisdiction is proper in either county. MCL 762.3(1) provides:

> "Any offense committed on the boundary line of 2 counties, or within 1 mile of the dividing line between them, may be alleged in the indictment to have been committed, and may be prosecuted and punished in either county."

Criminal conduct involving identity theft, forgery, misuse of financial transaction devices, fraud, and larceny. Pursuant to MCL 762.10c(1), conduct prohibited by MCL 762.10c(2) may be prosecuted in any one of the following jurisdictions:

- where the offense occurred.
- where the information used to commit the violation was illegally used.
- where the victim resides.

MCL 762.10c(2) states that the jurisdiction described in MCL 762.10c(1) "applies to conduct prohibited under 1 or more of the following laws and to conduct that is done in furtherance of or arising from the same transaction as conduct prohibited under 1 or more of the following laws:"

- Violating a provision of the identity theft protection act, MCL 445.61—MCL 445.79c.
- Violating former MCL 750.285 (identity theft).
- Intentionally reproducing, altering, counterfeiting, forging, or duplicating any part of an official state personal identification card, with criminal intent; selling or possessing with intent to deliver such official state personal identification card; stealing or knowingly using a stolen official state personal identification card, MCL 28.295.
- Intentionally reproducing, altering, counterfeiting, forging, or duplicating a driver license, with criminal intent, or using such a driver license, MCL 257.310(7).
- False certification under the Michigan Vehicle Code, MCL 257.903.

- Committing a violation concerning criminal use of a financial transaction device, MCL 750.157n—MCL 750.157r, MCL 750.157v, and MCL 750.157w.

- Using false pretenses with intent to defraud, MCL 750.218.

- Obtaining telecommunications services with intent to avoid charge for the services, MCL 750.219a.

- Preparing or submitting a loan application without authorization from the applicant, MCL 750.219e.

- Altering, forging, or counterfeiting a public record, MCL 750.248.

- Uttering and publishing a false, forged, altered, or counterfeit financial transaction device with intent to injure or defraud another person; MCL 750.248a.

- Knowingly uttering and publishing as true a false, forged, altered, or counterfeit record or other instrument, MCL 750.249.

- Committing larceny by conversion, MCL 750.362.

- Committing larceny by false personation, MCL 750.363.

- Secretly or surreptitiously capturing or transmitting personal identifying information from a transaction that involves the use of a financial transaction device by a person who is not a party to a transaction, MCL 750.539k.

If an individual is charged with multiple counts of identity theft under MCL 445.61—MCL 445.79c, or secretly or surreptitiously capturing or transmitting personal identifying information from a transaction that involves the use of a financial transaction device by a person who is not a party to a transaction, MCL 750.539k, and the violations could be prosecuted in more than one jurisdiction, all violations may be properly prosecuted in any of the applicable jurisdictions. MCL 762.10c(3).

Accessory after the fact. Because commission of the underlying crime is an element of any accessory after the fact charge, jurisdiction of such a charge is proper in the county where the underlying crime was committed, even when the actual assistance was rendered in a county different from the county in which the underlying crime occurred. *People v King*, 271 Mich App 235, 237 (2006). Similarly, even when the assistance was rendered in a state other than Michigan, jurisdiction to try a defendant charged with accessory after the fact lies in Michigan because "MCL 762.2(2)(a) provides that Michigan has jurisdiction over any crime where any

act constituting an element of the crime is committed with Michigan." *King*, 271 Mich App at 243.

B. Venue

For a district of the **first class,** venue for criminal actions is in the **county** where the violation occurred. MCL 600.8312(1).

> A district of the first class consists of one or more counties, where each county is responsible for maintaining, financing, and operating the district court within its county. MCL 600.8103(1).

For a district of the **second class,** venue for criminal actions is in the **district** where the violation occurred. MCL 600.8312(2).

> *A district of the second class consists of a group of political subdivisions within a county, where the county is responsible for maintaining, financing, and operating the district court within its county.* MCL 600.8103(2).

For a district of the **third class,** venue for criminal actions is in the **political subdivision** where the violation occurred, except that when the violation occurred in a political subdivision where the court is not required to sit, venue is proper in any political subdivision where the court is required to sit. MCL 600.8312(3).

> *A district of the third class consists of one or more political subdivisions within a county, where each political subdivision is responsible for maintaining, financing, and operating the district court within its political subdivision.* MCL 600.8103(3).

Criminal conduct near county boundary lines. "If an offense is committed on the boundary of 2 or more counties, districts or political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned." MCL 762.3(3)(a).

Multiple counties affected by an offense. "Whenever a felony consists or is the culmination of [two] or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect." MCL 762.8.

5.3 A District Court Magistrate's Authority

Subject to the chief district judge's approval, district court magistrates generally have the authority to issue arrest warrants and search warrants; conduct arraignments, fix bail and accept bond, and accept pleas for specified offenses; conduct probable cause conferences[4]; and impose sentences for specified offenses. MCL 600.8511(a)-(h). "Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division." MCR 4.401(B).

> **Note—"Magistrate" and "District Court Magistrate" Definitions:** The terms "magistrate" and "district court magistrate" are not always synonymous. According to the Code of Criminal Procedure, a "magistrate" is a district court judge or a municipal court judge, but a "magistrate" is not a "district court magistrate." MCL 761.1(f). The term "district court magistrate" is specifically used in the Code of Criminal Procedure when the subject matter involves a district court magistrate. But the Code of Criminal Procedure also states that a "district court magistrate" may exercise the powers, jurisdiction, and duties of a "magistrate" if expressly authorized by the Revised Judicature Act, MCL 600.101 *et seq*. That is, if authorized by law, a "district court magistrate" may exercise the powers and duties of a municipal court or a district court judge. MCL 761.1(f).
>
> Note also that MCR 6.003(4) recognizes the distinction between a "magistrate" and a "district court magistrate." MCR 6.003(4) defines "court" or "judicial officer" as "a judge, a magistrate, or a district court magistrate authorized in accordance with the law to perform the functions of a magistrate." A district court magistrate's authority is also subject to conditions found in MCR 4.401(A)-(B), which provide:
>
>> **"(A) Procedure.** Proceedings involving district court magistrates must be in accordance with relevant statutes and rules.
>>
>> **(B) Duties.** Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division."

[4] A magistrate may "conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge." MCL 600.8511(h). See Chapter 4 for discussion of probable cause conferences.

Note—Appointment of Counsel: "When a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed." MCL 775.16. "If the person states that he or she is unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the [Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981—MCL 780.1003]." MCL 775.16. The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced *for a crime for which an individual may be imprisoned upon conviction*, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA) (emphasis supplied). The MIDCA requires the trial court to "assure that each criminal defendant[] is advised of his or her right to counsel[,]" MCL 780.991(1)(c), and to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant . . . not later than at the defendant's first appearance in court[,]" MCL 780.991(3)(a). See Section 3.4(B) for discussion of the MIDCA.

Arrest warrants and search warrants.[5] A district court magistrate may issue arrest warrants for felonies, misdemeanors, and ordinance violations pursuant only to the written authorization of the prosecuting attorney or municipal attorney. MCL 764.1(1)-(2) and MCL 600.8511(e). A district court magistrate needs no authorization to issue a warrant for the arrest of an individual to whom a police officer issued a traffic citation under MCL 257.728 if the individual failed to appear in court when required. MCL 600.8511(e).

A district court magistrate has the jurisdiction and duty "[t]o issue search warrants, if authorized to do so by a district court judge." MCL 600.8511(g). See also MCL 780.651(1); MCL 780.651(3).

Arraignments and first appearances. In addition to limited jurisdiction under MCL 600.8511(a)-(c), as authorized by the chief judge, to "arraign and sentence upon pleas of guilty or nolo contendere" for certain listed violations that are punishable by no more than 93 days' imprisonment,[6] a district court magistrate has jurisdiction, as authorized by the chief judge, to arraign defendants and set bond for certain other offenses, including violations of MCL 257.625 (offenses involving the operation of a motor vehicle while intoxicated or visibly impaired), MCL 257.625m (operation of a commercial motor vehicle by a person with an unlawful blood alcohol content), MCL 324.81134 (offenses involving the operation of an ORV while under the influence of alcoholic liquor and/or a controlled

[5] See Chapter 2 for a more complete discussion of issuing arrest warrants and search warrants.

[6] See Section 5.3 for more information.

substance, while visibly impaired, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body),[7] and MCL 324.82128 and MCL 324.82129 (offenses involving the operation of a snowmobile while under the influence of alcoholic liquor and/or a controlled substance, while visibly impaired, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body). MCL 600.8511(b)-(c).

Additionally, MCL 600.8511(d) provides that a district court magistrate, if authorized by the chief judge, has jurisdiction over arraignments for contempt violations and violations of probation when the violation arises directly out of a case in which a judge or district court magistrate conducted the same defendant's arraignment under MCL 600.8511(a), (b), or (c), or the same defendant's first appearance under MCL 600.8513. MCL 600.8511(d) applies only to offenses punishable by imprisonment for not more than one year, a fine, or both. District court magistrates are not authorized to conduct violation hearings or sentencing hearings, but may set bond and accept pleas. *Id*.

A district court magistrate may also preside over a defendant's "first appearance" in certain circumstances. MCL 600.8513(1) states:

> "When authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination and acceptance of any written demand or waiver of jury trial. However, this section does not authorize a district court magistrate to accept a plea of guilty or nolo contendere not expressly authorized under [MCL 600.8511 or MCL 600.8512a]. A defendant neither demanding nor waiving preliminary examination in writing is deemed to have demanded preliminary examination and a defendant neither demanding nor waiving jury trial in writing is considered to have demanded a jury trial."

Fixing bail and accepting bond. Without any apparent qualification, a district court magistrate has a duty "[t]o fix bail and accept bond in all cases." MCL 600.8511(f). See SCAO Form MC 241 (Bond).

Civil infractions, misdemeanors, and ordinance violations not punishable by imprisonment. To the extent expressly authorized by the

[7] Effective March 31, 2015, 2014 PA 405 repealed MCL 324.81135. 2014 PA 405, enacting section 1. However, MCL 600.8511(c) still provides that "the chief judge may authorize the magistrate to arraign defendants and set bond with regard to violations of . . . [MCL 324.81135.]"

chief judge, presiding judge, or only judge of the district, MCL 600.8512a permits a district court magistrate to:

> "(a) Accept an admission of responsibility, decide a motion to set aside a default or withdraw an admission, and order civil sanctions for a civil infraction and order an appropriate civil sanction permitted by the statute or ordinance defining the act or omission.
>
> (b) Accept a plea of guilty or nolo contendere and impose sentence for a misdemeanor or ordinance violation punishable by a fine and which is not punishable by imprisonment by the terms of the statute or ordinance creating the offense."

Guilty pleas and nolo contendere pleas to certain enumerated offenses punishable by imprisonment.

- **Offenses punishable by up to 90 days' imprisonment.** MCL 600.8511(a) provides that a district court magistrate has the jurisdiction and duty "[t]o arraign and sentence upon pleas of guilty or nolo contendere for violations of the following acts or parts of acts, or a local ordinance substantially corresponding to these acts or parts of acts, when authorized by the chief judge of the district court, if the maximum permissible punishment does not exceed 90 days in jail or a fine, or both."
  - MCL 324.48701—MCL 324.48740 (sport fishing)
  - MCL 324.40101—MCL 324.40120 (wildlife conservation)
  - MCL 324.80101—MCL 324.80199 (Marine Safety Act)[8]
  - MCL 475.1—MCL 479.43 (Motor Carrier Act)
  - MCL 480.11—MCL 480.25 (Motor Carrier Safety Act of 1963)
  - MCL 287.261—MCL 287.290 (Dog Law of 1919)
  - MCL 436.1703 and MCL 436.1915 (Liquor Control Code)
  - MCL 324.501—MCL 324.513 (DNR Commission)
  - MCL 324.8901—MCL 324.8907 (littering)

[8] See Section 5.13 for a detailed discussion of arrest and arraignment procedure following a person's alleged violation of the Marine Safety Act.

- MCL 324.43501—MCL 324.43561 (hunting/fishing licensing)
- MCL 324.73101—MCL 324.73111 (recreational trespass)
- MCL 750.546—MCL 750.552c (willful trespass)[9]

- **Michigan Vehicle Code violations.** Except for violations of MCL 257.625 (offenses involving the operation of a motor vehicle while intoxicated or visibly impaired) and MCL 257.625m (operation of a commercial motor vehicle by a person with an unlawful blood alcohol content), and local ordinances substantially corresponding to those provisions, MCL 600.8511(b) permits a district court magistrate (if authorized by the chief district judge) to arraign and sentence defendants on pleas of guilty or no contest for violations of the Michigan Vehicle Code (or violations of local ordinances substantially corresponding to a provision of the Vehicle Code), as long as the maximum permissible punishment does not exceed 93 days in jail, a fine, or both.

  However, a district court magistrate may be authorized to arraign defendants and set bond for violations of MCL 257.625 and MCL 257.625m or substantially corresponding local ordinances. MCL 600.8511(b).

- **ORV and snowmobile violations.** Similarly, if authorized by the chief district judge and if the maximum permissible punishment does not exceed 93 days in jail, a fine, or both, MCL 600.8511(c) permits a district court magistrate to arraign and sentence defendants on pleas of guilty or no contest for violations of MCL 324.81101 to MCL 324.81150 (ORV licensing) and MCL 324.82101—MCL 324.82160 (snowmobiles) or violations of a local ordinance substantially corresponding to one of these statutory provisions.

  The district court magistrate's authority to arraign and sentence does not extend to guilty or no contest pleas for violations of MCL 324.81134 (offenses involving the operation of an ORV while under the influence of alcoholic liquor and/or a controlled substance, while visibly impaired, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body)[10] or MCL 324.82128 and MCL 324.82129 (offenses involving the

[9] Effective March 14, 2016, 2015 PA 211 repealed MCL 750.546—MCL 750.551; however, MCL 600.8511(a)(*xii*) has not been amended accordingly.

[10] Effective March 31, 2015, 2014 PA 405 repealed MCL 324.81135. 2014 PA 405, enacting section 1. However, MCL 600.8511(c) still provides that "the chief judge may authorize the magistrate to arraign defendants and set bond with regard to violations of . . . [MCL 324.81135.]"

operation of a snowmobile while under the influence of alcoholic liquor and/or a controlled substance, while visibly impaired, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body); however, the chief judge may authorize a district court magistrate to arraign defendants and set bond for violations under these statutes. MCL 600.8511(c).

Probable cause conferences. District court magistrates have jurisdiction "[t]o conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge." MCL 600.8511(h)[11]; see also MCR 6.108(B) ("[a] district court magistrate may conduct probable cause conferences when authorized to do so by the chief district judge and may conduct all matters allowed at the probable cause conference, except taking pleas and imposing sentences unless permitted by statute to take pleas or impose sentences[]").

Appointing counsel. Provided the district's chief judge has so authorized, a district court magistrate may "[a]pprove and grant petitions for the appointment of an attorney to represent an indigent defendant accused of any misdemeanor punishable by imprisonment for not more than 1 year or ordinance violation punishable by imprisonment." MCL 600.8513(2)(a). See SCAO Form MC 222 (Petition/ Order for Court Appointed Attorney).

> **Note:** "When a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed." MCL 775.16. "If the person states that he or she is unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the [Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981—MCL 780.1003]." MCL 775.16. See Section 3.4(B) for discussion of the MIDCA.

Appealing a district court magistrate's ruling. A party may appeal as of right any decision of the district court magistrate to the district court in which the magistrate serves. MCR 4.401(D). The appeal must be in writing, must be made within seven days of the entry of the decision being appealed, and should substantially comply with the form outlined in MCR 7.104. MCR 4.401(D). Except as otherwise provided by statute or court rule, no fee is required to file an appeal of a district court magistrate's ruling. *Id*. The district court hears the matter de novo. *Id*.

[11] See Chapter 4 for discussion of probable cause conferences.

District court judge's control of magisterial action. MCR 4.401(C) states that "[a]n action taken by a district court magistrate may be superseded, without formal appeal, by order of a district judge in the district in which the magistrate serves."

Videoconferencing Technology. "A district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006." MCR 4.401(E).

> ~~**Note:** MCR 4.401(C) does not expressly distinguish between "magistrate" and "district court magistrate."~~

5.4 Record Requirements

Except as provided by law or supreme court rule, all proceedings in district court shall be recorded by the district court recorder by the use of approved recording devices or taken by the district court reporter. MCL 600.8331.

MCR 6.610(C) advises that, unless a writing is permitted, a verbatim record must be made of district court proceedings listed in MCR 6.610(D), (E), and (F). MCR 6.610(D) deals solely with arraignments in misdemeanor cases and provides that a writing may be used to inform a defendant of the offense, the maximum sentence, and the defendant's rights. MCR 6.610(E) addresses pleas of guilty or nolo contendere and similarly allows a defendant to be informed of his or her rights in writing. A writing may **not** be used to satisfy the record requirements of a sentencing proceeding under MCR 6.610(F).

5.5 Arraignment on Arrest by Warrant

A defendant arrested with (or without) a warrant for a misdemeanor offense is statutorily entitled to an arraignment.

Judges and district court magistrates are authorized by statute to conduct arraignments and set bail using interactive video technology. MCL 767.37a states:

> "(1) A judge or district court magistrate may conduct initial criminal arraignments and set bail by 2-way interactive video technology communication between a court facility and a prison, jail, or other place where a person is imprisoned or detained. A judge or district court magistrate may conduct initial criminal arraignments and set bail on weekends, holidays, or at any time as determined by the court.
>
> * * *

(5) This act does not prohibit the use of 2-way interactive video technology for arraignments on the information, criminal pretrial hearings, criminal pleas, sentencing hearings for misdemeanor violations cognizable in the district court, show cause hearings, or other criminal proceedings, to the extent the Michigan supreme court has authorized that use."[12]

A. When Arrest Is Made in Same County Where Charged Offense Occurred

A warrant for an individual's arrest must direct the arresting officer to take the arrestee, without unnecessary delay, before a magistrate of the judicial district in which the charged offense occurred. MCL 764.1b.

"Taken before" or "brought before" a magistrate or judge for purposes of arraignment or setting bail means either of the following:

> (*i*)physical presence before a judge or district court magistrate, or
>
> (*ii*) presence before a judge or district court magistrate by using two-way interactive video technology. MCL 761.1(u); see also MCR 6.104(A) (which, under MCR 6.001(B), is specifically applicable to misdemeanor cases).

MCR 6.006, expressly applicable to criminal procedure in district court, permits the use of two-way interactive video technology in specified situations. In part, MCR 6.006 states:

[12] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Remote participation as set out in Administrative Order No. 2012-7 is permitted only in the following situations: "1) judicial assignments; 2) circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district; 3) district court districts that have multiple court locations in which a judicial officer would have to travel to a different courthouse within the district; [and] 4) a multiple district plan in which a district court magistrate would have to travel to a different district." *Id*. "The judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." *Id*. Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

> **"(A) Defendant in the Courtroom or at a Separate Location.** District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations."

See also MCR 4.401(E) ("[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006[]").

Use of video and audio technology under MCR 6.006 must comply "with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).[13]

Interim bail. MCR 6.102, a rule that addresses arrests on a warrant, is expressly applicable to matters of procedure involving misdemeanor offenses over which the district court has jurisdiction. MCR 6.001(D). MCR 6.102(F) states:

> **"(F) Release on Interim Bail.** If an accused has been arrested pursuant to a warrant that includes an interim bail provision, the accused must either be arraigned promptly or released pursuant to the interim bail provision. The accused may obtain release by posting the bail on the warrant and by submitting a

[13] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Remote participation as set out in Administrative Order No. 2012-7 is permitted only in the following situations: "1) judicial assignments; 2) circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district; 3) district court districts that have multiple court locations in which a judicial officer would have to travel to a different courthouse within the district; [and] 4) a multiple district plan in which a district court magistrate would have to travel to a different district." *Id*. "The judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." *Id*. Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

recognizance to appear before a specified court at a specified date and time, provided that

(1) the accused is arrested prior to the expiration date, if any, of the bail provision;

(2) the accused is arrested in the county in which the warrant was issued, or in which the accused resides or is employed, and the accused is not wanted on another charge;

(3) the accused is not under the influence of liquor or controlled substance; and

(4) the condition of the accused or the circumstances at the time of arrest do not otherwise suggest a need for judicial review of the original specification of bail."

Provisions similar to those in MCR 6.102(F) are also found in MCL 780.581 (interim bail and warrantless arrests), which, subject to the conditions of MCL 780.582a, is made applicable to arrests on warrants by MCL 780.582.[14]

B. When Arrest Is Made in County Different From Where Offense Occurred

MCL 764.4 governs misdemeanor arrests by warrant when the arrest and the charged offense do not occur in the same county. If an individual is arrested on a warrant for an offense committed in a different county and the offense is one for which bail may not be denied, the arrestee has the right to request and to be taken before a magistrate of the judicial district in which he or she was arrested. MCL 764.4. In those circumstances:

- The magistrate before whom the accused appears may take from the person a recognizance with sufficient sureties for the accused's appearance within ten days before a magistrate in the same district where the charged offense occurred. MCL 764.5.

[14] Effective June 1, 2016, the Michigan Supreme Court conditionally approved proposed standards submitted pursuant to the Michigan Indigent Defense Commission Act (MIDCA) by the Michigan Indigent Defense Commission, including that "[w]here there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment." Administrative Order No. 2016-2, ___ Mich ___, ___ (2016). See Section 3.4(B) for discussion of the MIDCA.

- The magistrate must certify on the recognizance that the accused was permitted to post bail and must deliver the recognizance to the arresting officer. Without unnecessary delay, the arresting officer must see that the recognizance is delivered to a magistrate or clerk of the court where the accused will be appearing. MCL 764.6.

- If the magistrate refuses to permit the arrestee to post bail or if insufficient bail is offered, the official having charge of the arrestee must take him or her before a magistrate in the judicial district where the charged offense was committed. MCL 764.7.

- Unless the alleged offense is a violation of MCL 764.15a, 750.81, or 750.81a, the interim bond provisions in MCL 780.581 (similar to the provisions in MCR 6.102(F), discussed above, and MCL 780.581, discussed briefly in Section 3.6, below) apply to misdemeanor arrests by warrant. MCL 780.582 and MCL 780.582a(1).

  Note: Although MCR 6.001(B) omits MCR 6.104 (with the exception of MCR 6.104(A)) from its list of court rules applicable to procedural matters involving offenses over which the district court has jurisdiction, the rule does not expressly prohibit its use with regard to misdemeanor arrests by warrant. MCR 6.104(B) requires that an individual arrested by warrant be taken to the court named in the warrant. If an accused is arrested in a county other than the one in which the offense occurred and other than the county named in the arrest warrant, the arresting agency must make arrangements with the proper county for the accused's prompt transportation to that county. MCR 6.104(B). Two-way interactive video technology as authorized by MCR 6.006(A) may be used to satisfy the requirements of MCR 6.104(B);[15] see also MCR 4.401(E) ("[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006[]").

[15] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

> If an accused first appears before the court in a county other than the one in which the offense occurred or, if arrested by warrant, in a county not listed in the arrest warrant, and the accused is not represented by counsel, the court must advise the accused of certain rights and decide whether to release the accused before trial. MCR 6.104(C). An accused's first appearance under MCR 6.104(C) may be "by way of two-way interactive video technology[.]" MCR 6.104(C).

5.6 Arraignment on Arrest Without a Warrant

With only specific exceptions, a police officer may not arrest a person without a warrant for a misdemeanor unless the offense was committed in the officer's presence. MCL 764.15(1) and MCL 764.15a. Consequently, arraignments for warrantless misdemeanor arrests are most frequently held in the district where the misdemeanor occurred.

Two important exceptions to the warrant requirement for misdemeanor arrests concern arrests for offenses involving the operation of a vehicle, snowmobile, or ORV while intoxicated or visibly impaired, MCL 764.15(1)(h)-(k), and arrests for domestic assault, MCL 764.15a. In addition, a police officer who has reasonable cause to believe a person committed a misdemeanor offense punishable by more than 92 days of imprisonment may arrest that person without a warrant and without having witnessed the criminal conduct. MCL 764.15(1)(d).

A peace officer who arrests an individual without a warrant must, without unnecessary delay, take the arrestee before a magistrate in the district where the offense occurred and present the magistrate with a complaint complying with MCR 6.101 stating the offense for which the individual was arrested. MCL 764.13.

MCL 764.9c addresses warrantless arrests for misdemeanors or ordinance violations punishable by not more than 93 days in jail and provides an alternative to formal arraignment:

> "(1) . . . if a police officer has arrested a person without a warrant for a misdemeanor or ordinance violation for which the maximum permissible penalty does not exceed 93 days in jail or a fine, or both, instead of taking the person before a magistrate and promptly filing a complaint as provided in section 13 of this chapter, the officer may issue to and serve

> upon the person an appearance ticket[16] as defined in section 9f of this chapter and release the person from custody."

MCL 780.581 specifically addresses warrantless misdemeanor arrests:

> "(1) If a person is arrested without a warrant for a misdemeanor or a violation of a city, village, or township ordinance, and the misdemeanor or violation is punishable by imprisonment for not more than 1 year, or by a fine, or both, the officer making the arrest shall take, without unnecessary delay, the person arrested before the most convenient magistrate of the county in which the offense was committed to answer to the complaint."

Judges and district court magistrates are authorized by statute to conduct arraignments and set bail using interactive video technology. MCL 767.37a states:

> "(1) A judge or district court magistrate may conduct initial criminal arraignments and set bail by 2-way interactive video technology communication between a court facility and a prison, jail, or other place where a person is imprisoned or detained. A judge or district court magistrate may conduct initial criminal arraignments and set bail on weekends, holidays, or at any time as determined by the court.
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> * * *
>
> (5) This act does not prohibit the use of 2-way interactive video technology for arraignments on the information, criminal pretrial hearings, criminal pleas, sentencing hearings for misdemeanor violations cognizable in the district court, show cause hearings, or other criminal proceedings, to the extent the Michigan supreme court has authorized that use."[17]

Interim bail. "[I]f a magistrate is not available or immediate trial cannot be had," an individual arrested without a warrant for a misdemeanor offense or ordinance violation punishable by imprisonment for not more than one year may be entitled to post an interim bond with the arresting officer or other authorized officer. MCL 780.581(2). The bond amount may not exceed the maximum possible fine for the offense but may not be less than 20 percent of the minimum possible fine for the offense. *Id.*[18] For a more detailed discussion, see Section 7.2(D).

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[16] See Section 5.12(D) for more information about appearance tickets.

5.7 "Without Unnecessary Delay"

The requirement that an accused be arraigned "without unnecessary delay" is more clearly quantified by case law involving defendants' challenges to the length of their post-arrest/pre-arraignment detention. In all "but the most extraordinary situations," an individual arrested without a warrant may not be detained for more than 48 hours without a judicial determination of probable cause. *People v Whitehead*, 238 Mich App 1, 4 (1999). Where there is no bona fide emergency to justify a lengthy detention and circumstances indicate that the detention was prolonged in an effort to obtain more evidence to support the accused's guilt, a person's constitutional right to be free of unreasonable seizure is implicated. *Id.* at 13. Therefore, statements made by an accused during a period of detention longer than 48 hours may not be admissible against the accused at trial. *Id.* at 4.

A delay of more than 48 hours between a defendant's warrantless arrest and the probable cause hearing is presumptively unreasonable and shifts the burden to the government to show the delay was caused by extraordinary circumstances. *Riverside Co v McLaughlin*, 500 US 44, 56-57 (1991). Based on *Riverside*, the Court of Appeals found that a delay in excess of 80 hours was a presumptive violation of the Fourth Amendment protection against unreasonable seizure. *People v Manning*, 243 Mich App 615, 631 (2000). However, in the absence of police misconduct, such a lengthy delay did not automatically make involuntary any statements the defendant made during the extended detention. *Id.* at 644-645. Notwithstanding the unreasonableness of the seizure, the *Manning* Court concluded that the ultimate admissibility of a

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[17] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Remote participation as set out in Administrative Order No. 2012-7 is permitted only in the following situations: "1) judicial assignments; 2) circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district; 3) district court districts that have multiple court locations in which a judicial officer would have to travel to a different courthouse within the district; [and] 4) a multiple district plan in which a district court magistrate would have to travel to a different district." *Id.* "The judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." *Id.* Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

[18] Effective June 1, 2016, the Michigan Supreme Court conditionally approved proposed standards submitted pursuant to the Michigan Indigent Defense Commission Act (MIDCA) by the Michigan Indigent Defense Commission, including that "[w]here there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment." Administrative Order No. 2016-2, ___ Mich ___, ___ (2016). See Section 3.4(B) for discussion of the MIDCA.

defendant's statement required a traditional inquiry into the statement's voluntariness. *Id.* at 645. The *Manning* Court emphasized that even short delays could be unconstitutional if the delay was unreasonable under the circumstances presented. *Id.* at 630, citing *Riverside*, 500 US at 56-57.

See also *People v Cain (Darryl) (Cain I)*, 299 Mich App 27, 48-50 (2012), vacated in part on other grounds 495 Mich 874 (2013) (the defendant was not deprived of due process despite not being arraigned until three days after his arrest where "no evidence was obtained as a direct result of the 'undue delay,' which would have begun . . . 48 hours after [the] defendant's arrest[;]" because the evidence against the defendant, including his statement to police and his identification from a photo lineup, was obtained within 48 hours after his arrest, "there was no evidence to suppress[]").

An accused who is not taken before a court for arraignment but has not yet been released must be arraigned without unnecessary delay through use of two-way interactive video technology authorized by MCR 6.006(A). MCR 6.104(A).[19] (MCR 6.104(A) is specifically applicable to misdemeanor cases. MCR 6.001(B).)

5.8 Required Advice of Rights at Arraignments in District Court

When a defendant is arraigned in district court for an offense over which the district court has jurisdiction, the defendant must be given certain specific information. MCR 6.610(D)(1) states:

> "(1) Whenever a defendant is arraigned on an offense over which the district court has jurisdiction,[20] the defendant must be informed of
>
> (a) the name of the offense;
>
> (b) the maximum sentence permitted by law; and

[19] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

[20] See Section 5.2(A) for discussion of a district court's jurisdiction.

(c) the defendant's right

(*i*) to the assistance of an attorney[21] and to a trial;

(*ii*) (if subrule [D][2] applies)[22] to an appointed attorney[23]; and

(*iii*) to a trial by jury, when required by law."

This information may be given to the defendant in a writing made part of the file or by the court on the record. MCR 6.610(D)(1). See SCAO Form DC 213 (Advice of Rights). See also the Appendix for a checklist, a flowchart, and a script for conducting misdemeanor arraignments in district court.

5.9 Right To Counsel

A criminal defendant's right to the assistance of counsel is recognized in the federal and state constitutions and in a Michigan statute. US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1. However, there is no federal or state constitutional right to appointed counsel when a defendant is charged with a misdemeanor and no sentence of imprisonment is imposed. *People v Richert (After Remand)*, 216 Mich App 186, 192-194 (1996).

"When a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed." MCL 775.16. "If the person states that he or she is unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the

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[21] The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., applies to an indigent defendant who "is being prosecuted or sentenced for a crime *for which an individual may be imprisoned upon conviction*, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA) (emphasis supplied). The MIDCA requires the trial court to "assure that each criminal defendant[] is advised of his or her right to counsel[,]" MCL 780.991(1)(c), and to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant . . . not later than at the defendant's first appearance in court[,]" MCL 780.991(3)(a). See also MCL 775.16. See Section 5.9 for additional discussion of advice of the right to counsel at arraignment. See Section 3.4(B) for a thorough discussion of the MIDCA.

[22] MCR 6.610(D)(2) governs an indigent defendant's right to appointed counsel when a conviction could result in imprisonment.

[23] The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., applies to an indigent defendant who "is being prosecuted or sentenced for a crime *for which an individual may be imprisoned upon conviction*, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA) (emphasis supplied). The MIDCA requires the trial court to "assure that each criminal defendant[] is advised of his or her right to counsel[,]" MCL 780.991(1)(c), and to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant . . . not later than at the defendant's first appearance in court[,]" MCL 780.991(3)(a). See also MCL 775.16. See Section 5.9 for additional discussion of advice of the right to counsel at arraignment. See Section 3.4(B) for a thorough discussion of the MIDCA.

[Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981—MCL 780.1003[24]]." MCL 775.16. "The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge[; r]epresentation includes but is not limited to the arraignment on the complaint and warrant." Administrative Order No. 2016-2, ___ Mich at ___. See also MCR 6.610(D)(1)(c), which requires the district court at arraignment to advise a defendant of his or her right to the assistance of counsel and to appointed counsel under certain circumstances. See Chapter 3 for more information on a defendant's right to counsel, including waiver of that right, determining indigency for purposes of appointing counsel, and situations involving multiple defendants.

5.10 Entering a Plea at Arraignment

Statutory law concerning arraignments for district court misdemeanors indicates that a defendant must enter a plea to the charge after the court has informed the defendant of the charge as it is stated in the warrant or complaint:

> "At the arraignment of an accused charged with a misdemeanor or an ordinance violation, the magistrate shall read to the accused the charge as stated in the warrant or complaint. The accused shall plead to the charge, and the plea shall be entered in the court's minutes." MCL 774.1a.

Language appearing in the court rules stops short of requiring a defendant to enter a plea at the arraignment. See MCR 6.610(D)(4). If a defendant refuses to plead to the charged offense, the magistrate must enter a plea of not guilty on the defendant's behalf. MCL 774.1a. See the Appendix for a checklist, flowcharts, and a script for conducting misdemeanor arraignments and entering a defendant's plea to the offense charged.

5.11 Pretrial Release

A court may not deny pretrial release to a person charged with a misdemeanor. Const 1963, art 1, § 15; MCR 6.106(B). Unless an order has

[24] The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA). The MIDCA requires the trial court to "assure that each criminal defendant[] is advised of his or her right to counsel[,]" MCL 780.991(1)(c), and to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant . . . not later than at the defendant's first appearance in court[,]" MCL 780.991(3)(a). See Section 3.4(B) for discussion of the MIDCA.

already entered, the court must determine the conditions of a defendant's release at the defendant's arraignment on the complaint and/or warrant. MCR 6.106(A). For persons charged with misdemeanors, the court must order the release of the defendant on personal recognizance or an unsecured appearance bond, or subject to a conditional release, with or without money bail (ten percent, cash, or surety). MCR 6.106(A)(2)-(3). See SCAO Forms MC 240 (Order/Pretrial Release) and MC 241 (Bond). See Chapter 7 for more information on pretrial release.

5.12 Misdemeanor Traffic Violations and Appearance Tickets

A. Beginning a Misdemeanor Traffic Case

A misdemeanor traffic case begins in one of three ways:

- when a law enforcement officer serves an individual with a written citation for a traffic violation and the citation is filed in district court, MCR 6.615(A)(1)(a);
- when a sworn complaint is filed in district court and an arrest warrant is issued, MCR 6.615(A)(1)(b); or
- when other special procedures authorized by statute are taken,[25] MCR 6.615(A)(1)(c).

A written citation is a summons that commands the offender's initial appearance in court to respond to the violation alleged by the citation. MCR 6.615(A)(2)(a)-(b). A single citation may serve as a sworn complaint and as the basis for a misdemeanor warrant. MCR 6.615(A)(1)(b).

A misdemeanor offense and a civil infraction both may be alleged in a single citation. MCR 6.615(A).[26]

B. Arraignment on a Misdemeanor Traffic Citation

A person arrested for a misdemeanor violation of MCL 257.625(1) (operating while intoxicated), MCL 257.625(3) (operating while visibly impaired), MCL 257.625(6) (zero tolerance/minor operation), MCL 257.625(7) (operating while intoxicated or visibly impaired with a minor in the vehicle), MCL 257.625(8) (operating with any

[25] Procedures for citing out-of-state motorists, for example. See the Michigan Judicial Institute's *Traffic Benchbook* for more information.

[26] Effective January 1, 2006, the prohibition against alleging both a misdemeanor and a civil infraction in a single citation was eliminated.

amount of certain controlled substances in the body), or MCL 257.625m (operating a commercial motor vehicle with an unlawful blood alcohol content), or for a violation of a local ordinance substantially corresponding to MCL 257.625(1), MCL 257.625(3), MCL 257.625(6), MCL 257.625(8), or MCL 257.625m,[27] must be arraigned on the citation, complaint, or warrant within 14 days of the arrest or service of the warrant. MCL 257.625b(1).

A district court magistrate may conduct arraignments on misdemeanor traffic violations if the magistrate is so authorized by statute and by the judges of the district. MCR 6.615(C).

The consequences for a defendant who fails to appear as required or to otherwise respond appropriately to any matter pending as a result of the misdemeanor traffic citation are expressly detailed in MCR 6.615(B). If the individual who failed to appear is a Michigan resident, the court

> "(a) *must* initiate the procedures required by MCL 257.321a[28] for the failure to answer a citation; and
>
> "(b) *may* issue a warrant for the defendant's arrest." MCR 6.615(B)(1)(a)-(b). (Emphasis added.)
>
> **Note:** An arrest warrant may issue without regard to whether a sworn complaint is filed with the court. MCR 6.615(B)(1)(b).

If the individual who failed to appear is not a Michigan resident, the court may take one or more of the following actions:

> "(a) the court may mail a notice to appear to the defendant at the address in the citation;
>
> "(b) the court may issue a warrant for the defendant's arrest; and
>
> "(c) if the court has received the driver's license of a nonresident, pursuant to statute, it may retain the license as allowed by statute. The court need not retain the license past its expiration date." MCR 6.615(B)(2)(a)-(c).
>
> **Note:** An arrest warrant may issue without regard to whether a sworn complaint is filed with the court. MCR 6.615(B)(2)(b).

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[27] See the Michigan Judicial Institute's *Traffic Benchbook* for detailed information on these offenses.

[28] Process of suspending driver's license.

Failure to appear as required to answer for a violation reportable to the Secretary of State under MCL 257.732 is a misdemeanor offense punishable by not more than 93 days' imprisonment, a $100.00 fine, or both. MCL 257.321a(1).

C. Conducting Hearings on Contested Cases

A court may not hear a contested case until a citation has been filed with the court. MCR 6.615(D)(1). Even when a citation is filed electronically, the court has discretion whether to hear the case or to decline hearing it until the citation is signed by the issuing officer and filed on paper. *Id*. If a court requires a signed paper version of the citation to be filed and that action is not taken, the case "may be dismissed with prejudice." MCR 6.615(D)(1).[29]

A misdemeanor traffic case must be conducted according to the constitutional and statutory procedures and safeguards applicable to misdemeanor offenses cognizable by the district court. MCR 6.615(D)(2).

D. Appearance Tickets

When a police officer makes a warrantless arrest for a misdemeanor or ordinance violation punishable by a maximum of 93 days in jail, a fine, or both, the officer may, instead of bringing the accused before a magistrate and promptly filing a complaint, issue and serve on the offender an appearance ticket, and release the person from custody. MCL 764.9c(1).[30]

No sworn complaint is necessary for the magistrate's acceptance of an accused's plea on an appearance ticket issued under MCL 764.9c. MCL 764.9g(1). If, however, the accused pleads not guilty to the offense charged in the appearance ticket, a sworn complaint must be filed with the magistrate to proceed with prosecuting the offender. *Id*. Where an appearance ticket is issued for a misdemeanor violation and is in the form of a "Uniform Law Citation" containing the language, "I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief," it constitutes a sworn complaint under MCL 257.727c, MCL 764.1e, and MCR 6.615. *City of Plymouth v McIntosh*, 291 Mich App 152, 161 (2010). A prosecutor is not required to file a second sworn complaint in order to proceed on a not guilty plea. *Id*. at 163. No arrest warrant may issue for an offense listed on an appearance ticket until a sworn complaint is filed. *Id*.

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[29] As amended, effective January 1, 2006, dismissal of the case is discretionary rather than mandatory.

[30] For a more detailed discussion of appearance tickets, see Section 2.13(A).

Similarly, a peace officer may issue a written citation to a person arrested without a warrant for most misdemeanor traffic offenses. See MCR 6.615(A)(1)(a) and MCL 257.728(1). If the officer issues a citation for a misdemeanor punishable by imprisonment for not more than 90 days, a magistrate may accept the accused's plea of guilty without the filing of a sworn complaint. MCL 257.728e. However, if the accused pleads not guilty, a sworn complaint must be filed with the magistrate. *Id*.[31]

A district court magistrate may accept an accused's guilty plea without requiring that a sworn complaint be filed when the offense charged falls within the district court magistrate's authority under MCL 600.8511. MCL 764.9g(2).[32]

5.13 Violations of the Marine Safety Act

Unless otherwise indicated, a violation of the Marine Safety Act (MSA),[33] MCL 324.80101 *et seq*., is a misdemeanor. MCL 324.80171. A peace officer who observes a marine law violation or the commission of a crime may immediately arrest the violator without a warrant, or the officer may issue the person a written or verbal warning. MCL 324.80166(4). If an officer has reasonable cause to believe that an individual, at the time of his or her involvement in an accident, was operating a vessel in violation of MCL 324.80176(1), MCL 324.80176(3), MCL 324.80176(4), MCL 324.80176(5), MCL 324.80176(6), or MCL 324.80176(7) (offenses involving operation of a motorboat while under the influence of alcoholic liquor and/or a controlled substance, with an unlawful blood alcohol content, with any amount of certain controlled substances in the body, or while visibly impaired, or operation by a person less than 21 years of age with any bodily alcohol content), or a local ordinance corresponding to MCL 324.80176(1), MCL 324.80176(3), or MCL 324.80176(6), the officer may arrest that individual without a warrant. MCL 324.80180(1).

A. Arraignment After a Warrantless Arrest

If an officer arrests an individual without a warrant for certain MSA violations (listed below), the individual must be arraigned without unreasonable delay by a magistrate or judge who

- is within the county where the offense allegedly occurred,
- has jurisdiction of the offense, and

[31] See Chapter 2 for further discussion.

[32] See Section 5.3 for discussion of a district court magistrate's authority.

[33] See Chapter 3 in the Michigan Judicial Institute's *Recreational Vehicles Benchbook* for more information.

- is nearest or most accessible with reference to the place where the arrest was made. MCL 324.80167.

Pursuant to MCL 324.80167, MSA offenses requiring immediate arraignment when the offender is arrested without a warrant are:

- negligent homicide;

- violations of MCL 324.80176(1), MCL 324.80176(3), MCL 324.80176(4), or MCL 324.80176(5) (offenses involving operation of a motorboat while under the influence of alcoholic liquor and/or a controlled substance, with an unlawful blood alcohol content, with any amount of certain controlled substances in the body, or while visibly impaired), or violations of local ordinances substantially corresponding to MCL 324.80176(1) or MCL 324.80176(3); or

- violations of MCL 324.80147 or violations of a local ordinance substantially corresponding to MCL 324.80147. The arresting officer may issue a written notice to appear in court for a violation of MCL 324.80147 if it does not appear that releasing the offender pending the issuance of a warrant would constitute a public menace.

  MCL 324.80147 prohibits the careless and reckless operation of a vessel in disregard of the rights or safety of others, without the exercise of due caution and circumspection, or at a speed or in a manner that endangers or is likely to endanger a person or property.

B. Written Notice To Appear After a Warrantless Arrest

If an individual is arrested without a warrant under conditions not referred to in MCL 324.80167, immediate arraignment is not required, and the arresting officer must prepare in duplicate a written notice directing the offender to appear in court. The notice must contain the name and address of the offender, the name of the offense charged, and the time and place the person must appear in court. If the arrested person demands arraignment before a magistrate or district court judge, the arresting officer must take the actions outlined in MCL 324.80167[34] in lieu of issuing the offender a written notice to appear in court. MCL 324.80168(1).

Timing of appearance required by written notice. Unless the arrestee demands an earlier hearing, the time listed in a written

[34] See Section 5.13(A).

notice to appear must be within a reasonable time after the arrest. MCL 324.80168(2).

Place of appearance. The place specified in the notice to appear must be before a magistrate or district court judge with jurisdiction of the offense and within the township or county in which the charged offense allegedly occurred. MCL 324.80168(3).

Methods of appearance. The person to whom a written notice to appear is issued may make appearance in person, by representation, or by mail. When an individual appears by representation or by mail, the magistrate or district judge may accept a plea of guilty or not guilty for purposes of arraignment just as if the offender had personally appeared before the court. The magistrate or district judge may require a person's appearance before the court by giving the person five days' notice of the time and place of his or her required appearance. MCL 324.80168(4).

5.14 A Crime Victim's Rights Following an Arraignment

Article 3 of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, assigns certain rights and responsibilities to victims of "serious misdemeanors."[35] "Serious misdemeanors" are listed by MCL 780.811(1)(a):

- assault and battery, including domestic assault and battery, MCL 750.81;
- assault and battery causing serious injury, MCL 750.81a;
- breaking and entering or illegal entry, MCL 750.115;
- fourth-degree child abuse, MCL 750.136b;
- contributing to the delinquency of a minor, MCL 750.145;
- using the internet or a computer to make a prohibited communication, MCL 750.145d;
- intentionally aiming a firearm without malice, MCL 750.233;
- discharging a firearm intentionally aimed at a person without causing injury, MCL 750.234;

[35] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for a detailed and comprehensive discussion of the Crime Victim's Rights Act.

- discharging a firearm intentionally aimed at a person and resulting in injury, MCL 750.235;
- indecent exposure; MCL 750.335a;
- stalking, MCL 750.411h;
- injuring a worker in a work zone, MCL 257.601b(2);
- leaving the scene of a personal injury accident, MCL 257.617a;
- operating a vehicle while under the influence of, or while visibly impaired by, intoxicating liquor, a controlled substance, and/or other intoxicating substance,[36] or with an unlawful blood alcohol content, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual, MCL 257.625;
- operating a motorboat while under the influence of, or while visibly impaired by, alcoholic liquor and/or a controlled substance, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual, MCL 324.80176(1) or MCL 324.80176(3);
- selling or furnishing alcohol to a minor if the violation results in physical injury or death, MCL 436.1701;
- violation of a local ordinance substantially corresponding to one of the offenses above; and
- a charged felony or serious misdemeanor that is subsequently reduced or pleaded to a misdemeanor.

Although many provisions of Article 3 of the CVRA deal with a law enforcement agency's or prosecuting attorney's obligations, the court may find it helpful to be cognizant of the following sections of the CVRA as early as the arraignment.

Identifying information about a crime victim must be contained in a separate statement. An officer investigating a serious misdemeanor involving one or more victims must file with the complaint, appearance ticket, or traffic citation a separate written statement containing the name, address, and telephone number of each victim. MCL 780.812.

[36] Effective March 31, 2013, MCL 257.625 was amended to include "other intoxicating substance[s]" in its various provisions dealing with the unlawful operation of a motor vehicle. MCL 780.811(1)(a) has not yet been amended to reflect this change.

Victim information is not a matter of public record, and statutory law exempts it from disclosure under the freedom of information act. MCL 780.830.

Notice required when the defendant pleads guilty or no contest to a serious misdemeanor. Within 48 hours of accepting a defendant's guilty or no contest plea to a serious misdemeanor, the court must notify the prosecuting attorney of the plea and the date scheduled for sentencing. MCL 780.816(1). The notice must include the name, address, and telephone number of the victim.

Notice required when no plea to a serious misdemeanor is accepted. Even when no plea is accepted at the arraignment and further proceedings are expected, the court must notify the prosecuting attorney of that fact within 48 hours of the arraignment. MCL 780.816(1).

Notice requirements in cases involving deferred judgments or delayed sentences. In all cases, the department of corrections, the department of human services, a county sheriff, or a prosecuting attorney must provide notice to a victim if the case against the defendant is resolved by assignment of the defendant to trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal. In performing this duty, the court, department of corrections, department of human services, county sheriff, or prosecuting attorney may furnish information or records to the victim that would otherwise be closed to public inspection, including information or records related to a defendant's youthful trainee status. MCL 780.752a; MCL 780.781a; MCL 780.811b.

- **Notice requirements prior to the defendant's admission to drug treatment court.**[37] Statutory law authorizes circuit and district courts to institute or adopt a drug treatment court. MCL 600.1062(1). Family divisions are also authorized to institute or adopt a drug treatment court for juveniles. MCL 600.1062(2). If an offender is admitted to a drug treatment court, adjudication of his or her crime may be deferred. MCL 600.1070(1)(a)-(c). A crime victim and others must be permitted to submit a written statement to the court prior to an offender's admission to drug treatment court. MCL 600.1068(4) provides:

  > "In addition to rights accorded a victim under the [CVRA], . . . MCL 780.751 to [MCL] 780.834, the drug treatment court must permit any victim of the offense or offenses of which the individual is charged, any victim

[37] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for discussion of drug treatment courts.

> of a prior offense of which that individual was convicted, and members of the community in which either the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the drug treatment court."
>
> **Note:** Subject to the agreement of the defendant, the defendant's attorney, the prosecutor, the judge of the transferring court, the judge of the receiving court, and the prosecutor of the receiving drug treatment court's funding unit, a drug treatment court may accept participants from any other jurisdiction based on the participant's residence or the unavailability of a drug treatment court in the jurisdiction where the participant is charged. MCL 600.1062(4).

- **Notice requirements prior to the defendant's admission to veterans treatment court.**[38] Circuit and district courts are authorized to adopt or institute a veterans treatment court. MCL 600.1201(2). If an offender is admitted to a veterans treatment court, adjudication of his or her crime may be deferred. MCL 600.1206(1)(c). Crime victims and community members must be permitted to submit written statements to the veterans treatment court prior to an offender's admission to that court. MCL 600.1205(4) provides:

> "In addition to rights accorded a victim under the [CVRA], . . . MCL 780.751 to [MCL] 780.834, the veterans treatment court shall permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted, and members of the community in which the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the veterans treatment court."

A participant in veterans treatment court must "[p]ay all crime victims' rights assessments under . . . MCL 780.905." MCL 600.1208(1)(d).

> **Note:** Subject to the agreement of the defendant, the defendant's attorney, the prosecutor, the judge of the transferring court, the judge of the receiving veterans

[38] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for discussion of veterans treatment courts.

treatment court, and the prosecutor of the receiving veterans treatment court's funding unit, a veterans treatment court may accept participants from any other jurisdiction in the state based on either the participant's residence in the receiving jurisdiction or the unavailability of a veterans treatment court in the jurisdiction in which the participant is charged. MCL 600.1201(4).

- **Notice requirements prior to the defendant's admission to mental health court.**[39] Circuit and district courts are authorized to adopt or institute a mental health court, and the family divisions of circuit courts are authorized to adopt or institute a juvenile mental health court. MCL 600.1091(1)-(2). If an offender is admitted to a mental health court, he or she may be entitled to discharge and dismissal of the proceedings. MCL 600.1098(2)-(5). Crime victims must be permitted to submit written statements to the mental health court prior to an offender's admission to that court. MCL 600.1094(4) provides:

  "In addition to rights accorded a victim under the [CVRA], . . . MCL 780.751 to [MCL] 780.834, the mental health court shall permit any victim of the offense or offenses of which the individual is charged or, in the case of a juvenile, any victim of the activity that the individual is alleged to have committed and that would constitute a criminal act if committed by an adult, as well as any victim of a prior offense of which that individual was convicted or, in the case of a juvenile, a prior offense for which the individual has been found responsible, to submit a written statement to the court regarding the advisability of admitting the individual into the mental health court."

A participant in mental health court must "pay all . . . restitution[] and assessments[.]" MCL 600.1097(3).

Note: The court may, but is not required to, "accept participants from any other jurisdiction in [the] state based upon the residence of the participant in the receiving jurisdiction, the nonavailability of a mental health court in the jurisdiction where the participant is charged, and the availability of financial resources for both operations of the mental health court program and treatment services." MCL 600.1091(3).

[39] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for discussion of mental health courts.

Prosecutor's obligation to notify the crime victim. Within 48 hours after receiving notice from the court that at arraignment, a defendant pleaded guilty or no contest to a serious misdemeanor, or that no plea was accepted, the prosecutor must give the crime victim written notice of the statutory rights specified in MCL 780.816(1)(a)-(f).

Victim impact statements. The court may order the preparation of a presentence investigation report (PSIR) in any criminal misdemeanor case. MCL 771.14(1). If a crime victim requests, a written impact statement must be included in the PSIR if one is prepared. MCL 771.14(2)(b). In juvenile delinquency, designated, and serious misdemeanor cases, the victim also has the right to submit an oral or written impact statement if a disposition or presentence investigation report is prepared. MCL 780.792(1) and MCL 780.792(3); MCL 780.824. If no PSIR is prepared in a "serious misdemeanor" or designated case involving a misdemeanor, the court must "notify the prosecuting attorney of the date and time of sentencing at least 10 days prior to the sentencing," and the victim may submit a written impact statement to the prosecutor or court. MCL 780.792(2); MCL 780.825.

Restitution is required of any defendant convicted of a misdemeanor punishable by not more than one year. Full restitution is not limited to serious misdemeanor convictions. At sentencing for a misdemeanor punishable by imprisonment for one year or less, the court must order the defendant to make full restitution to "any victim of the defendant's course of conduct that gives rise to the conviction." MCL 780.826(2).

Part B: Commentary on Pleas

A person accused of an offense cannot be convicted of the offense unless he or she is found guilty of the charge by a judge or jury, or unless he or she confesses guilt for the offense or admits to the truth of the charge. MCL 763.2. A defendant charged with a misdemeanor offense cognizable in district court may stand mute or plead not guilty, guilty, or nolo contendere. These plea alternatives and their applicability to offenses over which the district court has jurisdiction are discussed in detail in the sections below.

See the Appendix for the following resources: a checklist of requirements for plea proceedings involving guilty and no contest pleas; a flowchart for guilty and no contest pleas; a flowchart for not guilty pleas; and a script for conducting misdemeanor arraignments and plea proceedings in district court.

5.15 Applicable Court Rules

Subchapter 6.600, the section devoted to criminal procedure in district court, contains all the information *expressly* applicable to plea proceedings in district court for offenses over which the district court has trial jurisdiction. Subchapter MCR 6.300 (Pleas) contains detailed information about the kinds of pleas available to defendants charged with criminal offenses cognizable by circuit courts. MCR 6.001(A). MCR 6.001(B) does not include subchapter 6.300 in its list of court rules applicable to misdemeanor plea proceedings in district court. However, provisions contained in subchapter 6.300 pertaining to plea proceedings involving offenses cognizable in circuit court may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

5.16 Record Requirements for Plea Proceedings

Except when a writing is permitted by law or by court rule, a verbatim record of plea proceedings in district court is required. MCR 6.610(C). When a record of district court proceedings is required, the proceedings must be taken by the district court reporter or recorded using a recording device approved by the state court administrator. MCL 600.8331.

A. Standing Mute or Pleading Not Guilty

Statutory law concerning misdemeanor arraignments indicates that a defendant *must* enter a plea to the charge after the court has informed the defendant of the charge as it is stated in the warrant or complaint. MCL 774.1a. No language in the court rule requires a defendant to enter a plea at the arraignment. See MCR 6.610(D)(4). Language in MCR 6.301(A), a rule applicable to felony pleas, instructs the court to enter a plea of not guilty on behalf of a defendant who refuses to plead to the charged offense. Similar language appears in MCL 774.1a. Where a plea of not guilty is entered, "every material allegation in the information [is placed in issue] and [] the defendant [is permitted] to raise any defense not otherwise waived." MCR 6.301(A).

With the court's permission, a defendant may stand mute or plead not guilty without a "formal" or "in-court" arraignment by filing a written statement signed by the defendant and any defense attorney of record. MCR 6.610(D)(4) states:

> "The court may allow a defendant to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement signed by the defendant and any defense attorney of record, reciting the general

> nature of the charge, the maximum possible sentence, the rights of the defendant at arraignment, and the plea to be entered. The court may require that an appropriate bond be executed and filed and appropriate and reasonable sureties posted or continued as a condition precedent to allowing the defendant to be arraigned without personally appearing before the court."

B. Plea Agreements

MCR 6.610(E)(5) requires district courts to place plea agreements on the record:

> "The court shall make the plea agreement a part of the record and determine that the parties agree on all the terms of that agreement. The court shall accept, reject, or indicate on what basis it accepts the plea."

Where all the terms of a plea agreement are not placed on the record, the trial court and the parties have not fully complied with the rule requirements, which are designed to safeguard the rights of the defendant and the prosecution if enforcement of the plea agreement becomes an issue. In *People v Hannold*, 217 Mich App 382 (1996), overruled in part on other grounds by *People v Smart*, 497 Mich 950, 950 (2015), details of the defendant's agreement to testify against another individual in exchange for a specific sentencing consideration were not included on the record made of the defendant's plea proceeding; instead, details of the agreement were contained in a sealed document on file with the court. When the defendant failed to provide the promised testimony, the court vacated his plea to a lesser charge, and he was convicted of the original, and more serious, controlled substance charge. *Hannold*, 217 Mich App at 383-386. Although the Court of Appeals concluded that the parties' failure to comply with the rule requirements was harmless error, the Court was unequivocal in its disapproval of such conduct:

> "This was error. We take this opportunity to emphasize that we do not condone such agreements or procedure and in fact strongly disapprove of plea agreements not fully and openly set forth on the record." *Id*. at 387.

5.17 Guilty Pleas[40]

A guilty plea is a conclusive conviction equivalent to a jury's guilty verdict. *People v Ginther*, 390 Mich 436, 440 (1972). A defendant's decision to plead guilty is the most serious step a defendant can take in his or her criminal prosecution. *People v Thew*, 201 Mich App 78, 95 (1993). Precisely because a guilty plea is the most serious aspect of a defendant's criminal case, a guilty plea must be a voluntary, knowing, and intelligent admission made with an adequate awareness of important circumstances and likely consequences. *Id.* at 95, citing *Brady v United States*, 397 US 742, 747-748 (1970).

The court rules expressly applicable to procedural matters involving criminal offenses cognizable in district court and those offenses cognizable in circuit court each contain provisions concerning guilty pleas. MCR 6.610(E) outlines the required procedure by which a district court may accept a defendant's plea of guilty or nolo contendere.[41] MCR 6.302 outlines the same procedure, albeit with more detail, for accepting a defendant's plea of guilty or no contest to a charged offense cognizable in circuit court. See the Appendix for reference material in conducting plea proceedings involving guilty and no contest pleas.

Criminal offenses over which the district court has jurisdiction. Pursuant to MCR 6.610(E), before a court may accept a defendant's plea of guilty or nolo contendere "the court shall in all cases comply with this rule." MCR 6.610(E) further provides:

> "(1) The court shall determine that the plea is understanding, voluntary, and accurate."[42]

To determine the accuracy of a defendant's guilty plea, the rule requires that the court question the defendant to "establish support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading[.]" MCR 6.610(E)(1)(a). When a defendant pleads no contest, the court must not question the defendant about his or her participation in the crime but must use other available information to establish the accuracy of the defendant's plea. MCR 6.610(E)(1)(b).

MCR 6.302 describes a detailed process by which the circuit court is to determine whether a plea is understanding, voluntary, and accurate. See MCR 6.302(B)-(D).[43]

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[40] See Section 5.19 on sentence bargains.

[41] See Section 5.18 for discussion of no contest pleas.

[42] See Sections 5.24 and 5.25 for detailed discussion of these factors.

Competency requirements. An incompetent defendant[44] cannot tender a valid guilty plea. *People v Kline*, 113 Mich App 733, 738 (1982). When a defendant offers to plead to the crime charged and significant record evidence suggests that the defendant is possibly incompetent, a trial court is obligated to make a separate finding with regard to competency before addressing the defendant's plea. *People v Whyte*, 165 Mich App 409, 414 (1988).

5.18 Nolo Contendere (No Contest) Pleas

A no contest plea is generally recognized as an alternative to a guilty plea. See MCR 6.610(E)(1)(b). A plea of no contest to a felony offense requires the court's consent. MCR 6.301(B).

A no contest plea prevents the court from eliciting a defendant's admission of guilt, but the result of the defendant's plea not to contest the charges against him or her is the same as if the defendant had admitted guilt. If a defendant pleads no contest to a charged offense, with the exception of questioning the defendant about his or her role in the charged offense, the court shall proceed in the same manner as if the defendant had pleaded guilty. MCL 767.37. See the Appendix for reference guides involving no contest pleas in district court.

A court's acceptance of a no contest plea and the limits such a plea places on questioning a defendant about the crime may be justified by circumstances surrounding the offense and the offender. A nonexhaustive list of reasons that might justify a court's acceptance of a no contest plea is found in *In re Guilty Plea Cases*, 395 Mich 96, 134 (1975). No contest pleas may be appropriate when the defendant is reluctant to describe the details of an especially sordid crime, the defendant cannot clearly recall the circumstances of the crime because he or she was intoxicated, the defendant has committed numerous crimes similar to the one charged and is unable to distinguish one from the others, or the defendant wishes to escape civil liabilities made possible by a guilty plea or trial conviction. *Id*.

Similarities between guilty pleas and no contest pleas. A no contest plea has virtually the same effect as a guilty plea. The procedures for accepting and recording the pleas are similar, the defendant may receive

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[43] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *People v Cole (David)*, 491 Mich 325, 330-332, 337-338 (2012) (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea[;]" however, MCR 6.302(B)(2) was subsequently amended to require this advice by the court).

[44] See Section 8.7 for more information on determining a defendant's competence.

the same sentence for a conviction without regard to the type of plea on which the conviction is based, and the conviction resulting from either plea is final.

The disposition following a no contest plea is a conviction with the same legal consequences as a guilty plea for purposes of other criminal proceedings. For example, a conviction obtained from a no contest plea may be used as a previous conviction for purposes of calculating multiple or habitual offender penalty provisions. Likewise, the prohibition against double jeopardy would prevent future prosecutions for the same offense when a conviction is obtained as the result of a defendant's no contest plea.

Effect of no contest plea on future civil litigation based on criminal conviction. A defendant's no contest plea to criminal charges does not estop that defendant from denying responsibility in a later civil action arising from the same conduct. *Lichon v American Universal Ins Co*, 435 Mich 408, 417 (1990).

5.19 Sentence Bargaining

A. Sentence Agreements and Recommendations

A defendant does not have a right to engage in plea negotiations with the prosecution. *People v Payne*, 285 Mich App 181, 191 (2009). Neither the United States Supreme Court nor the Michigan Supreme Court "'has recognized that the parties have a right to present a plea.'" *Id.* at 191, quoting *People v Grove*, 455 Mich 439, 469 n 36 (1997).[45]

A prosecutor and a defendant may reach a sentence agreement whereby the defendant agrees to plead guilty in exchange for a sentence to a specified term or within a specified range, or for a nonbinding prosecutorial sentence recommendation. See MCR 6.302(C). However, if the offense to which the defendant is to enter a plea is subject to a mandatory minimum sentence, "the trial court is without authority to impose[]" a lesser sentence. *People v Kreiner*, 497 Mich 1024, 1024-1025 (2015) (where the terms of a plea offer called for the defendant to plead guilty of first-degree criminal sexual conduct in exchange for a ten-year minimum sentence, the trial court was "without authority to impose[]" the proposed sentence because "MCL 750.520b(2)(b) provides that the statutorily authorized punishment for the offense to which [the] defendant

[45] *Grove*, 455 Mich 439, "has been superseded by MCR 6.310(B)." *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012).

[was] to plead guilty under the proposed plea agreement is 'imprisonment for . . . not less than 25 years[]'").

The extent to which a trial court may involve itself in sentence negotiations has been set out by the Michigan Supreme Court in *People v Killebrew*, 416 Mich 189 (1982), effectively superseded in part by ADM File No. 2011-19,[46] and *People v Cobbs*, 443 Mich 276 (1993). In *Killebrew*, 416 Mich at 205, the Supreme Court held that a trial court may not initiate or participate in discussions regarding a plea agreement. In *Cobbs*, 443 Mich at 283, the Supreme Court modified *Killebrew* to allow the trial court, at the request of a party, to state on the record the length of the sentence that appeared to be appropriate, based on the information available to the trial court at the time. The *Cobbs* Court made clear that the trial court's preliminary evaluation did not bind the court's ultimate sentencing discretion, because additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources. *Cobbs*, 443 Mich at 283.

Sentence recommendation under *Killebrew*. *Killebrew* limits a trial court's involvement to the approval or disapproval of a nonbinding prosecutorial sentence recommendation linked to a defendant's guilty plea. *Killebrew*, 416 Mich at 209. Under *Killebrew*, 416 Mich at 209, a trial court may accept a defendant's guilty plea without being bound by any agreement between the defendant and the prosecution. Where a trial court has decided not to adhere to the sentence recommendation accompanying the defendant's plea agreement, the court must explain to the defendant that the recommendation was not accepted and state the sentence that the court finds is the appropriate disposition. *Id*. at 209-210.[47] However, "[a] judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea." MCR 6.302(C)(3).[48]

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[46] See 495 Mich lxxix (2013).

[47] Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea[]'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012). In *Franklin (Joseph)*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin (Joseph)* Court clarified that "*Grove* has been superseded by MCR 6.310(B)[,]" and cautioned that "in the future, such an error will be 'plain[.]'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin (Joseph)*, 491 Mich 916, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Franklin (Joseph)*, 491 Mich at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

***Cobbs* plea.** *Cobbs* authorizes the trial court, at the request of a party, to state on the record the sentence that appears appropriate for the charged offense, on the basis of information available to the court at the time. *Cobbs*, 443 Mich at 283. Even when a defendant pleads guilty or nolo contendere to the charged offense in reliance on the court's preliminary determination regarding the defendant's likely sentence, the court retains discretion over the actual sentence imposed should additional information dictate the imposition of a longer sentence. *Id.* at 283. If the court determines it will exceed its previously stated sentence, the defendant has an absolute right to withdraw the plea. *Id.*[49]

"[T]he fact that new information [comes] to light after [a] *Cobbs* plea [is] entered does not justify the circuit court in vacating [a] defendant's bargained-for plea." *People v Martinez (Gilbert)*, 307 Mich App 641, 652-654 (2014) (holding that where the defendant entered a guilty plea in exchange for the prosecutor's agreement not to bring any additional charges regarding contact with the complainant "'grow[ing] out of [the] same investigation that occurred during [a certain period of years,]'" the "fact that the complainant, after [the] defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact[]" permitting the court to vacate the defendant's plea under either MCR 6.310 or contract principles).

Where a "defendant violate[s] a precondition of [a] plea agreement[,]" he or she "is not entitled to the benefit of [the] bargain[,]" and "the trial court [is neither] bound by [a] preliminary sentencing evaluation[nor] . . . required to afford [the] defendant an opportunity to withdraw [the] plea." *People v White (Rickey)*, 307 Mich App 425, 434-435 (2014) (holding that where the defendant failed to make a restitution payment that "was a specific

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[48] See ADM File No. 2011-19, effective January 1, 2014, effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation. See 495 Mich lxxix (2013). See Section 5.32 for more information on a defendant's right to withdraw a plea.

[49] Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea[]'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012). In *Franklin (Joseph)*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin (Joseph)* Court clarified that "*Grove* has been superseded by MCR 6.310(B)[,]" and cautioned that "in the future, such an error will be 'plain[.]'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin (Joseph)*, 491 Mich 916, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Franklin (Joseph)*, 491 Mich at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

precondition of being sentenced in accordance with [his] *Cobbs* evaluation[,]" he was not entitled to withdraw his plea after sentencing on the ground that the sentence imposed exceeded the preliminary evaluation) (citation omitted).

Committee Tip:

Make the attorneys do the extra work to provide the court with information regarding the reasons why a Cobbs hearing is appropriate, and, if a hearing is held, why a particular plea is appropriate. Even if the parties cannot agree on the terms, the court may still proceed with a Cobbs plea; it is not dependent on the assent of the parties. If the defendant elects to withdraw his or her plea, the trial court may consider a new Cobbs agreement, or proceed to trial.

In *People v Williams (Avana)*, 464 Mich 174 (2001), the Michigan Supreme Court distinguished between a trial court's role in sentence negotiations occurring under *Killebrew* and those occurring under *Cobbs*. According to the *Williams* (*Avana)* Court, *Cobbs* modified *Killebrew* "to allow somewhat greater participation by the judge." *Williams (Avana)*, 464 Mich at 177. However, the *Williams* (*Avana)* Court ruled that the requirement of *Killebrew*—that a court must indicate the sentence it considers appropriate if the court decides against accepting the prosecutorial recommendation—does not apply to a *Cobbs* agreement later rejected by the court that made the preliminary evaluation. *Williams (Avana)*, 464 Mich at 178-179. The Court explained the distinction between *Cobbs* and *Killebrew* as preserving the trial court's impartiality in sentence negotiations by minimizing the potential coercive effect of a court's participation in the process:

> "In cases involving sentence recommendations under *Killebrew*, the neutrality of the judge is maintained because the recommendation is entirely the product of an agreement between the prosecutor and the defendant. The judge's announcement that the recommendation will not be followed, and of the specific sentence that will be imposed if the defendant chooses to let the plea stand,[50] is the first involvement of the court, and does not constitute bargaining with the defendant, since the judge makes that announcement and determination of the sentence on the judge's own initiative after reviewing the presentence report.

By contrast, the degree of the judge's participation in a *Cobbs* plea is considerably greater, with the judge having made the initial assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process. Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.

Thus, we hold that in informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand." *Williams (Avana)*, 464 Mich at 179-180.

B. Violations of a Sentence Agreement or Recommendation

1. By Prosecutor

As a general rule, fundamental fairness requires that promises made during plea bargaining be respected, where (1) the government agent was authorized to enter into the agreement; and (2) the defendant relied on the promise to his or her detriment. *People v Ryan (Thomas)*, 451 Mich 30, 41 (1996).

Where a defendant is aggrieved by the breach of an unauthorized non-plea agreement with the police (that the defendant not be prosecuted) he or she is not entitled to specific performance of that agreement. *People v Gallego (Luis)*, 430 Mich 443, 445, 452 (1988). Instead, suppression or exclusion of the written agreement is an appropriate remedy. *Id.* at 446, 456-457.

[50] However, see ADM File No. 2011-19, effective January 1, 2014, amending MCR 6.302(C)(3) and MCR 6.310(B)(2) to eliminate a defendant's ability to withdraw a plea if the court rejects a plea agreement involving a prosecutorial sentence recommendation (effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation). See 495 Mich lxxix (2013).

Where a sentencing agreement negotiated between the defendant and the prosecution is subsequently breached by the prosecution, a reviewing court has discretion to choose between vacating the plea or ordering specific performance, with considerable weight given to the defendant's choice of remedy. *People v Nixten*, 183 Mich App 95, 97, 99 (1990) (where the defendant did not assert his innocence and only complained that the prosecution did not fulfill its part of the bargain, the Court of Appeals found that specific performance was the appropriate remedy and remanded for resentencing before a different judge).

2. By Defendant

"On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement." MCR 6.310(E). However, where a "prosecutor's motion [to vacate a plea is] not based on [the] defendant's failing to comply with the terms of the plea agreement[and t]he record shows that [the] defendant fully complied with his [or her] part of the plea bargain[,]" MCR 6.310(E) "[does not] permit[] the trial court to vacate [the] . . . plea on its own motion or that of the prosecutor[.]" *People v Martinez (Gilbert)*, 307 Mich App 641, 648, 650 (2014).

A defendant's breach of a plea agreement constitutes grounds for setting aside the agreement. *People v Abrams*, 204 Mich App 667, 672-673 (1994) (where the defendant breached his plea agreement by engaging in criminal activity, the prosecution was allowed to pursue its case against the defendant).

Where a "defendant violate[s] a precondition of [a] plea agreement[,]" he or she "is not entitled to the benefit of [the] bargain[,]" and "the trial court [is neither] bound by the preliminary sentencing evaluation[nor] . . . required to afford [the] defendant an opportunity to withdraw [the] plea." *People v White (Rickey)*, 307 Mich App 425, 434-435 (2014) (holding that where the defendant failed to make a restitution payment that "was a specific precondition of being sentenced in accordance with [his] *Cobbs* evaluation[,]" he was not entitled to withdraw his plea after sentencing on the ground that the sentence imposed exceeded the preliminary evaluation) (citation omitted).

An evidentiary hearing is required for the court to determine if a substantial breach of a plea agreement has occurred. *United States v Frazier (Eric)*, 213 F3d 409, 419 (CA 7, 2000). The burden is on the prosecution to show by a preponderance of the

evidence that a defendant breached the plea agreement. *Id.* at 419. A defendant who breaches a plea agreement forfeits any right to its enforcement. *United States v Wells*, 211 F3d 988, 995 (CA 6, 2000).

It is appropriate to grant a prosecutor's motion to void a plea bargain where the defendant has not lived up to his or her part of the bargain. *Abrams*, 204 Mich App at 672-673. See also *People v Acosta*, 143 Mich App 95, 99 (1985) (it was not error for the trial court to grant the prosecution's motion to void a plea agreement where the defendant absconded, failed to appear to enter his guilty plea, and was arrested eight months later).

It is appropriate to grant a prosecutor's motion to set aside a guilty plea made pursuant to a plea bargain where defense counsel concealed material information during the bargaining process. *People v Cummings*, 84 Mich App 509, 513-514 (1978).

Additionally, "[e]xcept as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct[51] after the plea is accepted but before sentencing." MCR 6.310(B)(3).[52] See also *People v Garvin (Larry)*, 159 Mich App 38, 44 (1987)[53] (the defendant's failure to live up to his part of a plea bargain did not void his guilty plea, but rather, waived his right to withdraw the plea); *People v Kean*, 204 Mich App 533, 535-536 (1994)[54] (where, pursuant to a plea agreement, the defendant entered a qualifying drug and alcohol treatment program before sentencing, but left the program after one week, failed to appear at sentencing, and was arrested more than two and a half years later, the trial court's denial of the defendant's motion to withdraw his plea was upheld).

3. By the Court

If the court receives information that in its judgment dictates a lower sentence than that included in a sentence agreement, it

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[51] "For purposes of [MCR 6.310], misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing." MCR 6.310(B)(3).

[52] See Section 5.32 for more information on a defendant's right to withdraw a plea.

[53] *Garvin (Larry)*, 159 Mich App 38, was decided before the adoption of MCR 6.310(B)(3). See ADM File No. 2011-19, effective January 1, 2014.

[54] *Kean*, 204 Mich App 533, was decided before the adoption of MCR 6.310(B)(3). See ADM File No. 2011-19, effective January 1, 2014.

must notify the prosecutor of the sentence it intends to impose and allow the prosecutor to withdraw from the plea. *People v Seibert*, 450 Mich 500, 511 (1995).

"[I]f the court chooses not to follow an agreement to a sentence for a specified term or within a specified range, [the court must explain to the defendant that] the defendant will be allowed to withdraw from the plea agreement." MCR 6.302(C)(3). However, "[a] judge's decision not to follow [a prosecutorial] sentence recommendation does not entitle the defendant to withdraw the defendant's plea." MCR 6.302(C)(3).[55]

A defendant is entitled to withdraw his or her plea, after acceptance but before sentencing, when the court is unable to comply with an agreement for a sentence for a specified term or within a specified range, or when the court is unable to sentence a defendant in accord with the court's initial statement regarding the sentence it would impose.[56] MCR 6.310(B)(2)(a)-(b).[57]

4. Standard of Review

The trial court's finding that a plea agreement was breached is reviewed for clear error, and even when the court finds a breach, the trial court has discretion to affirm the plea. MCR 2.613(C); MCR 6.310(C), and 1989 Staff Comment; *People v Hannold*, 217 Mich App 382, 388-389 (1996), overruled in part on other grounds by *People v Smart*, 497 Mich 950, 950 (2015).

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[55] See ADM File No. 2011-19, effective January 1, 2014, effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation. See 495 Mich lxxix (2013). See Section 5.32 for more information on a defendant's right to withdraw a plea.

[56] However, "[e]xcept as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct after the plea is accepted but before sentencing." MCR 6.310(B)(3). See Section 5.32 for more information on a defendant's right to withdraw a plea.

[57] Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea[]'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012). In *Franklin (Joseph)*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin (Joseph)* Court clarified that "*Grove* has been superseded by MCR 6.310(B)[,]" and cautioned that "in the future, such an error will be 'plain[.]'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin (Joseph)*, 491 Mich 916, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Franklin (Joseph)*, 491 Mich at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

C. Ineffective Assistance of Counsel Causing Lapse or Rejection of Plea Offer[58]

"[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v Kentucky*, 559 US 356, 373 (2010),[59] citing *Hill v Lockhart*, 474 US 52, 57 (1985). See also *Missouri v Frye*, 566 US ___, ___ (2012) ("plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages[]").[60]

1. Establishing Ineffective Assistance Under *Strickland*

"[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland* [*v Washington*, 466 US 668, 687 (1984)]." *Frye*, 566 US at ___, citing *Hill*, 474 US at 57.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused[,] . . . [and w]hen defense counsel allow[s such an] offer to expire without advising the defendant or allowing him [or her] to consider it, defense counsel [does] not render the effective assistance the Constitution requires." *Frye*, 566 US at ___.[61]

In *Frye*, 566 US at ___, the respondent was charged with driving without a license, a felony that carried a maximum term of four years' imprisonment. The prosecutor offered to defense counsel a choice of two plea bargains, including an offer to reduce the charge to a misdemeanor that carried a maximum term of imprisonment of one year and to recommend a 90-day sentence if the respondent pleaded

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[58] See Section 6.23(E) for discussion of plea withdrawal based on ineffective assistance of counsel.

[59] *Padilla*, 559 US 356, has prospective application only under both federal and state rules of retroactivity. See *Chaidez v United States*, 568 US ___, ___ (2013); *People v Gomez*, 295 Mich App 411, 413 (2012).

[60] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US ___, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2).

[61] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US ___, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d at 738-739, quoting 28 USC 2255(h)(2).

guilty. *Id.* at ___. Counsel failed to communicate the offers to the respondent, who entered an open plea of guilty to the original felony charge and was sentenced to three years in prison. *Id.* at ___. After determining that counsel's performance was deficient under the first part of the *Strickland*[62] test, *Frye*, 566 US at ___, the Court turned to *Strickland*'s prejudice requirement:

> "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice . . . , it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 US at ___.

Noting that, in light of the respondent's intervening arrest on an additional charge of driving without a license shortly before the plea hearing was held, there was reason to doubt that the prosecution would have adhered to the misdemeanor plea offer or that the trial court would have accepted it unless they were required to do so under state law, the *Frye* Court remanded the case to the state appeals court to consider whether the "plea offer, if accepted by [the respondent], would have been adhered to by the prosecution and accepted by the trial court." *Frye*, 566 US at ___.

Similarly, where defense counsel's ineffective assistance results in a defendant's *rejection* of a favorable plea offer, followed by his or her conviction at an ensuing trial and the imposition of a sentence harsher than that offered, "[the] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the

[62] 466 US at 687.

court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v Cooper*, 566 US ___, ___ (2012).[63]

In *Cooper*, 566 US at ___, it was conceded that defense counsel rendered ineffective assistance by advising the respondent that the prosecution would not be able to obtain a conviction at trial and convincing him, on that basis, to reject the prosecution's offer to dismiss two charges and to recommend a sentence of 51 to 85 months' imprisonment if the respondent pleaded guilty to two remaining charges. Following trial, the respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment. *Id.* at ___. The *Cooper* Court rejected the petitioner's contention that "there can be no finding of *Strickland*[64] prejudice arising from plea bargaining if the defendant is later convicted at a fair trial[,]" holding that "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it[, and i]f that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Cooper*, 566 US at ___, ___. Because the respondent established "that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea [offer,]" and because he received a sentence after trial that was "3½ times greater than he would have received under the plea[,]" the *Strickland* test was satisfied. *Cooper*, 566 US at ___.

Although defense counsel's erroneous advice and failure to inform the defendant of the 25–year mandatory minimum sentence for a conviction of the charged offense "fell below an objective standard of reasonableness[,]" the defendant was not entitled to reinstatement of a rejected plea offer where the record demonstrated that "it was not reasonably probable that he would have accepted the . . . offer[]" had he been properly advised. *People v Douglas (Douglas II)*, 496 Mich 557, 593-594, 598 (2014), aff'g in part and rev'g in part *People v Douglas (Douglas I)*, 296 Mich App 186 (2012), citing *Cooper*, 566 US at ___ (additional citations omitted). In *Douglas II*, 496 Mich at 591, defense counsel "never informed the defendant that he

[63] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, neither *Frye*[, 566 US ___,] nor *Cooper*[, 566 US ___,] created a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d at 738-739, quoting 28 USC 2255(h)(2).

[64] 466 US at 687.

faced a 25-year mandatory minimum prison sentence if convicted [as charged] of [first-degree criminal sexual conduct (CSC-I) (victim under 13)] at trial[, but instead] . . . mistakenly advised [him] that a conviction at trial would result in a potential maximum sentence of 20 years in prison, and that he would likely have to serve approximately five to eight years before being eligible for parole." After rejecting two pretrial plea offers, one for the defendant to plead guilty to attempted criminal sexual conduct and one for him to plead guilty to fourth-degree criminal sexual conduct, the defendant was convicted of CSC-I and sentenced to the mandatory 25-year prison term. *Id*. at 561, 591. The Court of Appeals, in addition to concluding that the defendant was entitled to a new trial on the basis of several evidentiary errors and ineffective assistance of counsel at trial, held that he had "established that counsel's failure to inform him of the actual consequences of accepting or rejecting [a] plea offer prejudiced him[,]" and that he was therefore entitled to reinstatement of the prosecution's second plea offer. *Douglas I*, 296 Mich App at 204-208 (because the defendant "show[ed] that the offer was valid, that he would have accepted the offer, and that his convictions and sentences would have been much less severe than those that were imposed after trial[,] . . . [he] satisfied both prongs of the *Strickland*[65] test[]").

On appeal, the Michigan Supreme Court affirmed *Douglas I*, 296 Mich App 186, to the extent that it granted the defendant a new trial on the basis of evidentiary errors and ineffective assistance of counsel at trial. *Douglas II*, 496 Mich at 561-583. However, the *Douglas II* Court further held that "the Court of Appeals erred in concluding that the prosecution's prior plea offer must be reinstated," because "the trial court did not reversibly err in determining that the defendant [had] not shown prejudice as a result of counsel's deficient performance." *Id*. at 561, 591. Rather, "the record amply support[ed the trial court's] conclusion that, even had the defendant been properly advised of the consequences he faced if convicted at trial," it "would not have affected this particular defendant's decision to reject the pleas . . in light of his protestations of innocence." *Id*. at 595, 598.

"Although a defendant's proclamation of innocence does not relieve counsel of his [or her] normal responsibilities under *Strickland*[, 466 US 668], it may affect the advice counsel gives." *Burt v Titlow*, 571 US ___, ___, ___ (2013) (holding that the Sixth Circuit Court of Appeals erred in overturning the Michigan

[65] 466 US at 687.

Court of Appeals' decision that defense counsel's advice to the respondent to withdraw his guilty plea satisfied *Strickland*, "given that [the] respondent was claiming innocence and only days away from offering self-incriminating testimony in open court pursuant to a plea agreement involving an above-guidelines sentence[]").

2. Remedy

When "a defendant shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence," the remedy, like other Sixth Amendment remedies, "should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" *Cooper*, 566 US at ___, quoting *United States v Morrison*, 449 US 361, 364 (1981). Noting that "[t]he specific injury" suffered in such a case may not always be redressed simply by imposition of a lesser sentence, the *Cooper* Court explained that in some cases—for example, if the offer was for a guilty plea to a less serious count or if a mandatory sentence applied to the charged offense—"the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Cooper*, 566 US at ___. If the trial court does so, "the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id*. at ___.

"In implementing a remedy . . . , the trial court must weigh various factors[,]" including "a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions[]" and "any information concerning the crime that was discovered after the plea offer was made." *Cooper*, 566 US at ___. In *Cooper*, 566 US at ___, where defense counsel's ineffective assistance resulted in the respondent's rejection of a plea offer to dismiss two charges and to recommend a much lower sentence than the sentence imposed following trial, "[t]he correct remedy . . . [was] to order the State to reoffer the plea agreement." If the respondent accepted the offer, the Michigan trial court would then have discretion, under MCR 6.302(C)(3), to determine "whether to vacate the convictions and resentence [the] respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence [the] respondent accordingly, or to leave the convictions and sentence from trial undisturbed." *Cooper*, 566 US at ___.

A defendant is not entitled to reinstatement of a rejected plea offer if he or she is unable to establish that "it was . . . reasonably probable that[, but for counsel's deficient advice,] he [or she] would have accepted the . . . offer." *Douglas II*, 496 Mich at 593-595, 598 (citing *Cooper*, 566 US at ___, and holding that "the record amply support[ed the trial court's] conclusion that, even had the defendant been properly advised of the consequences he faced if convicted at trial," it "would not have affected this particular defendant's decision to reject the [prosecution's plea offers] . . . in light of his protestations of innocence[]").

Where the trial court determined that the defendant's decision to reject a plea offer, under which she would have pleaded guilty of first-degree criminal sexual conduct in exchange for a ten-year minimum sentence, "was the result of ineffective assistance on the part of her trial counsel and ordered the prosecutor to re-offer the plea[,]" the trial court was "without authority to impose[]" the proposed sentence because "MCL 750.520b(2)(b) provides that the statutorily authorized punishment for the offense to which [the] defendant [was] to plead guilty under the proposed plea agreement is 'imprisonment for . . . not less than 25 years.'" *People v Kreiner*, 497 Mich 1024, 1024-1025 (2015) (citing *Cooper*, 566 US ___, and remanding to "the Court of Appeals to address the appropriate remedy, if any, for [the] defendant").

5.20 Required Advice of Rights at Plea Proceedings

MCR 6.610(E)(1)-(9) govern plea proceedings when the charged offense is cognizable in district court. This section discusses in detail a district court's obligations when a defendant pleads guilty or no contest to an offense over which the district court has jurisdiction.

See the Appendix for the following resources: a checklist of requirements for proceedings in district court involving guilty and no contest pleas; a flowchart representing the guilty/no contest plea process; and a script for conducting misdemeanor arraignments and plea proceedings in district court.

A. "Grouping of Rights"

A guilty plea cannot be "understandingly" made unless the defendant has knowledge of the consequences of his or plea.[66]

[66] See Section 5.25 for detailed discussion of the requirement that a plea is "understood."

Automatic reversal is mandated where the record does not affirmatively show that before pleading guilty, a defendant was advised that his or her guilty plea waived a trio of constitutional rights known as "*Jaworski* rights." See *People v Jaworski*, 387 Mich 21, 27 (1972); see also *Boykin v Alabama*, 395 US 238, 279-280 (1969).

The three constitutional rights waived by a defendant's guilty plea are:

- the right to a trial by jury,
- the right to confront one's accusers, and
- the privilege against self-incrimination. *Boykin*, 395 US at 279; *Jaworski*, 387 Mich at 30.

MCR 6.610(E)(3)(b) requires a court to advise a defendant of the trial rights that are waived by a guilty or no contest plea. MCR 6.610(E)(3) states:

> "(3) The court shall advise the defendant of the following:
>
> * * *
>
> (b) that if the plea is accepted the defendant will not have a trial of any kind and that the defendant gives up the following rights that the defendant would have at trial:
>
> (*i*) the right to have witnesses called for the defendant's defense at trial,
>
> (*ii*) the right to cross-examine all witnesses called against the defendant,
>
> (*iii*) the right to testify or to remain silent without an inference being drawn from said silence,
>
> (iv) the presumption of innocence and the requirement that the defendant's guilt be proven beyond a reasonable doubt."

The Michigan Supreme Court specifically approved of a trial court's "grouping" of a defendant's rights in the court's recital of rights to a defendant. *In re Guilty Plea Cases*, 395 Mich 96, 114-115 (1975). Provided that the record at a plea proceeding reflects that none of the three *Jaworski* rights was omitted, reversal is not necessarily required where each right is not explained separately or is "imprecise[ly] recit[ed]." *In re Guilty Plea Cases*, 395 Mich at 122.

However, a defendant "is automatically entitled to set aside his or her plea when reference to those rights, either by their express enumeration or by reference to a written document, is omitted from the in-court plea proceedings." *People v Al-Shara*, 311 Mich App 560, 577 (2015), citing *People v Saffold*, 465 Mich 268, 273 (2001); *Jaworski*, 387 Mich at 31.

B. Method of Recital

According to MCR 6.610(E)(4), a defendant or defendants may be informed of the trial rights in MCR 6.610(E)(3)(b) as follows:

> "(a) on the record,
>
> (b) in a writing made part of the file, or
>
> (c) in a writing referred to on the record.
>
> If the court uses a writing pursuant to [MCR 6.610](E)(4)(b) or [MCR 6.610(E)(4)](c), the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights."

The trial court must assume the principal burden of advising the defendant of the required information before accepting a plea. The purpose of requiring the trial court to personally address the defendant is to enable the court "to observe [the defendant's] demeanor and responses" to the information as he or she receives it, but the information conveyed to the defendant may come from sources other than the court. *In re Guilty Plea Cases*, 395 Mich at 114. According to the Michigan Supreme Court:

> "A guilty plea conviction will not be reversed if the judge engages in the required colloquy but fails to mention an item which the record shows was established through, for example, an opening statement of or interjection by the prosecutor or defense counsel in the hearing of the judge and defendant." *Id*. at 114-115.

The Court of Appeals affirmed a defendant's conviction of OUIL-3rd after finding that the defendant failed to establish that his earlier plea-based conviction (his second OUIL conviction, which served as the basis for his OUIL-3rd) was invalid because the trial court had not informed the defendant of his right to a trial by jury. *People v Harris*, 191 Mich App 422, 425 (1991). In *Harris*, the Court found that the defendant had been provided with written information about

the rights to which he was entitled, and the written advice of rights complied with MCR 6.610(4)(b), which allows a defendant to be informed of his or her trial rights in writing. The Court further noted that the defendant failed to produce any evidence that the written advice of rights he signed violated the standard set forth in the court rule. *Harris*, 191 Mich App at 425.

However, "a written advice of rights alone—signed by a defendant off the record and outside of the court's presence, and unreferenced by the court or anyone else during the plea hearing—cannot satisfy, substantially or otherwise, a trial court's obligation under MCR 6.610(E)(4) to ensure that the defendant's plea is understandingly and voluntarily made with knowledge of his or her *Jaworski* rights." *Al-Shara*, 311 Mich App at 576. In *Al-Shara*, 311 Mich App at 563, the defendant "signed a written Pre-Trial Conference Summary' form detailing the terms of [his nolo contendere] plea agreement[]" and waiving his trial rights, including his *Jaworski* rights. However, "[a]t the plea hearing, the district court . . . referenced [only the] defendant's right to a jury trial [and] wholly failed to inform [him] of his right to remain silent and his right to confront his accusers[]" as required under MCR 6.610(E)(3)(b); additionally, the district court "failed to make any reference to [the] defendant's execution of a written advice-of-rights form or to verify that [he] actually read and understood the rights communicated on the form he signed[as required under MCR 6.610(E)(4)]." *Al-Shara*, 311 Mich App at 573. The Court of Appeals affirmed the circuit court's order vacating the defendant's plea and remanding for a trial, rejecting the prosecutor's contention that the defendant's signature on the written waiver form constituted "substantial compliance" with MCR 6.610(E)(4):

> "[E]ven when a written advice-of-rights form has been signed by a defendant, there cannot be a total omission of any reference during the in-court proceedings to either the enumerated rights in question or to the form itself signed by [the] defendant off the record[,] . . . [and] when the rights implicated by the plea-taking procedure include a defendant's *Jaworski* rights, the defendant is *automatically entitled* to set aside his or her plea when reference to those rights, either by their express enumeration or by reference to the written document, is omitted from the in-court plea proceedings." *Al-Shara*, 311 Mich App at 576-577, citing *Saffold*, 465 Mich at 273; *Jaworski*, 387 Mich at 31 (emphasis added).
>
> **Note:** The Editorial Advisory Committee emphasized the importance of obtaining an oral statement and waiver from a defendant who was advised of his or her

trial rights in writing. Because some English-speaking defendants are functionally illiterate, it is imperative that the court determine that a defendant has indeed read and understood rights provided to him or her in writing. In addition to the English language, SCAO Form DC 213 (Advice of Rights) is available in Spanish, Arabic, Chinese, Hmong, Korean, and Russian versions.

C. Substantial Compliance with Rule Requirements

"When considering whether a trial court complied with the court rules governing plea proceedings and whether any deviation entitles a defendant to reversal of his or her plea, [the appellate court reviews] under the doctrine of substantial compliance whether the trial court observed the court rules detailing the plea-taking procedure" *Al-Shara*, 311 Mich App at 571-572, citing *People v Saffold*, 465 Mich 268, 273 (2001). "Under this doctrine, literal or 'talismanic' compliance with the court rules is not required." *Al-Shara*, 311 Mich App at 572, citing *Saffold*, 465 Mich at 280; *In re Guilty Plea Cases*, 395 Mich at 124.[67]

In *Saffold*, 465 Mich at 275-276, the Michigan Supreme Court concluded that automatic reversal was not required when a trial court failed to advise a defendant at a plea proceeding that the defendant's tender of a guilty plea waived the presumption of innocence and the right to trial, where the court did so advise the defendant at an earlier stage of the proceedings. The Court noted that although the trial court had not strictly complied with the requirements of MCR 6.302(B)(3),[68] there existed substantial compliance with the rule sufficient to have alerted the defendant to the fact that a guilty plea waived the defendant's right to trial and the rights attending to a trial. *Id*. at 271. The Court specifically ruled that it was not necessary that a defendant be advised of the individual trial rights waived by his or her guilty plea, as long as the record showed that the defendant was informed that his or her guilty plea waived the defendant's general right to trial. *Id*. at 273-274.

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[67] The *Al-Shara* Court noted that the district court had "mistakenly relied on [*People v Ward*, 459 Mich 602, 613-614 (1999), opinion corrected on denial of reh 460 Mich 1204 (1999)], in which the Court did not apply the doctrine of substantial compliance but instead emphasized that withdrawal of a guilty plea after conviction and sentencing is disfavored and subject to a showing of a miscarriage of justice[;]" rather, where a defendant raises "a timely motion to set aside a plea in accordance with the temporal restraints set forth in MCR 6.610(E)(8), the . . . case is not a collateral attack subject to review under *Ward*[, 459 Mich at 613-614, but] is instead properly considered under the principles of [*Saffold*, 465 Mich 268]." *Al-Shara*, 311 Mich App at 571-572 n 6 (additional citations omitted).

[68] Equivalent provisions pertaining to criminal procedure in district court are found in MCR 6.610(E)(3)(b).

However, "it remains the rule in Michigan that failure to advise a defendant of his or her *Jaworski* rights during plea proceedings mandates automatic reversal and the setting aside of the defendant's plea." *Al-Shara*, 311 Mich App at 572 (citing *Saffold*, 465 Mich at 273, and holding that the defendant was automatically entitled to set aside his plea where there was a "total omission of two of the three *Jaworski* rights from the record of [the] defendant's plea proceedings[]" and where the district court "failed to make any reference to [the] defendant's execution of a written advice-of-rights form or to verify that [the] defendant actually read and understood the rights communicated on the form he signed[]") (additional citations omitted).

In *Al-Shara*, 311 Mich App at 573 n 7 (citations omitted), the Court of Appeals specifically addressed the application of the "substantial compliance" doctrine to pleas taken in district court:

> "While MCR 6.610 is not identical to its circuit court counterpart, MCR 6.302, the two rules nonetheless share many common features and the same overarching aim to inform a defendant of the rights waived by entering a plea, as well as the consequences of a plea[; h]ence, . . . like a circuit court under MCR 6.302, a district court need not conduct the colloquy described in MCR 6.610 verbatim, but it must substantially comply with the rule. And as in the circuit court, whether reversal is required will depend on the nature of the noncompliance, bearing in mind that omission of a *Jaworski* right requires automatic reversal because such a defect is intrinsically harmful and cannot be corrected on remand. . . . Where a *Jaworski* right is not implicated, whether a deviation occurred is judged under the substantial compliance doctrine, and under MCR 6.610(E)(8), a defendant is only entitled to relief if the deviation affected his or her substantial rights."

"Because trial rights and sentencing consequences are distinct," the substantial compliance doctrine does not apply to violations of MCR 6.302(B)(2) (applicable to offenses cognizable in circuit court, requiring a trial court to advise defendant of mandatory minimum sentence and maximum possible prison sentence).[69] *People v Brown (Shawn)*, 492 Mich 684, 698 (2012).

[69] A substantially similar provision pertaining to criminal procedure in district court is found in MCR 6.610(E)(3)(a).

D. Repeating the Required Advice of Rights at Subsequent Proceedings

If the defendant previously waived the assistance of counsel, MCR 6.005(E) (applicable to matters of procedure involving felony offenses but not expressly applicable to procedural matters involving offenses cognizable in district court) mandates that the court advise the defendant of his or her continuing right to an attorney's assistance and obtain the defendant's continued waiver of that right before beginning any court proceeding following the defendant's initial waiver. Substantial compliance with the mandates contained in MCR 6.005(E)(1)-(3) is required. *People v Russell*, 471 Mich 182, 191 (2004).

Although no rule similar to MCR 6.005(E) expressly applies to waivers when the offense is *not* cognizable in circuit court, making a record of a defendant's waiver of counsel at the beginning of each proceeding in district court may minimize appellate problems related to a defendant's right to counsel.[70]

Where a defendant is fully advised of his *Jaworski* rights at a proceeding prior to the proceeding at which the defendant's guilty plea is accepted, the court's failure to repeat the rights at the plea proceeding did not necessarily invalidate the defendant's guilty plea. *People v Kosecki*, 73 Mich App 293 (1977). In *Kosecki*, the Court of Appeals affirmed the defendant's plea-based conviction when the record showed that the defendant was fully advised of his rights at the time he entered his plea. Two weeks later, at the defendant's sentencing hearing, the court permitted the defendant to withdraw his guilty plea. Later the same day, the defendant retendered, and the court accepted, his guilty plea. *Id*. at 297-298. The Court explained:

> "When a plea is withdrawn on the day of sentencing, for a reason that does not indicate that defendant pled in ignorance of his *Jaworski* rights, and retendered the same day, it is not absolutely necessary that the subsequent plea be preceded by a recital of the *Jaworski* rights." *Id*. at 298.

[70] See Section 5.21 for discussion of a defendant's right to counsel as it relates to plea proceedings. See Chapter 3 for more general information on the topic.

5.21 Advice About the Right To Counsel[71]

A defendant has a constitutional right to counsel at plea proceedings[72] as well as at trial proceedings. Consequently, an indigent defendant has the right to appointed counsel at plea proceedings if actual imprisonment may result from the plea. *People v Bailey*, 7 Mich App 157, 159 (1967). If the defendant wishes to plead guilty without the advice of counsel, the court must obtain for the record a defendant's waiver of his or her right to counsel at all proceedings pertaining to the defendant's plea. When an indigent defendant is sentenced to jail pursuant to a plea obtained in the absence of counsel, the record must show that the defendant was offered counsel and made an intelligent and understanding waiver of counsel. *Id.* at 160.

A defendant's Sixth Amendment right to counsel attaches at the defendant's initial proceeding, regardless of the prosecution's involvement in, or awareness of, the proceeding. *Rothgery v Gillespie Co*, 554 US 191 (2008). "[T]he negotiation of a plea bargain . . . is almost always the critical point for a defendant" and thus "criminal defendants require effective counsel during plea negotiations" even though they occur out of court and the prosecutor may have little or no notice of a deficiency in defense counsel's conduct. *Missouri v Frye*, 566 US ___, ___ (2012).[73] "The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences." *Frye*, 566 US at ___. For example, any party make any formal offers part of the record at any plea proceeding or before a trial on the merits. *Id.* at ___.

MCR 6.610(E)(2) sets forth specific conditions with which a district court must comply before accepting a defendant's guilty or no contest plea to an offense over which the district court has jurisdiction:

> "The court shall inform the defendant of the right to the assistance of an attorney. If the offense charged requires on conviction a minimum term in jail, the court shall inform the defendant that if the defendant is indigent the defendant has the right to an appointed attorney. The court shall also give such advice if it determines that it might sentence to a term of incarceration, even if suspended."

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[71] See Chapter 3 for more information about a defendant's right to counsel.

[72] See the Appendix for quick reference materials regarding the conduct of plea proceedings.

[73] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US ___, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2).

MCR 6.610(F)(3) addresses enhancement of a subsequent charge as it relates to an indigent defendant's right to counsel in a previous conviction. MCR 6.610(F)(3) states:

> "Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction."

5.22 Advice About the Right to Trial

Before the court accepts a defendant's guilty plea, the court must advise the defendant of the rights the defendant will waive as a result of pleading guilty. According to MCR 6.610(E)(3)(b), the court must inform the defendant

> "that if the plea is accepted the defendant will not have a trial of any kind and that the defendant gives up the following rights that the defendant would have at trial:[74]
>
> > (*i*) the right to have witnesses called for the defendant's defense at trial,
> >
> > (*ii*) the right to cross-examine all witnesses called against the defendant,
> >
> > (*iii*) the right to testify or to remain silent without an inference being drawn from said silence,
> >
> > (*iv*) the presumption of innocence and the requirement that the defendant's guilt be proven beyond a reasonable doubt."

Right to a trial by jury. A defendant has a constitutional right to be tried by a jury in misdemeanor cases even when conviction would not result in imprisonment. Const 1963, art 1, § 20; *People v Antkoviak*, 242 Mich App 424, 463 (2000). In *Antkoviak*, the defendant was charged with violating MCL 436.1703 (minor in possession) and was denied a jury trial because conviction would not result in incarceration. The Court of Appeals concluded that Michigan's constitution guaranteed a trial by jury to any defendant accused of a criminal offense. The Court explained that although MCL 436.1703 proscribes conduct classified as a "petty offense," the conduct prohibited is clearly classified by statute as a

[74] See the Appendix for quick reference materials about plea proceedings in district court.

"crime" for which a defendant has the right to a trial by jury. MCL 750.5; *Antkoviak*, 242 Mich App at 471, 481.

Electing a bench trial. A defendant is entitled to a jury trial "when required by law." MCR 6.610(D)(1)(c)(*iii*). However, a defendant may waive his or her right to a jury trial. MCR 6.401 applies to matters of procedure involving criminal offenses over which the circuit court has jurisdiction, and although it is not expressly applicable to procedural matters involving offenses over which the district court has jurisdiction, the rule may be instructive. MCR 6.401 mirrors MCL 763.3, which does *not* distinguish between the jurisdictional requirements of district or circuit courts. MCL 763.3 provides in part:

> "(1) *In all criminal cases arising in the courts of this state* the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury." (Emphasis added.)

MCR 6.401 itself states that a defendant has the right to be tried by a jury but may waive the right to a jury and choose to be tried by the court.[75] A defendant's election to be tried by the bench requires the prosecutor's consent and the court's approval. *Id*.

MCL 763.3(1) requires that a defendant wishing to waive the right to a jury trial make and sign a written statement of waiver similar in substance to the example contained in the statute.[76] In addition to the written waiver, in cases involving crimes other than minor offenses, "the waiver of trial by jury shall be made in open court after the defendant has been arraigned and has had opportunity to consult with legal counsel." MCL 763.3(2).

With the exception of requiring the written waiver, MCR 6.402 (a rule not specifically made applicable to criminal procedure involving offenses cognizable in district court but which may be instructive where no other rule applies) mirrors the other legislative requirements of a defendant's waiver of the right to be tried by a jury. MCR 6.402 states:

> **"(A) Time of Waiver.** The court may not accept a waiver of trial by jury until after the defendant has been arraigned or has waived an arraignment on the information, or, in a court where arraignment on the information has been eliminated under MCR 6.113(E), after the defendant has otherwise been

[75] No similar provision is found in the court rules specifically applicable to proceedings involving offenses cognizable in district court.

[76] Language used in the statute appears verbatim in SCAO Form MC 260 (Waiver/Jury Trial).

provided with a copy of the information, and has been offered an opportunity to consult with a lawyer.

(B) Waiver and Record Requirements. Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding."

5.23 Advice About Possible Sentence

Before a court may accept a defendant's guilty or no contest plea, the court must inform the defendant of any mandatory minimum jail sentence for a conviction of the offense, as well as the maximum possible penalty permitted by statute. MCR 6.610(E)(3)(a). The extent to which a trial court may involve itself in sentence negotiations is defined by the Michigan Supreme Court's decisions in *People v Killebrew*, 416 Mich 189 (1982), effectively superseded in part by ADM File No. 2011-19,[77] and *People v Cobbs*, 443 Mich 276 (1993).

Killebrew limits a trial court's involvement to the approval or disapproval of a non-binding prosecutorial sentence recommendation linked to a defendant's guilty plea. *Killebrew*, 416 Mich at 209. Under *Killebrew*, a trial court may accept a defendant's guilty plea without being bound by any agreement between the defendant and the prosecution. *Id*. Where a trial court has decided not to adhere to the sentence recommendation accompanying the defendant's plea agreement, the court must explain to the defendant that it has decided not to accept the prosecutorial recommendation *and* the court must advise the defendant of the sentence it has determined is appropriate to the circumstances of the offense and the offender. *Id*. at 209; *People v Scott*, 197 Mich App 28, 32 (1992). However, "[a] judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea." MCR 6.302(C)(3).[78]

- Characteristics of negotiations under *Killebrew*

[77] Effective January 1, 2014. See 495 Mich lxxix (2013).

[78] See ADM File No. 2011-19, effective January 1, 2014, effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation. See 495 Mich lxxix (2013).

- a defendant's plea is linked to a non-binding prosecutorial sentence recommendation.
- the trial court may accept or reject the agreement as it exists.
- if the court rejects the agreement, the court must indicate what sentence it believes is appropriate under the circumstances.

The Court's decision in *Cobbs* involved its review of a trial court's participation in sentence negotiations in the absence of an existing or proposed agreement between the defendant and the prosecution. *Cobbs*, 443 Mich at 282-284. *Cobbs* authorizes the trial court to make a preliminary evaluation of the sentence appropriate to the offense and the offender if requested by either party. The prosecution or the defendant may ask the court to indicate on the record the length of imprisonment that appears appropriate for the charged offense, based on the information then available to the court. *Id.* at 283. Even when a defendant pleads guilty or no contest to the charged offense in reliance on the court's preliminary determination regarding the defendant's likely sentence—a *Cobbs* agreement—the court retains discretion over the actual sentence imposed should additional information dictate the imposition of a longer sentence. *Id*. If the court determines it will exceed its previously stated sentence, the defendant has an absolute right to withdraw the plea.* *Id*.

- Characteristics of negotiations under *Cobbs*
  - the defendant or the prosecution asks the trial court what sentence appears appropriate under the circumstances if a guilty plea was offered.
  - the court's preliminary evaluation is based on the information then available and the court retains discretion over the actual sentence imposed if additional information warrants a longer sentence.
  - if the court decides to impose a sentence longer than the sentence first indicated by the court, the defendant must be given an opportunity to withdraw his or her plea.

In *People v Williams*, 464 Mich 174 (2001), the Michigan Supreme Court distinguished between a trial court's role in sentence negotiations occurring under *Killebrew* and those occurring under *Cobbs*. According to the *Williams* Court, *Cobbs* modified *Killebrew* "to allow somewhat greater participation by the judge." *Williams*, 464 Mich at 177. However, the *Williams* Court ruled that the requirement of *Killebrew*—that a court must indicate the sentence it considers appropriate if the court decides against accepting the prosecutorial recommendation—does not apply to a *Cobbs*

agreement later rejected by the court that made the preliminary evaluation. *Williams*, 464 Mich at 178-179. The Court explained the distinction between *Cobbs* and *Killebrew* as preserving the trial court's impartiality in sentence negotiations by minimizing the potential coercive effect of a court's participation in the process:

> "In cases involving sentence recommendations under *Killebrew*, the neutrality of the judge is maintained because the recommendation is entirely the product of an agreement between the prosecutor and the defendant. The judge's announcement that the recommendation will not be followed, and of the specific sentence that will be imposed if the defendant chooses to let the plea stand,[79] is the first involvement of the court, and does not constitute bargaining with the defendant, since the judge makes that announcement and determination of the sentence on the judge's own initiative after reviewing the presentence report.
>
> By contrast, the degree of the judge's participation in a *Cobbs* plea is considerably greater, with the judge having made the initial assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process. Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.
>
> Thus, we hold that in informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand." *Williams*, 464 Mich at 179-180.

- The impact of *Williams* on negotiations

[79] However, see ADM File No. 2011-19, effective January 1, 2014, amending MCR 6.302(C)(3) and MCR 6.310(B)(2) to eliminate a defendant's ability to withdraw a plea if the court rejects a plea agreement involving a prosecutorial sentence recommendation (effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation). See 495 Mich lxxix (2013).

- the *Williams* decision is implicated only when there exists a *Cobbs* agreement (the defendant has agreed to plead guilty based on the trial court's preliminary evaluation of the proper sentence), and the trial court determines it will not adhere to its preliminary sentence evaluation as reflected by the *Cobbs* agreement.

- the defendant must be given an opportunity to withdraw his or her guilty plea after the court informs the defendant it will not abide by the sentence first announced.

- unlike the requirement in *Killebrew* that arises when the court refuses to follow a prosecutorial sentence recommendation, when the trial court decides against imposing the sentence first articulated by the court itself (the *Cobbs* agreement), it may *not* inform the defendant of the sentence the court has since decided is appropriate (because to do so would involve the court in the sentence negotiation process to an extent carefully avoided in *Killebrew* and *Cobbs*).

MCR 6.310, a court rule not expressly applicable to matters of criminal procedure involving cases cognizable in district court, incorporates the outcome in *Williams*. MCR 6.310(B)(2)(b) states:

> "[T]he defendant is entitled to withdraw the plea if
>
> * * *
>
> (b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose."[80]

Plea agreements involving probation. A trial court may impose additional conditions on a defendant's sentence of probation, even when the sentence is part of the defendant's plea agreement and did not contain the additional conditions. *People v Johnson*, 210 Mich App 630, 633-634 (1995). In *Johnson*, the defendant moved to withdraw his plea or to force

[80] Failure to provide the defendant with an opportunity to withdraw a plea as required by MCR 6.310(B) constitutes plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012). In *Franklin*, 491 Mich at 916, the Michigan Supreme Court concluded that failing to provide the defendant with the opportunity to withdraw his plea was *not* plain error in *Franklin* because of its previous holding in *People v Grove*, 455 Mich 439 (1997), which permitted "the trial court [to] reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[.]" However, the *Franklin* Court clarified that MCR 6.310(B) superseded *Grove*, 455 Mich 439, and stated that because of this "in the future, such an error will be 'plain[.]'" *Franklin*, 491 Mich at 916. The *Franklin* Court also found that even where plain error exists, an appellate court must still "'exercise its discretion in deciding whether to reverse.'" *Franklin*, 491 Mich at 916, quoting *People v Carines*, 460 Mich 750, 763 (1999).

specific performance of the sentence agreement on which he relied when he offered his nolo contendere plea. According to the defendant, because the additional conditions imposed by court were not conditions to which he agreed, he did not knowingly or voluntarily agree to the sentence imposed. *Id.* at 632.

Based in large part on the "unique features of probation," the Court of Appeals affirmed the defendant's sentence as imposed by the trial court. *Johnson*, 210 Mich App at 634. Noting that an order of probation may be altered or amended, in form and substance, without providing the defendant with notice of the change or an opportunity to be heard about it, the Court concluded "that a sentencing court may place conditions on a defendant's probation regardless of whether it was covered in the plea agreement." *Id*. at 634-635.

Collateral consequences to a defendant's guilty or no contest plea. A defendant's ignorance of "future collateral or incidental effects" of a valid guilty or no contest plea does not entitle the defendant to withdraw the plea at a later date. *People v Haynes*, 256 Mich App 341, 349 (2003); *People v Davidovich*, 463 Mich 446, 453 (2000). A defendant is not automatically entitled to withdraw such a plea because the plea is not made involuntary or unknowing when it results in consequences collateral to the defendant's involvement in the criminal offense charged, even when the defendant was not aware of the consequences at the time he or she tendered the plea. *Davidovich*, 463 Mich at 453 ("[I]mmigration consequences of a plea are collateral matters that do not bear on whether the defendant's plea was knowing and voluntary").

> **Note:** The Editorial Advisory Committee suggests that at the time of the plea proceeding, a court advise a defendant of any potential consequences of the defendant's plea then known to the court.
>
> In addition to a plea's potential impact on a defendant's immigration status, a defendant's plea to a charged offense could affect the defendant's probation or parole status. No court rule or statute requires a court to tell a defendant charged with a misdemeanor offense that his or her guilty plea may constitute a violation of the defendant's probation or parole. However, this information appears on SCAO Form DC 213 (Advice of Rights) in paragraph 8, and fairness and equity suggests that a defendant be provided with this information before the court accepts his or her guilty plea.

5.24 Plea Must Be Accurate

Before accepting a defendant's plea of guilty or nolo contendere to a misdemeanor or felony offense, the court must determine that the plea given is accurate.[81] MCR 6.610(E)(1); MCR 6.302(D). A guilty plea is valid as long as the court establishes a sufficient factual basis for finding that the defendant is responsible for the offense charged *or* the offense to which he or she pleaded guilty. *People v LaFay*, 182 Mich App 528, 531-532 (1990). It is error to accept a defendant's guilty plea when the defendant's testimony indicates his or her innocence. *People v Thomas*, 36 Mich App 589, 592-593 (1971). A court may not accept a defendant's guilty or no contest plea if the court is not convinced of the plea's accuracy. MCR 6.610(E)(1).

According to statutory law, whenever a defendant pleads guilty, the court has a duty, "before pronouncing judgment or sentence upon such plea," to conduct the investigation necessary to determine that the plea was freely made with full knowledge of the nature of the accusation. MCL 768.35. If the court doubts the veracity of a guilty or no contest plea, the judge is obligated to vacate the plea,[82] direct entry of a not guilty plea, and order the case to trial. MCL 768.35.

When a defendant pleads guilty to a misdemeanor, the court should evaluate the accuracy of the plea by questioning the defendant to establish support for a finding that the defendant is indeed guilty of the offense charged *or* that the defendant is guilty of the offense to which he or she is pleading. MCR 6.610(E)(1)(a). Even when an exculpatory inference could be drawn from a defendant's admissions and the defendant urges the adoption of that exculpatory inference, if an inculpatory inference can be drawn from the same admissions, a factual basis in support of the defendant's guilty plea exists. *People v Thew*, 201 Mich App 78, 85, 87 (1993); *In re Guilty Plea Cases*, 395 Mich 96, 128-132 (1975).

Establishing the accuracy of a defendant's no contest plea. When a defendant pleads nolo contendere, the court may not determine whether the plea is accurate by questioning the defendant about his or her participation in the offense. Rather, the court must determine the propriety of the no contest plea on the basis of other available information. MCR 6.610(E)(1)(b). The court rule does not suggest what "other available information" might include, but case law indicates that any evidence properly admitted may be used to establish the factual basis for a defendant's nolo contendere plea.

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[81] See the Appendix for a script containing the essential components of a proper plea proceeding.

[82] See Section 5.29 for information on vacating an *accepted* plea.

The Michigan Supreme Court affirmed a trial court's use of the transcript of a defendant's preliminary examination to establish a factual basis for the defendant's nolo contendere plea in *People v Chilton*, 394 Mich 34 (1975). The *Chilton* Court observed:

> "If a defendant were compelled by direct testimony to provide the factual basis to convince a court that he had committed a crime, his plea, regardless of the label attached, would be a guilty plea. A nolo contendere plea by its nature prohibits an examining [judge] from eliciting from the defendant the requisite factual basis to support a nolo plea. But this does not relieve the magistrate from establishing a sufficient basis. It simply means that basis must be established via another medium." *Id.* at 37-38.

See also *People v Johnson*, 122 Mich App 26, 28 (1982) (parties stipulated to use of a police report to establish a factual basis for the defendant's no contest plea).

When a defendant offers to plead no contest to a specific intent crime but claims he or she was too intoxicated to form the requisite intent, the prosecution must provide evidence to refute the intoxication defense. If no refutation is offered, no factual basis exists to support the element of specific intent, and the court may not properly accept the defendant's no contest plea. *People v Polk*, 123 Mich App 737, 740-741 (1982).

If a defendant's no contest plea is accepted, MCR 6.302 (not expressly applicable to procedural matters involving offenses cognizable in district court) requires that the court "state why a plea of nolo contendere is appropriate." MCR 6.302(D)(2)(a). An appellate court must remand a case to the trial court for supplementation of the record where the trial court did not provide proper justification for its failure to directly question the defendant. *People v Harper*, 83 Mich App 390, 400-401 (1978). Even where a trial court relied on a preliminary examination transcript as factual support for a defendant's no contest plea, the court was still required to indicate for the record "a valid reason for not personally interrogating the defendant." *Id.*

> **Note:** The court rules governing criminal procedure in cases involving offenses over which the district court has trial jurisdiction contain no requirement similar to MCR 6.302(D)(2). Though not required, a district court's articulation for the record of its reasons for finding a defendant's nolo contendere plea appropriate would almost certainly assist any appellate review of the case. Both MCR 6.302(D) and MCR 6.610(E) do require that the court determine that the defendant's plea is supported by facts indicating the defendant's participation in the crime charged.

5.25 Plea Must Be Understanding and Voluntary

In addition to establishing a plea's accuracy, a court must determine that the plea given is understanding and voluntary before accepting it. MCR 6.610(E)(1). The Appendix contains a script of a plea proceeding's essential components.

An understanding plea in district court. Before a district court may accept a defendant's guilty or nolo contendere plea, the court must comply with the requirements of MCR 6.610(E), which requires that the court inform the defendant of his or her right to the assistance of an attorney. MCR 6.610(E)(2).

An understanding plea requires that a defendant be advised of any mandatory minimum jail sentence that would be imposed for conviction of the charged offense as well as the maximum possible penalty for conviction. MCR 6.610(E)(3)(a).

Before accepting a defendant's guilty or no contest plea, the court must also advise the defendant of his or her right to trial and of the rights attendant to the right to trial. MCR 6.610(E)(3)(b).

An understanding plea in circuit court. MCR 6.302(B), a rule expressly applicable to matters of procedure involving offenses over which the circuit court has jurisdiction, contains a few details not found in MCR 6.610(E) that may be helpful in assuring that a defendant's plea in district court is understanding and voluntary.[83] MCR 6.302(B) specifically requires that the court speak directly to the defendant or defendants and "determine that each defendant understands" the factors listed in MCR 6.302(B)—many, but not all, of which are found in MCR 6.610(E). MCR 6.302(B) requires the court to advise the defendant of the following information not found in MCR 6.610(E):

> "(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea[, and]

[83] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *People v Cole (David)*, 491 Mich 325, 330-332, 337-338 (2012) (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea[;]" however, MCR 6.302(B)(2) was subsequently amended to require this advice by the court).

> (5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right."[84] MCR 6.302(B)(4)-(5).

A voluntary plea in district court. MCR 6.610(E)(6) indicates the method by which a court is to determine whether a defendant's plea is voluntary. In determining a plea's voluntariness, MCR 6.610(E)(6) requires the court to ask a defendant specific questions before accepting the defendant's guilty or nolo contendere plea:

> "The court must ask the defendant:
>
> > "(a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;
> >
> > (b) whether anyone has threatened the defendant; and
> >
> > (c) whether it is the defendant's own choice to plead guilty."

A voluntary plea in circuit court. MCR 6.302(C)(4), a rule not expressly applicable to plea proceedings involving offenses cognizable in district court, includes information similar to that found in MCR 6.610(E)(6). In addition to the questions directed at the defendant required by both court rules, MCR 6.302(E) requires the court to further question the prosecutor and defense attorney. Under MCR 6.302(E), the trial court must ask the prosecutor and the defendant's attorney "whether either is aware of any promises, threats, or inducements other than those already disclosed on the record." MCR 6.302(E). The court must also ask the parties whether they are satisfied that the court has complied with the requirements of MCR 6.302(B)-(D);[85] a defendant's plea may not be accepted until any deficiency is corrected. MCR 6.302(E).

A trial court's acceptance of a defendant's guilty or no contest plea is implicit proof of the court's determination that the plea was freely, understandingly, and voluntarily made. *In re Guilty Plea Cases*, 395 Mich 96, 126 (1975).

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[84] See Section 5.35 for information on appealing plea-based convictions.

[85] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *People v Cole (David)*, 491 Mich 325, 330-332, 337-338 (2012) (holding that, "regardless of the explicit wording of" former MCR 6.302(B)-(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea[;]" however, MCR 6.302(B)(2) was subsequently amended to require this advice by the court).

Before imposing a defendant's sentence on a guilty or no contest plea, a trial court must investigate the truth of the defendant's plea to the extent necessary to satisfy the court that the plea was given freely, without undue influence, and with full knowledge of the nature of the offense to which the defendant pleaded. MCL 768.35.

> "In order to be accepted, a plea of guilty in a criminal case must be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance." *People v Thew*, 201 Mich App 78, 82 (1993), quoting *In re Valle*, 364 Mich 471, 477 (1961).

More evidence is required to establish that a defendant's plea was involuntary than simply that the defendant received incorrect advice from counsel. *People v Wilhite*, 240 Mich App 587, 596 (2000). Any party may choose to make any formal offers a matter of record at any plea proceeding or before a trial on the merits to assist any later review of defense counsel's performance. *Missouri v Frye*, 566 US ___, ___ (2012).[86]

Appellate review of a defendant's waiver of rights requires a determination that there was a "voluntary relinquishment of a known right . . . [which requires a determination] that the person had a right, that he knew he had it, and that he freely and knowingly elected not to exercise it." *People v Phillips*, 383 Mich 464, 470 (1970).

5.26 Unconditional Guilty Pleas

A defendant's unconditional guilty or no contest plea waives his or her right to challenge issues involving the defendant's factual guilt. *People v New*, 427 Mich 482, 491 (1986); *People v Eaton*, 184 Mich App 649, 654 n 3 (1990). The same unconditional guilty or no contest plea does not necessarily waive a defendant's right to challenge the state's authority to bring the defendant to trial. *New*, 427 Mich at 495-496; *Eaton*, 184 Mich App at 658.

Pretrial evidentiary issues. By pleading guilty or nolo contendere, a defendant waives the right to raise issues on appeal regarding a pretrial denial of his or her motion to suppress evidence or quash the information because those issues involve the defendant's factual guilt. *New*, 427 Mich at 485.

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[86] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US ___, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2).

Statutes of limitation. The statute of limitations in a criminal case is an affirmative, waivable, nonjurisdictional defense. *People v Burns*, 250 Mich App 436, 440 (2002); *People v Bulger*, 462 Mich 495, 517 n 7 (2000). A defendant's unconditional plea of guilty or no contest waives the defendant's right to challenge his or her conviction on the ground that the applicable limitations period had expired. *People v Allen*, 192 Mich App 592, 600 (1992).

In *Allen*, 192 Mich App at 594, a warrant charging the defendant with CSC-1 issued in October 1980, and the defendant's whereabouts were unknown for more than eight years after issuance of the warrant. In January 1989, the prosecutor filed a *nolle prosequi*. *Id*. Six months later, the defendant's whereabouts were discovered, and the prosecutor refiled the charges against the defendant. *Id*. at 598. The defendant's motion to quash the information on the ground that his prosecution was barred by the statute of limitations was denied, and the defendant pleaded no contest to CSC-1. *Id*. at 594. In affirming the defendant's conviction, the Court of Appeals recognized the argument that a limitations period may "implicate[] the very authority of the state to bring the defendant to trial," but the Court ultimately decided that the statute of limitations defense is more closely related to determining a defendant's factual guilt. *Id*. at 601-602, quoting *People v New*, 427 Mich at 495. According to the *Allen* Court:

> "[A]n unconditional plea of guilty or nolo contendere waives the statute of limitations defense because, even though the effect of a successful defense is to prevent the state from obtaining a conviction, the purpose of the statute relates to determining a defendant's factual guilt." *Allen*, 192 Mich App at 602.

A limitations period serves to reduce the potential for inaccuracies, stale evidence, lost witnesses, and fading memories, which are important components of establishing a defendant's factual guilt. *Id*.

Waiver of any issue involving the 180-day rule. A defendant's unconditional guilty plea waives any appellate challenge based on the 180-day rule. MCR 6.004(D) defines the rule:

> **"(1) The 180-Day Rule.** Except for crimes exempted by MCL 780.131(2) [a criminal offense committed by an inmate of a state correctional facility while incarcerated in the facility or a criminal offense committed by an inmate after escaping from a correctional facility but before he or she is returned to the facility], the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written

> notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail."

Before 1988 PA 400 amended the 180-day rule to exempt offenses committed by an inmate while incarcerated in a correctional facility or offenses committed after an inmate escaped from a correctional facility and before he or she was returned to the facility, Michigan courts were divided in decisions involving the 180-day rule and no contest or guilty pleas. See e.g., *People v Eaton*, 184 Mich App 649, 651-652 (1990). The Michigan Supreme Court resolved the conflict by holding that the Legislature's intent in adopting the 180-day rule—even before the amendments of 1988 PA 400—was to promote concurrent sentencing by promptly trying defendants subject to more than a single term of imprisonment. *People v Smith*, 438 Mich 715, 718-719 (1991) (the defendant committed the offense after her escape from prison but before her return to custody). According to the *Smith* Court, that purpose was not furthered by application of the 180-day rule to a defendant's trial on a charge for which a consecutive sentence would be mandated if the defendant was convicted. *Id.* at 717-718, overruling *People v Woodruff*, 414 Mich 130 (1982) and citing with approval *People v Loney*, 12 Mich App 288, 292 (1968).

In concluding that the 180-day rule was not applicable to the defendant's case in *Smith*, the Supreme Court affirmed the Court of Appeals' decision in *Eaton*, 184 Mich App 649, on the same basis. *People v Eaton*, 439 Mich 915 (1992) (the defendant's offense occurred while he was incarcerated in a correctional facility).

5.27 Conditional Guilty Pleas

MCR 6.301(C)(2) pertains to conditional pleas, but MCR 6.301 is not enumerated in MCR 6.001(B) as applicable to plea proceedings involving offenses over which the district court has trial jurisdiction. However, the information contained in the court rule is instructive. MCR 6.301(C)(2) states:

> "A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified

> pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only."

Conditional guilty pleas may be appropriate when a defendant has a "legitimate legal defense notwithstanding his factual guilt." *People v Reid*, 420 Mich 326, 334 (1984). A conditional guilty plea anticipates that the prosecution may be precluded from proving its case against a defendant because of claims or defenses to which the defendant believes he or she is entitled. *Id*. at 334-335.

"A conditional [guilty] plea requires the agreement of the defendant, the prosecutor, and the judge." *People v Andrews*, 192 Mich App 706, 707 (1992). When a defendant tenders a conditional guilty plea, the record must reflect the prosecution's explicit agreement to the defendant's request to make the plea conditional on his or her pursuit of an issue previously ruled on by the trial court and preserved by the defendant's conditional plea. A prosecutor's silence is not implicit consent to the defendant's conditional plea for the purpose of satisfying the rule requirement. *People v McFadden*, 170 Mich App 640, 642 (1988).

In *McFadden*, the Michigan Supreme Court reversed the Court of Appeals and remanded the case to the circuit court where the defendant was to be permitted 30 days to withdraw his plea. According to the Supreme Court:

> "[T]he record is clear in this case that the agreement concerning the preservation of the issue in question was made in the presence of the assistant prosecuting attorney [who] did not object to this agreement nor consent to it[. U]nder the circumstances of this case we believe the appropriate remedy is to place the defendant in the position he enjoyed prior to making the agreement in question." *People v McFadden*, 433 Mich 868 (1989).

5.28 Prohibited Pleas

Unless the prosecutor consents, MCR 6.301(D) prohibits a court from accepting a defendant's plea to an offense lesser than the one charged. MCR 6.301 applies to matters of procedure involving offenses cognizable in circuit court but may be instructive with regard to plea proceedings involving offenses cognizable in district court.

5.29 Refusing To Accept a Plea or Plea Agreement

MCR 6.610(E)(5) permits a district court to reject a plea agreement. However, the court rule offers no guidance on the procedure or requirements for rejecting a plea made in district court. However, MCR 6.301(A), applicable to procedural matters involving felony offenses, but potentially instructive in cases involving offenses cognizable in district court, permits a court to refuse a defendant's plea as long as the refusal is made pursuant to the court rules. Where a court refuses to accept a defendant's plea, the court must enter a plea of not guilty on the record. *Id*. For more information on rejecting a plea for a felony offense, see Section 6.22.

5.30 Written Pleas

Under very specific circumstances, a case may be completely disposed of in writing and without the defendant ever having to appear personally before the court. MCR 6.610(D)(4) permits a defendant to enter a plea without personally appearing before the court under certain circumstances:

> "The court may allow a defendant to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement signed by the defendant and any defense attorney of record, reciting the general nature of the charge, the maximum possible sentence, the rights of the defendant at arraignment, and the plea to be entered. The court may require that an appropriate bond be executed and filed and appropriate and reasonable sureties posted or continued as a condition precedent to allowing the defendant to be arraigned without personally appearing before the court."

Provided some additional requirements are met, MCR 6.610(E)(7) permits a defendant to enter a written plea of guilty or no contest. "Pleas by mail" are regularly used to accommodate traffic offenders from out of state. See SCAO Form DC 223 (Plea by Mail). MCR 6.610(E)(7) states:

> "A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if
>
> > "(a) the court decides that the combination of the circumstances and the range of possible sentences makes the situation proper for a plea of guilty or nolo contendere;

> "(b) the defendant acknowledges guilt or nolo contendere, in a writing to be placed in the district court file, and waives in writing the rights enumerated in MCR 6.610(E)(3)(b); and
>
> "(c) the court is satisfied that the waiver is voluntary."

Note: As amended, MCR 6.610(E)(7) eliminates the provisions contained in former MCR 6.610(E)(6)(b) that required the court, in advance of a plea, to give the defendant written notice of the sentence to be imposed and the rights enumerated in MCR 6.610(E)(3)(b).

5.31 Deferral

Where the prosecutor and the defendant agree on a sentence in exchange for the defendant's guilty or nolo contendere plea, the court has discretion to accept or reject the plea agreement, take the matter under advisement, or defer any action until the court has an opportunity to review the defendant's presentence report. *People v Eloby*, 215 Mich App 472, 474 (1996).

A provision of a court rule expressly applicable to procedural matters involving offenses over which the circuit court has jurisdiction permits a court to take a defendant's plea "under advisement." MCR 6.302(C)(3)(d) and MCR 6.302(F). No similar provision exists in the court rules concerning procedural matters involving offenses over which the district court has jurisdiction.

> **Note:** A proposal was published in 437 Mich 1257-1258 (1991) that would have amended MCR 6.610 to include a detailed method by which district courts could accept pleas under advisement, but the proposal was never adopted.

Deferred adjudication provisions. There are several specific statutes authorizing a court to defer sentencing a defendant for a plea-based conviction provided the defendant complies with any terms or conditions on which the period of deferment is based. In addition to the provisions discussed below, discharge and dismissal of proceedings may be available in a veterans treatment court, see MCL 600.1200 *et seq.*, or in a mental health court or juvenile mental health court, see MCL 600.1090 *et seq*. The statutes governing these specialized treatment courts resemble the provisions governing drug treatment courts. For a thorough discussion of specialized treatment courts and deferred adjudication, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3.

- **MCL 333.7411, Controlled Substances Act**

- MCL 333.7411(1)[87] permits a sentencing court to defer further proceedings on a first-time offender's conviction, whether by guilty plea or guilty verdict, for possession or use of specified controlled substances for a period of up to one year. Included in the statutory offenses listed in MCL 333.7411 for which deferment is authorized are several misdemeanor offenses punishable by as much as one year and as little as 90 days. See e.g., MCL 333.7403(2)(c) and MCL 333.7404(2)(a)-(d).

- When a court opts to defer adjudication under MCL 333.7411(1), no judgment of guilt is entered on the record, and the offender must consent to the deferment. When the offender is placed on probation in lieu of immediate sentencing, the terms and conditions of his or her probation must include payment of a probation supervision fee described in MCL 771.3c. Participation in a drug treatment court is a term or condition that may be imposed on a defendant under § 7411 deferral.

- If the offender violates a term or condition of probation, "the court may enter an adjudication of guilt and proceed as otherwise provided." MCL 333.7411(1).

- When an offender fulfills the terms and conditions of his or her period of deferment, the court must discharge the offender and dismiss the offender's case without an adjudication of guilt. Except as otherwise provided by law, "[d]ischarge and dismissal under [MCL 333.7411] . . . is not a conviction for purposes of [MCL 333.7411] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under [MCL 333.]7413." MCL 333.7411(1). A person is entitled to only one discharge and dismissal under MCL 333.7411. *Id.*

- All court proceedings under MCL 333.7411 are open to the public. MCL 333.7411(2). "[I]f the record of proceedings . . . is deferred under [MCL 333.7411], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 333.7411(2). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 333.7411(3). This nonpublic record is open, for limited purposes as set out in MCL 333.7411(3)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the

[87] MCL 333.7411(1) is the statutory deferment provision in the Controlled Substances Act, MCL 333.7101 *et seq.*

Department of Corrections, and the Department of Human Services. MCL 333.7411(3).

- **MCL 750.350a(4), Parental Kidnapping Act**

  - Deferment is available to a parent convicted by plea or verdict if the parent has no previous kidnapping-related convictions.

  - Without entering an adjudication of guilt and with the parent's consent, the court may defer further proceedings and place the parent on probation pursuant to lawful terms and conditions.

  - Participation in a drug treatment court may be made a term or condition of deferral.

  - If the parent violates a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise authorized.

  - If the parent fulfills the terms and conditions of probation, the court must discharge the parent from probation and dismiss the proceedings against him or her.

  - Discharge and dismissal is without an adjudication of guilt and is not a conviction for purposes of disqualification or disabilities imposed by law for conviction of a crime, including any additional penalties imposed for second or subsequent convictions.

  - A parent is entitled to only one discharge and dismissal under MCL 750.350a(4).

  - All court proceedings under MCL 750.350a are open to the public. MCL 750.350a(5). "[I]f the record of proceedings . . . is deferred under [MCL 750.350a], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 750.350a(5). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 750.350a(6). This nonpublic record is open, for limited purposes as set out in MCL 750.350a(6)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 750.350a(6).

- **MCL 769.4a, Spouse Abuse Act**

- Deferment is available to an accused convicted by plea or verdict if the accused has no previous convictions for domestic assault against a specified victim. MCL 769.4a(1).

- Specified victims are the offender's spouse or former spouse, a person with whom the offender has had a child, a person with whom the offender has or has had a dating relationship, or a person who resides or has resided in the same household with the offender. MCL 769.4a(1).

- With the consent of the accused and of the prosecuting attorney in consultation with the victim, the court may, without entering a judgment of guilt, defer further proceedings and place the accused on probation. MCL 769.4a(1).

- The order of probation may require the accused to pay for and participate in a mandatory counseling program. MCL 769.4a(3).

- Participation in a drug treatment court may be made a term or condition of deferral. MCL 769.4a(3).

- If the accused violates a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise authorized. MCL 769.4a(2).

- The court must enter an adjudication of guilt and proceed as authorized if the accused commits an assaultive crime during probation. MCL 769.4a(4)(a); see also MCL 769.4a(8).

- The court must enter an adjudication of guilt and proceed as authorized if the accused violates the court's order to receive counseling regarding his or her violent behavior. MCL 769.4a(4)(b).

- The court must enter an adjudication of guilt and proceed as authorized if the accused violates the court's order that he or she have no contact with a named individual. MCL 769.4a(4)(c).

- If the accused fulfills the terms and conditions of probation, the court must discharge the individual from probation and dismiss the proceedings against him or her. MCL 769.4a(5).

- A person is entitled to only one discharge and dismissal under MCL 769.4a. MCL 769.4a(5).

- Discharge and dismissal is without an adjudication of guilt and is not a conviction for purposes of MCL 769.4a or for

purposes of disqualifications or disabilities imposed by law for conviction of a crime. However, a discharge and dismissal *does* constitute a prior conviction for purposes of a prosecution under MCL 750.81(3) or MCL 750.81(4)[88] (certain repeat offenses involving domestic assault or assault of a pregnant individual), or a prosecution under MCL 750.81a(3) for aggravated domestic assault with one or more previous domestic assault convictions. MCL 769.4a(5).

- All court proceedings under MCL 769.4a are open to the public. MCL 769.4a(6). "[I]f the record of proceedings . . . is deferred under [MCL 769.4a], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 769.4a(6). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 769.4a(7). This nonpublic record is open, for limited purposes as set out in MCL 769.4a(7)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 769.4a(7).

- **MCL 762.11(1), Holmes Youthful Trainee Act (HYTA)**

  - Deferment as a youthful trainee is available to offenders who plead guilty to a criminal offense, other than a felony for which the maximum punishment is life imprisonment, a major controlled substance offense, a traffic offense, or an enumerated criminal sexual conduct offense.

  - The offense must have occurred on or after the offender's 17th birthday but before his or her 24th birthday.[89]

  - Participation in a drug treatment court may be made a term or condition of deferral. MCL 762.13(1)(b).

  - Without entering a judgment of conviction and with the offender's consent, the court may assign the offender to the status of youthful trainee.

  - MCL 762.11—MCL 762.14 contain provisions specific to the terms and conditions of an individual's deferment as a youthful trainee.

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[88] Effective July 25, 2016, 2016 PA 87 amended MCL 750.81 (governing domestic assault) by adding new MCL 750.81(3) to prescribe an additional misdemeanor penalty for the assault or assault and battery of a pregnant individual, and to add this new offense to provisions prescribing enhanced penalties for subsequent convictions. Although the amendments resulted in the renumbering of former MCL 750.81(3) and MCL 750.81(4), MCL 769.4a(5) was not amended accordingly and still refers to the former subsections.

[89] Additionally, an individual over 14 years of age whose jurisdiction has been waived may be eligible for youthful trainee status. MCL 762.15.

- **MCL 750.451c, Prostitution Offenses Committed By Human Trafficking Violation Victims**

  - Deferment is available under MCL 750.451c for certain enumerated prostitution-related offenses "if the violation . . . was committed as a direct result of the individual being a victim of a human trafficking violation[]" and the offender "has not been convicted previously" of an enumerated offense. MCL 750.451c(1)-(2).

  - The offender "bears the burden of proving to the court by a preponderance of the evidence that the violation was a direct result of his or her being a victim of human trafficking." MCL 750.451c(2)(c)(*i*).

  - Before deferring proceedings, the court must contact the Department of State Police to determine whether the offender was previously convicted of an enumerated offense or has previously availed himself or herself of deferment under MCL 750.451c. MCL 750.451c(2)(a). Additionally, if a search of State Police records "reveals an arrest for an assaultive crime but no disposition, the court shall contact the arresting agency and the court that had jurisdiction over the violation to determine the disposition of that arrest[.]" MCL 750.451c(2)(b).

  - Without entering a judgment of guilt and with the consent of the offender and the prosecuting attorney, the court may defer the proceedings, place the offender on probation, and impose any conditions permitted under MCL 771.3 or MCL 750.451c(4). MCL 750.451c(2); MCL 750.451c(4).

  - The court may enter an adjudication of guilt upon a violation of a term or condition of probation. MCL 750.451c(3).

  - The court must enter an adjudication of guilt if the offender commits an enumerated offense or violates an order that he or she receive counseling for violent behavior or that he or she have no contact with a named individual. MCL 750.451c(5).

  - Upon fulfillment of the terms and conditions of probation, the court must discharge the offender and dismiss the proceedings without adjudication of guilt. MCL 750.451c(6). Discharge and dismissal "is not a conviction for purposes of [MCL 750.451c] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime." MCL 750.451c(6).

  - An individual is entitled to only one discharge and dismissal under MCL 750.451c. MCL 750.451c(6).

- All court proceedings under MCL 750.451c are open to the public. MCL 750.451c(7). "[I]f the record of proceedings . . . is deferred . . . , the record of proceedings during the period of deferral shall be closed to public inspection." MCL 750.451c(7). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record, which is open, for limited purposes as set out in MCL 750.451c(8)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 750.451c(8).

5.32 Withdrawing or Challenging a Plea

A. Motion to Withdraw Plea in District Court

1. Timing of Motion to Withdraw Plea

A defendant may not challenge a plea on appeal unless the defendant first moves in the trial court to withdraw the plea for noncompliance with applicable court rules. MCR 6.610(E)(8)(a). A defendant may file a motion to withdraw his or her plea before or after sentencing. *Id*. If the motion to withdraw is made after the sentence has been imposed, it must be made within the time for filing a late application for leave to appeal under MCR 7.105(G)(2) (not more than six months after entry of the judgment). MCR 6.610(E)(8)(a); MCR 7.105(G)(2); see also *People v Clement*, 254 Mich App 387, 390, 393 (2002) (applying former MCR 7.103(B)(6)).[90]

2. Standards for Withdrawal of Pleas

When a defendant moves to withdraw his or her plea, the trial court must determine whether a deviation from the court rules occurred during the plea process, and if so, whether the deviation affected the defendant's substantial rights. MCR 6.610(E)(8)(b). If the court concludes that a deviation affecting the defendant's substantial rights occurred, the court must correct the deviation *and* offer the defendant the option of withdrawing his or plea. *Id*. If the court concludes either that no deviation occurred or that any deviation that occurred did not affect the defendant's substantial rights, a defendant may withdraw his or her plea "only if it does not cause substantial prejudice to the people because of reliance on the plea." *Id*.

[90] See Section 5.35 for discussion of appealing a plea-based conviction.

B. Plea Withdrawal in Circuit Court[91]

1. Timing

Court rules specific to matters of procedure involving offenses over which the circuit court has jurisdiction give a defendant the "right to withdraw any plea until the court accepts it on the record." MCR 6.310(A). Even when a circuit court has already accepted a plea on the record, there are circumstances under which the plea may be withdrawn before sentencing. MCR 6.310(B)(1) provides:

> "Except as provided in [MCR 6.310(B)(3)[92]], after acceptance but before sentence,
>
> > (1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by [MCR 6.310(C)]."

"MCR 6.310(C) permits a defendant to withdraw a guilty plea after sentencing only if the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside." *People v Sanford (Davontae)*, 495 Mich 989, 989 (2014). "'A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process.'" *Id.* at 989-990, quoting *People v Brown (Shawn)*, 492 Mich 684, 693 (2012).

2. "In the Interest of Justice" & "Substantial Prejudice"

"MCR 6.310(B) permits [a] defendant to withdraw his [or her] plea before sentencing if withdrawal is in the interest of justice, unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea." *People v Allen (Demarcus)*, ___ Mich ___, ___ (2015) (citing MCR 6.310(B)(1) and *People v Jackson (Dwayne)*, 203 Mich App 607, 611-612

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[91] For more information on this topic, see Section 6.23.

[92] MCR 6.310(B)(3) provides, in part, that "[e]xcept as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct after the plea is accepted but before sentencing."

(1994), and noting that "[t]he trial court applied an erroneous legal standard when it concluded that there was no legal basis for the court to allow the defendant to withdraw his plea unless there was a defect in the plea-taking process[]") (additional citations omitted).

A defendant wishing to withdraw a plea after it has been accepted has the initial burden of providing reasons sufficient to establish that withdrawing the plea would be "in the interest of justice." If the defendant satisfies this element, the burden shifts to the prosecution to show that "substantial prejudice" would result if the court permitted the defendant to withdraw his or her plea. *People v Gomer*, 206 Mich App 55, 57-58 (1994). "Substantial prejudice" requires the prosecution to show that its ability to prosecute the defendant was hampered, not merely inconvenienced, by the delay resulting from its reliance on the defendant's plea. *Id*.

Doubt about the veracity of a defendant's nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, 264 Mich App 139, 150 (2004). In *Patmore*, the defendant moved to withdraw his no contest plea on the basis that the complainant had recanted her preliminary examination testimony on which the defendant's plea was based.

When no sentence agreement is involved, a defendant who wishes to withdraw his no contest plea before sentencing must comply with the requirements of MCR 6.310(B)(1). Unless claiming an error in the plea proceeding itself, the defendant has the burden of showing that withdrawal of the plea is in the interest of justice; that is, the defendant must show that there is a fair and just reason for withdrawal. MCR 6.310(B)(1); *Patmore*, 264 Mich App at 150-151. If the defendant satisfies this burden, then the prosecution must establish that substantial prejudice would result if the defendant was permitted to withdraw his plea. The *Patmore* Court explained:

> "In keeping with this standard, we believe that for recanted testimony, which provided a substantial part of the factual basis underlying a defendant's no-contest plea, to constitute a fair and just reason for allowing the defendant to withdraw his plea, at a minimum, the defendant must prove by a preponderance of credible evidence that the original testimony was indeed untruthful. If the defendant meets this burden, the trial court must then determine whether other evidence is

> sufficient to support the factual basis of the defendant's plea. If the defendant fails to meet this burden or if other evidence is sufficient to support the plea, then the defendant has not presented a fair and just reason to warrant withdrawal of his no-contest plea. Even if the defendant presents such a fair and just reason, prejudice to the prosecution must still be considered by the trial court." *Id.* at 152 (internal citations omitted).

Because no Michigan case law involved the circumstances presented in *Patmore* (recanted testimony in the context of a defendant's motion to withdraw a nolo contendere plea), the Court of Appeals noted that recanted testimony in the context of a defendant's motion for new trial is generally regarded with suspicion and considered untrustworthy. *Patmore*, 264 Mich App at 153. In the context of a new trial, a defendant would be required to establish either the veracity of the witness' recanted testimony or the falsity of the witness' initial testimony. The *Patmore* Court concluded that recanted testimony in both contexts—motions for new trial and motions to withdraw a plea—should be similarly viewed.

In *Patmore*, the defendant argued that the witness's preliminary examination testimony against him was the result of coercion. He claimed that the witness was threatened with losing custody of her child if she did not testify against the defendant. The Court of Appeals reversed the trial court's decision allowing the defendant to withdraw his plea because the defendant

> "failed to prove by a preponderance of credible evidence that [the complainant]'s preliminary examination testimony was untruthful, particularly given [the police officer]'s preliminary examination testimony which clearly supported [the complainant]'s original description of the offense and defendant's intent." *Patmore*, 264 Mich App at 154.

"MCR 6.310(B)(1) [does] not permit [a] circuit court to vacate [a] defendant's plea" where the "defendant [has] neither moved for [withdrawal] nor consented to it." *People v Martinez (Gilbert)*, 307 Mich App 641, 647, 653-654 (2014) (holding that where the defendant entered a guilty plea in exchange for the prosecutor's agreement not to bring any additional charges regarding contact with the complainant "'grow[ing] out of [the] same investigation that occurred during [a certain period of years,]'" the "fact that the complainant, after [the]

defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact[]" permitting the court to vacate the defendant's plea under either MCR 6.310 or contract principles).

A trial court may not sua sponte vacate an accepted plea without the defendant's consent, even if the defendant indicates that he or she is innocent. *People v Strong*, 213 Mich App 107, 111-112 (1995). After a defendant's guilty plea has been accepted, his or her consent is required before a court may vacate the plea on the court's own motion. *Id*. at 112; MCR 6.310(B)(1). The *Strong* Court noted that to the extent MCL 768.35 appeared to conflict with MCR 6.310(B), the court rule controlled "[b]ecause the mechanism for the withdrawal of an accepted plea is a matter of practice and procedure." *Strong*, 213 Mich App at 112-113.

3. Plea Withdrawals and Sentence Agreements

There exists no absolute right to withdraw a guilty plea after it has been accepted by the court. A defendant wishing to withdraw a plea before being sentenced must establish a fair and just reason for withdrawal of the plea. *People v Harris*, 224 Mich App 130, 131 (1997). But where a defendant pleads guilty based on the court's preliminary evaluation of an appropriate sentence, the defendant does have an absolute right to withdraw his or her plea if the court imposes a sentence greater than the one on which the defendant relied. *People v Cobbs*, 443 Mich 276, 283 (1993).

MCR 6.310(B)(2), a rule not expressly applicable to procedure in cases over which the district court has trial jurisdiction, governs plea withdrawals in circuit court when a sentence agreement is involved:

> "Except as provided in [MCR 6.310(B)(3)], after acceptance but before sentence,
>
> * * *
>
> (2) the defendant is entitled to withdraw the plea if
>
> (a) the plea involves an agreement for a sentence for a specified term or within a specified range, and the court states that it is unable to follow the agreement; the trial court shall then state the sentence it

> intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or
>
> (b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose."

MCR 6.310(B)(3) provides:

> "Except as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct after the plea is accepted but before sentencing. For purposes of this rule, misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing."

A court's failure to grant a defendant the opportunity to affirm or withdraw a plea under MCR 6.310(B)(2) is plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012).[93] See *People v Muttscheler*, 481 Mich 372, 373-374 (2008), where the trial court sentenced the defendant outside the guidelines despite the defendant's agreement with the prosecutor to a sentence within the guidelines.[94] The Michigan Supreme Court affirmed the Court of Appeals decision to remand the case and stated, "[The] defendant will be allowed to withdraw his plea only if the trial court cannot agree to a sentence within the guidelines." *Id.* at 376.

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[93] In *Franklin*, the Michigan Supreme Court concluded that failing to provide the defendant with the opportunity to withdraw his plea was *not* plain error in *Franklin* because of its previous holding in *People v Grove*, 455 Mich 439 (1997), which permitted "the trial court [to] reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[.]" However, the *Franklin* Court clarified that MCR 6.310(B) superseded *Grove*, 455 Mich 439, and stated that because of this "in the future, such an error will be 'plain[.]'" *Franklin*, 491 Mich at 916. The *Franklin* Court also found that even where plain error exists, an appellate court must still "'exercise its discretion in deciding whether to reverse.'" *Franklin*, 491 Mich at 916, quoting *People v Carines*, 460 Mich 750, 763 (1999).

[94] The court imposed a prison sentence when the guidelines called for an intermediate sanction— a penalty for which the maximum term of incarceration was not to exceed 12 months in jail.

Divisibility of Multiple Pleas Arising From Single Plea Agreement. In *People v Blanton*, ___ Mich App ___, ___ (2016), the parties disputed whether, when a defendant pleads guilty to multiple charges under a single plea agreement, MCR 6.310(C) "allows [the] defendant to withdraw his [or her] entire plea or only his [or her] plea to" a charge affected by a defect in the plea-taking process. Before accepting the defendant's guilty plea to charges of felony-firearm and two other offenses, the trial court in *Blanton*, ___ Mich App at ___, failed to advise the defendant of the mandatory minimum sentence (or consecutive nature of the sentence) applicable to the felony-firearm charge. After sentencing, the defendant moved to withdraw his guilty plea in its entirety under MCR 6.310(C) based on the defect in the plea proceeding with respect to the felony-firearm charge. *Blanton*, ___ Mich App at ___. The trial court agreed, rejecting the prosecution's assertion that the defendant should be permitted to withdraw only the plea of guilty of felony-firearm. *Id.* at ___. Noting that there was no binding Michigan precedent on point, the trial court cited *State v Turley*, 149 Wash 2d 395 (2003), for the proposition that "'plea agreements are "package deals" and indivisible[,]'" and that the defendant was therefore not limited to withdrawing only the "'"defective" portion of his plea.'" *Blanton*, ___ Mich App at ___ (citation omitted).

The Court of Appeals affirmed. "Given that there was no precedential authority on [the] issue in Michigan, . . . the trial court [did not] abuse[] its discretion in applying the contractual approach set forth in *Turley*[, 149 Wash 2d 395,]" and in concluding that its failure to advise the defendant of the full nature of the penalty for felony-firearm, in violation of MCR 6.302(B)(2), permitted him to withdraw his guilty pleas to all three charges. *Blanton*, ___ Mich App at ___. "'[C]ontractual analogies may be applied in the context of a plea agreement' if to do so would not 'subvert the ends of justice.'" *Id.* at ___, quoting *People v Swirles (After Remand)*, 218 Mich App 133, 135 (1996). "Given the nature of the plea-bargaining process in Michigan where both parties often tend to negotiate a 'package deal,' . . . adherence to the [contractual] approach set forth in *Turley* would not 'subvert the ends of justice.'" *Blanton*, ___ Mich App at ___ (noting that the "references in MCR 6.302 and MCR 6.310 to the singular terms 'plea' and 'plea proceeding' [did] not necessarily resolve the issue[]") (citations omitted). The Court noted that "the objective facts reveal[ed] an intent by the prosecution and [the] defendant to treat the plea agreement as indivisible[]" where "[the] defendant was charged with multiple offenses in a single Information; he negotiated with the prosecution to allow

him to plead guilty to three charges contemporaneously in exchange for the dismissal of the remaining charges and the habitual offender enhancement; a single document contained the terms of the plea agreement; and the trial court accepted [the] defendant's pleas to all three charges at one hearing." *Blanton*, ___ Mich App at ___, citing *Turley*, 149 Wash 2d at 400. Accordingly, "the trial court did not abuse its discretion in allowing [the] defendant to withdraw his plea in its entirety rather than only partially because the plea agreement [was] indivisible." *Blanton*, ___ Mich App at ___.

4. Defendant's Failure to Comply with Terms of Plea Agreement

A court may vacate a defendant's plea on the prosecutor's motion if the defendant failed to comply with the conditions of the defendant's plea agreement. MCR 6.310(E).

Additionally, "[e]xcept as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct[95] after the plea is accepted but before sentencing." MCR 6.310(B)(3). See also *People v Kean*, 204 Mich App 533, 536 (1994) (where the defendant violated both the letter and the spirit of his plea agreement, the trial court properly denied the defendant's motion to withdraw his plea).[96]

5. Plea Withdrawal Following Failure to Gain Admission to a Specialized Treatment Court

An individual who waives the right to a preliminary examination and pleads guilty to a charged offense in order to apply for admission to a drug treatment court, mental health court, or veterans treatment court must be permitted to withdraw the plea, and is entitled to a preliminary examination, if he or she is not admitted to the court. MCL 600.1068(5); MCL 600.1094(3); MCL 600.1205(5).[97]

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[95] "For purposes of [MCR 6.310], misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing." MCR 6.310(B)(3).

[96] *Kean*, 204 Mich App 533, was decided before the adoption of MCR 6.310(B)(3). See ADM File No. 2011-19, effective January 1, 2014.

C. Future Changes in Law May Not Justify Withdrawal of Previous Plea

Michigan case law contains repeated rulings that a defendant may not withdraw a valid guilty plea simply because the plea was tendered without knowledge "of the future collateral or incidental effects of the initial valid plea." *People v Haynes*, 256 Mich App 341, 349 (2003). A defendant's "change of mind" is not a valid basis for permitting a defendant to withdraw his or her plea. *People v Everard*, 225 Mich App 455, 458 (1997).

The Michigan Supreme Court refused to permit a resident alien to withdraw his guilty plea after a change in federal immigration law mandated the defendant's deportation based on multiple convictions that included his previous guilty plea. *People v Osaghae*, 460 Mich 529, 533 (1999). The Court declined the defendant's suggestion that his prior plea was invalid because he was not advised of possible federal consequences to the state conviction. The Court noted that even if the federal law had been in effect at the time of the defendant's guilty plea, there existed no state law requiring that the defendant be advised of federal consequences to a guilty plea. According to the *Osaghae* Court,

> "Absent a substantial change in law that is to be applied retroactively, the validity of a guilty plea is to be determined under the law on the day the plea is taken. And even in such an instance, high thresholds must be cleared if a defendant seeks to withdraw a plea after a lengthy delay, or for reasons relating to the consequences of the plea." *Id*.

D. Defects in Previous Plea-Based Conviction May Not Necessarily Invalidate Its Use to Enhance Future Offenses

The Michigan Supreme Court refused to permit a defendant to withdraw his plea of guilty of operating a motor vehicle while under the influence of liquor, second offense (OUIL 2d), 14 months after the plea was entered and after he was charged with OUIL 3d, where "retained counsel, in the absence of the prosecutor, knowingly entered a woefully defective plea at arraignment without bringing the defects to the court's attention[]" in order to "preserve[] the strategic possibility of setting aside the plea if [the] defendant were ever charged with another OUIL offense." *People v*

[97] Or, in the case of a juvenile who "has admitted responsibility[] as part of his or her referral process to a "drug treatment court[]" or "mental health court," the juvenile "may withdraw his or her admission of responsibility." MCL 600.1068(5); MCL 600.1094(3). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for discussion of these specialized treatment courts.

Ward, 459 Mich 602, 604-605 (1999) (holding that such tactics constituted a "transparent manipulation of the system[]" and refusing to "allow defense counsel to harbor plain error as a parachute in the event of a subsequent OUIL charge[]").

E. Proceedings Following Plea Withdrawal

For offenses over which a circuit court has jurisdiction, where a plea is withdrawn or vacated, a case may proceed to trial on any charges previously brought against the defendant or on any charges that could have been brought against the defendant if he or she had not entered a plea. MCR 6.312.

5.33 Prosecutor's Right To Withdraw From a Plea Agreement

Where the court accepts a plea bargain in which the prosecutor and the defendant agreed to the sentence to be imposed, the court may not then impose on the defendant a sentence lower than the one to which the prosecutor agreed. To allow such a departure offends the prosecutor's charging authority, and if the court deviates from the agreement between the defendant and the prosecutor, the prosecutor must be permitted to withdraw. *People v Siebert*, 450 Mich 500, 504 (1995).

> "Plea bargains [] are more than contracts between two parties. As the judicial representative of the public interest, the trial judge is an impartial party whose duties and interests are separate from and independent of the interests of the prosecutor and defendant. The court's interest is in seeing that justice is done. In the context of plea and sentence agreements, the court's interest in imposing a just sentence is protected by its right to reject any agreement, except that which invades the prosecutor's charging authority. A trial court may reject pleas to reduced charges, and it may protect its sentencing discretion by rejecting sentence agreements. In this sense, neither the prosecutor nor the defendant can dictate the sentence." *Id.* at 509-510 (footnote omitted).

A prosecutor may motion for vacation of a defendant's plea agreement if the defendant has failed to comply with the agreement's terms. MCR 6.310(E). The court's disposition of a prosecutor's motion under this rule is discretionary, however, and the rule does not entitle a prosecutor to the remedy outlined there. *Id*. Furthermore, where a "prosecutor's motion [to vacate a plea is] not based on [the] defendant's failing to comply with the terms of the plea agreement[and t]he record shows that [the] defendant fully complied with his [or her] part of the plea bargain[,]" MCR 6.310(E) "[does not] permit[] the trial court to vacate [the] . . . plea on its own

motion or that of the prosecutor[.]" *People v Martinez (Gilbert)*, 307 Mich App 641, 648-650, 653-654 (2014) (holding that where the defendant entered a guilty plea in exchange for the prosecutor's agreement not to bring any additional charges regarding contact with the complainant "'grow[ing] out of [the] same investigation that occurred during [a certain period of years,]'" the "fact that the complainant, after [the] defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact[]" permitting the court to vacate the defendant's plea under either MCR 6.310 or contract principles).

> **Note:** Prior to January 1, 2006, the action permitted under MCR 6.310(E) (formerly MCR 6.310(C)) must have occurred *before* a defendant's sentence was imposed.

5.34 Admissibility of Pleas and Plea Discussions

MRE 410 governs the admissibility of pleas, plea discussions, and related statements:

> "Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> > (1) A plea of guilty which was later withdrawn;
> >
> > (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
> >
> > (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or
> >
> > (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (*i*) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (*ii*) in a criminal proceeding

> for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel."

"MRE 410(4) does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority[; i]t only requires that the defendant's statement be made 'in the course of plea discussions' with the prosecuting attorney." *People v Smart*, 497 Mich 950, 950 (2015) (overruling the "statement to the contrary in *People v Hannold*, 217 Mich App 382, 391 (1996)[]").

MRE 803(22) concerns the hearsay exception for a judgment of previous conviction. Specifically, MRE 803(22) provides that the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

> "Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

5.35 Appealing a Plea-Based Conviction

According to MCR 6.625, which makes no distinction between appeals based on convictions by plea or verdict, subchapter 7.100 of the court rules governs appeals in misdemeanor cases.

Michigan law does not provide an appeal of right to defendants convicted by plea. Appeal from a plea-based conviction is by application for leave to appeal. MCL 770.3(1)(d). See also MCR 6.302(B)(5); MCR 7.103(A)(1).

A. District Court[98]

MCR 7.105(A)(1)-(2) provides:

> "An application for leave to appeal must be filed with the clerk of the circuit court within:

[98] See the Michigan Judicial Institute's *Appeals & Opinions Benchbook*, Chapter 2, for a thorough discussion of appeals to the circuit court.

> (1) 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed, or
>
> (2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision if the motion was filed within:
>
> > (a) the initial 21-day period, or
> >
> > (b) such further time as the trial court or agency may have allowed during that 21-day period."

Additionally, if a defendant who has pleaded guilty or nolo contendere requests appointment of counsel within 21 days after entry of the judgment or sentence, "an application must be filed within 21 days after entry of an order:

> (a) appointing or denying the appointment of an attorney, or
>
> (b) denying a timely filed motion described in [MCR 7.105(A)](2)." MCR 7.105(A)(3).

When an appeal of right or an application for leave has not been timely filed, an appellant may file a late application, following the procedures for filing an application for leave, accompanied by a statement of facts explaining the delay. MCR 7.105(G)(1). "The answer may challenge the claimed reasons for the delay[, and t]he circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application." *Id*. A defendant must challenge his or her guilty plea within the time allotted for applications for delayed leave to appeal in circuit court under MCR 7.105(G)(2); that is, a defendant must appeal a plea-based conviction no later than six months after entry of the judgment or entry of an order denying a motion to withdraw the plea. MCR 6.610(E)(8); MCR 7.105(G)(2)(a); MCR 7.105(G)(2)(c); see also *People v Clement*, 254 Mich App 387, 390-391 (2002) (applying former MCR 7.103(B)(6)).

MCR 6.610(E)(8) addresses the process when "a defendant seeks to challenge the plea." Similar to provisions found in MCR 6.310(C), MCR 6.610(E)(8) states:

> "(a) A defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules.

> Such a motion may be made either before or after sentence has been imposed. After imposition of sentence, the defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.105(G)(2).
>
> (b) If the trial court determines that a deviation affecting substantial rights occurred, it shall correct the deviation and give the defendant the option of permitting the plea to stand or of withdrawing the plea. If the trial court determines either a deviation did not occur, or that the deviation did not affect substantial rights, it may permit the defendant to withdraw the plea only if it does not cause substantial prejudice to the people because of reliance on the plea.
>
> (c) If a deviation is corrected, any appeal will be on the whole record including the subsequent advice and inquiries."

B. Circuit Court

A defendant wishing to appeal a plea-based conviction over which the circuit court had jurisdiction must first raise the issue in trial court. MCR 6.310(D) states:

> **"(D) Preservation of Issues.** A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal."

C. Appointment of Appellate Counsel

In *Halbert v Michigan*, 545 US 605 (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004), and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a(1) and MCL 770.3a(4), the statutory provisions that address the appointment of appellate counsel, or the waiver of appointed appellate counsel, to indigent defendants convicted by plea.

Specifically, the *Halbert* Court held "that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." *Halbert*, 545 US at 610. The *Halbert* Court examined Michigan's appellate court system and noted that an appeal to the Michigan Court of Appeals, whether by right or by leave, is a defendant's first-tier appeal and that, to some degree, the Court of Appeals' disposition of these appeals involves a determination of the appeals' merit. The *Halbert* Court noted that "indigent defendants pursuing first-tier review in the Court of Appeals are generally ill-equipped to represent themselves," a critical fact considering that the Court of Appeals' decision on those defendants' applications for leave to appeal may entail an adjudication of the merits of the appeal. Said the Court:

> "Whether formally categorized as the decision of an appeal or the disposal of a leave application, the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Id.* at 619.

A district court is required to advise a defendant of his or her right to a court-appointed attorney if the court sentences the defendant to a term of incarceration and the defendant wishes to appeal the conviction. MCR 6.610(F)(4) states:

> "Immediately after imposing a sentence of incarceration, even if suspended, the court must advise the defendant, on the record or in writing, that:
>
> > (a) if the defendant wishes to file an appeal and is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and
> >
> > (b) the request for a lawyer must be made within 14 days after sentencing."

MCR 6.625 governs the appointment of counsel when requested by an indigent defendant sentenced to a term of incarceration:

> "(B) If the court imposed a sentence of incarceration, even if suspended, and the defendant is indigent, the court must enter an order appointing a lawyer if, within 14 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14

> days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition. If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day of the appointment."

See *People v William Fitzgerald James*, 272 Mich App 182, 183-184 (2006), where the Court of Appeals reiterated the ruling in *Halbert v Michigan*, 545 US 605 (2005), that an indigent defendant has the right to appointed counsel for the purpose of seeking leave to appeal to the Michigan Court of Appeals. The Court noted also that, pursuant to *Halbert*, 545 US 605, the defendant had "not waive[d] his right to the appointment [of appellate counsel] at the time of entering his guilty plea on the basis of the circuit court's mere advisement that waiver would occur." *William Fitzgerald James*, 272 Mich App at 198. Because no right to appellate counsel existed at the time the defendant pleaded guilty, the defendant could not have "intentionally relinquish[ed] a known right." *Id.* at 197.

D. No Appeal on Grounds Related to Factual Guilt

A defendant may not appeal a plea-based conviction on grounds related to the prosecution's capacity to prove the defendant's factual guilt—an appellate challenge to the state's evidence against the defendant is subsumed by a defendant's guilty plea. *People v New*, 427 Mich 482, 491 (1986). The same is true for a defendant's appeal of a conviction based on a plea of nolo contendere:

> "Since a plea of nolo contendere indicates that a defendant does not wish to contest his factual guilt, any claims or defenses which relate to the issue of factual guilt are waived by such a plea. Claims or defenses that challenge a state's capacity or ability to prove defendant's factual guilt become irrelevant upon, and are subsumed by, a plea of nolo contendere. . . . Only those defenses which challenge the very authority of the state to prosecute a defendant may be raised on appeal after entry of a plea of nolo contendere." *Id.* at 493 (footnote omitted).

E. Proceedings Following Plea Challenge

For offenses over which a circuit court has jurisdiction, where a plea is withdrawn or vacated, a case may proceed to trial on any charges previously brought against the defendant or on any charges that

could have been brought against the defendant if he or she had not entered a plea. MCR 6.312.

F. Waiver of Right to Appeal

A defendant may waive his or her right to appeal from a plea-based conviction in exchange for sentencing or charging concessions. *People v Cobbs*, 443 Mich 276, 285 (1993).

5.36 Misdemeanor Pleas Under Motor Vehicle Code, § 625

Before the court accepts a plea of guilty or no contest for a misdemeanor violation under MCL 257.625, or for a violation under a local ordinance substantially corresponding to MCL 257.625(1) (operating a motor vehicle while intoxicated), MCL 257.625(2) (allowing another person to operate a motor vehicle while under the influence of alcoholic liquor, a controlled substance, and/or other intoxicating substance, or with an unlawful blood alcohol content, or while visibly impaired), MCL 257.625(3) (operating a motor vehicle while visibly impaired), MCL 257.625(6) (zero tolerance), or MCL 257.625(8) (operating a motor vehicle with any amount of certain controlled substances in the body), the court must advise the defendant of the following:

- the maximum possible term of imprisonment;
- the maximum possible fine; and
- that the maximum possible licensing sanctions will be determined based on the defendant's master driving record (kept by the Secretary of State according to MCL 257.204a). MCL 257.625b(4).

The court may accept a defendant's plea to these violations at the conclusion of the pretrial conference held in compliance with MCL 257.625b(2). See Section 5.12 for information on the court's conduct of arraignments in cases involving misdemeanor violations of specified sections of MCL 257.625.

5.37 Marine Safety Act Pleas

A person arrested for violating the Marine Safety Act who was given a written notice to appear may tender a plea of guilty or not guilty in person, by representation, or by mail. MCL 324.80168(4). The magistrate or district court judge may accept the plea for purposes of arraignment "with the same effect as though the person personally appeared before him or her." *Id*.

Chapter 6: Felony Arraignments and Pleas

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SPECIAL NOTE:

Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district or municipal court on or after January 1, 2015,[1] 2014 PA 123 and 2014 PA 124 amended several provisions in the Code of Criminal Procedure and the Revised Judicature Act related to preliminary examinations, probable cause conferences, and the jurisdiction and duties of district court judges and magistrates with respect to pretrial proceedings in felony cases. Effective January 1, 2015, ADM File No. 2014-42 amended MCR 6.104 (governing arraignment on the warrant or complaint), MCR 6.110 (governing preliminary examinations), and MCR 6.111 (governing circuit court arraignment in district court), and added MCR 6.108 (governing probable cause conferences), to correspond to these statutory changes.

This revised version of Chapter 6 incorporates 2014 PA 123 and 2014 PA 124. The contents of this chapter are applicable to cases in which the defendant is arraigned in district or municipal court on or after January 1, 2015.

See the Appendix for a chart including information on the jurisdiction of district court judges and magistrates over preliminary matters in criminal proceedings. For a chart outlining the differences in procedures before and after January 1, 2015, as a result of statutory reforms concerning probable cause conferences, preliminary examinations, and felony pleas, see SCAO Memorandum, July 23, 2014. For additional information, see the SCAO's *Best Practices for Probable Cause Conferences and Preliminary Examinations*.

[1] See 2014 PA 123, enacting section 1; 2014 PA 124, enacting section 2.

Part A: Felony Arraignments in District Court

6.1 Introduction

The district court has jurisdiction over initial arraignments for all misdemeanors and felonies. See MCL 600.8311(c); MCR 6.610(D); MCR 6.610(H). MCR 6.610(H) expressly applies to a defendant's first appearance in district court for an offense not cognizable in district court—i.e., felony offenses and misdemeanor offenses punishable by imprisonment for more than one year. The "arraignment" to which MCR 6.610(H) refers is the proceeding at which a defendant makes his or her first appearance in *any* court. MCR 6.610(H) does not refer to the *circuit court arraignment* that occurs after a defendant has been bound over for trial following his or her preliminary examination. See MCL 766.13; MCL 600.8311(f); MCR 6.111; MCR 6.113.

Although the district court does not have trial jurisdiction over felony offenses, the district court has jurisdiction over *all* probable cause conferences and preliminary examinations, which are conducted only in felony cases and misdemeanor cases not cognizable by the district court. MCL 600.8311(d); MCL 600.8311(e).[2] If, after the preliminary examination, the district court finds probable cause to bind an individual over for trial on a felony or misdemeanor not cognizable by the district court, the district court judge "shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the [district court judge] may conduct the circuit court arraignment as provided by court rule." MCL 766.13[3]; see also MCL 600.8311(f)[4] (providing that the district court has jurisdiction of "[c]ircuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under . . . MCL 766.13[]"); MCR 6.111.[5]

Additionally, a district judge has the authority to accept a felony plea and must take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. MCL 766.4(3); MCR 6.111.[6]

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[2] See 2014 PA 124, effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015. See Chapter 4 for discussion of probable cause conferences and preliminary examinations.

[3] See 2014 PA 123, effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015.

[4] See 2014 PA 124, effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015.

[5] As amended by ADM File No. 2014-42, effective January 1, 2015.

[6] As amended by ADM File No. 2014-42, effective January 1, 2015.

Note: MCR 6.113(A) provides that, unless waived or delayed, "or as otherwise permitted by [court rule], the court with trial jurisdiction must arraign the defendant on the scheduled date."MCR 6.111 provides an exception to the general rule of MCR 6.113(A) that post-bindover arraignments must occur in the court with trial jurisdiction over the offense charged. MCR 6.111(A)[7] provides:

> "The circuit court arraignment may be conducted by a district judge in criminal cases cognizable in the circuit court immediately after the bindover of the defendant. A district court judge shall take a felony plea as provided by court rule if a plea agreement is reached between the parties. Following a plea, the case shall be transferred to the circuit court where the circuit judge shall preside over further proceedings, including sentencing. The circuit court judge's name shall be available to the litigants before the plea is taken."

Although MCL 766.4, MCL 766.13, and MCL 600.8311 were amended, effective May 20, 2014, to specifically authorize district court judges to accept felony pleas and to conduct circuit court arraignments,[8] and although MCR 6.111 was amended, effective January 1, 2015, to reflect these changes, MCR 6.113 has not yet been amended. See *Part B—Felony Pleas in District Court*.

Part A discusses district court arraignments involving felony offenses as those arraignments are contemplated under MCR 6.610(H); that is, *Part A* discusses an accused's first appearance in court on a charged offense over which the district court does not have trial jurisdiction.

See the Appendix for the following resources: a chart including information on the jurisdiction of district court judges and magistrates over preliminary matters in criminal proceedings; a script for conducting an arraignment; a checklist of requirements for felony arraignments in district court; and a checklist for conducting juvenile arraignments in district court.

[7] As amended by ADM File No. 2014-42, effective January 1, 2015.

[8] See 2014 PA 123 and 2014 PA 124, both effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015.

6.2 Jurisdiction and Venue

A. Jurisdiction

A district court has the same power to hear and determine matters within its jurisdiction as does a circuit court over matters within the circuit court's jurisdiction. MCL 600.8317. MCL 600.8311[9] provides, in relevant part:

> "The district court has jurisdiction of all of the following:
>
> * * *
>
> (c) Arraignments, the fixing of bail and the accepting of bonds.
>
> (d) Probable cause conferences in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the probable cause conference under . . . MCL 766.4.[10]
>
> (e) Preliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the preliminary examination under . . . MCL 766.1[*et seq*]. There shall not be a preliminary examination for any misdemeanor to be tried in a district court.
>
> (f) Circuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under . . . MCL 766.13. Sentencing for felony cases and misdemeanor cases not cognizable by the district court shall be conducted by a circuit judge."

Additionally, "[a] district judge has the authority to accept a felony plea[and s]hall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties." MCL 766.4(3).[11] (However, "[s]entencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken." *Id*.)

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[9] See 2014 PA 124, effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015.

[10] See Section 4.4 for discussion of probable cause conferences.

[11] See 2014 PA 123, effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015.

A circuit court's trial jurisdiction includes "serious" or "high court" misdemeanors for which two years of imprisonment may be imposed. The Michigan Code of Criminal Procedure, MCL 760.1 *et seq.*, defines *felony* as a violation of Michigan's penal law for which a person, if convicted of the offense, may be punished by death or by imprisonment for more than one year or an offense specified by law to be a felony. MCL 761.1(g); see also MCL 750.7, defining *felony*, for purposes of the Michigan Penal Code, as "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison." The Code of Criminal Procedure defines *misdemeanor* as "a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(h); see also MCL 750.8 (Penal Code), defining *misdemeanor* as "any act or omission, not a felony, [that] is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court[.]" Consequently, any "misdemeanor" punishable by more than one year of imprisonment is a "felony" for purposes of determining trial jurisdiction.

Criminal conduct near county boundary lines. When an offense is committed within one mile of the boundary line between two counties, jurisdiction is proper in either county. MCL 762.3(1) provides:

> "Any offense committed on the boundary line of 2 counties, or within 1 mile of the dividing line between them, may be alleged in the indictment to have been committed, and may be prosecuted and punished in either county."

Accessory after the fact. Because commission of the underlying crime is an element of any accessory after the fact charge, jurisdiction of such a charge is proper in the county where the underlying crime was committed, even when the actual assistance was rendered in a county different from the county in which the underlying crime occurred. *People v King*, 271 Mich App 235, 237 (2006). Similarly, even when the assistance was rendered in a state other than Michigan, jurisdiction to try a defendant charged with accessory after the fact lies in Michigan because "MCL 762.2(2)(a) provides that Michigan has jurisdiction over any crime where any act constituting an element of the crime is committed with Michigan." *King*, 271 Mich App at 243.

B. Venue

For a **first class district**, venue for criminal actions is in the **county** where the violation occurred. MCL 600.8312(1). A first class district is made up of one or more counties, and each county is responsible for maintaining, financing, and operating the district court within that county. MCL 600.8103(1).

For a **second class district,** venue for criminal actions is in the **district** where the violation occurred. MCL 600.8312(2). A second class district is made up of a group of political subdivisions within a county, and the county is responsible for maintaining, financing, and operating the district court within the county. MCL 600.8103(2).

For a **third class district**, venue for criminal actions is in the **political subdivision** where the violation occurred, except that when the violation occurred in a political subdivision where the court is not required to sit, venue is proper in any political subdivision where the court is required to sit. MCL 600.8312(3). A third class district is made up of one or more political subdivisions within a county, and each political subdivision is responsible for maintaining, financing, and operating the district court within that political subdivision. MCL 600.8103(3).

Criminal conduct near county boundary lines. "If an offense is committed on the boundary of 2 or more counties, districts or political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned." MCL 762.3(3)(a).

Multiple counties affected by an offense. "Whenever a felony consists or is the culmination of [two] or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect." MCL 762.8.

6.3 A District Court Magistrate's Authority

In the context of felony pretrial proceedings, a district court magistrate generally has the authority, subject to the chief district judge's approval, to issue arrest warrants and search warrants, conduct arraignments for a limited number of enumerated offenses, and conduct probable cause conferences. MCL 600.8511. "Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division." MCR 4.401(B).

Note: The terms "magistrate" and "district court magistrate" are not always synonymous. According to the Code of Criminal Procedure, a "magistrate" is a district court judge or a municipal court judge, but a "magistrate" is not a "district court magistrate." MCL 761.1(f). The term "district court magistrate" is specifically used in the Code of Criminal Procedure when the subject matter involves a district court magistrate. But the Code of Criminal Procedure also states that a "district court magistrate" may exercise the powers, jurisdiction, and duties of a "magistrate" if expressly authorized by the Revised Judicature Act, MCL 600.101 *et seq*. That is, if authorized by law, a "district court magistrate" may exercise the powers and duties of a municipal court or a district court judge. MCL 761.1(f).

Note also that MCR 6.003(4) recognizes the distinction between a "magistrate" and a "district court magistrate." MCR 6.003(4) defines "court" or "judicial officer" as "a judge, a magistrate, or a district court magistrate authorized in accordance with the law to perform the functions of a magistrate." A district court magistrate's authority is also subject to conditions found in MCR 4.401(A)-(B), which provide:

> **"(A) Procedure.** Proceedings involving district court magistrates must be in accordance with relevant statutes and rules.
>
> **(B) Duties.** Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division."

In addition to setting out certain felony offenses for which a district court magistrate may be granted arraignment authority,[12] MCL 600.8511[13] provides, in relevant part:

> "A district court magistrate has the following jurisdiction and duties:
>
> * * *

[12] See MCL 600.8511(b)-(c). See below, under the heading "Arraignments and first appearances," for discussion of the enumerated offenses.

[13] See 2014 PA 124, effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015.

> (e) To issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney[.] . . .
>
> (f) To fix bail and accept bond in all cases.
>
> (g) To issue search warrants, if authorized to do so by a district court judge.
>
> (h) To conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge."

See also MCL 766.1,[14] which provides, in relevant part:

> "A district court magistrate . . . shall not preside at a preliminary examination or accept a plea of guilty or nolo contendere to an offense or impose a sentence except as otherwise authorized by . . . [MCL 600.8511(a)-(c)]."

Arrest warrants and search warrants.[15] A district court magistrate may issue arrest warrants for felonies, misdemeanors, and ordinance violations pursuant only to the written authorization of the prosecuting attorney or municipal attorney. MCL 764.1(1)-(2) and MCL 600.8511(e).[16]

A district court magistrate has the jurisdiction and duty "[t]o issue search warrants, if authorized to do so by a district court judge." MCL 600.8511(g). See also MCL 780.651(1); MCL 780.651(3).

Arraignments and first appearances. In addition to limited jurisdiction under MCL 600.8511(a)-(c), as authorized by the chief judge, to "arraign and sentence upon pleas of guilty or nolo contendere" for certain listed violations that are punishable by no more than 93 days' imprisonment,[17] a district court magistrate has jurisdiction, as authorized by the chief judge, to arraign defendants and set bond for certain other offenses, including violations of MCL 257.625 (offenses involving the operation of a motor vehicle while intoxicated or visibly impaired), MCL 257.625m (operation of a commercial motor vehicle by a person with an unlawful blood alcohol content), MCL 324.81134 (offenses involving the operation of an ORV while under the influence of alcoholic liquor and/or a

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[14] See 2014 PA 123, effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015.

[15] See Chapter 2 for a more complete discussion of issuing arrest warrants and search warrants.

[16] See Chapter 2 for a more complete discussion of issuing arrest warrants.

[17] See Section 5.3 for more information.

controlled substance, while visibly impaired, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body),[18] and MCL 324.82128 and MCL 324.82129 (offenses involving the operation of a snowmobile while under the influence of alcoholic liquor and/or a controlled substance, while visibly impaired, with an unlawful blood alcohol content, or with any amount of certain controlled substances in the body).[19] MCL 600.8511(b)-(c).

A district court magistrate may also preside over a defendant's "first appearance" in certain circumstances**.** MCL 600.8513(1) states that

> "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination and acceptance of any written demand or waiver of jury trial. However, this section does not authorize a district court magistrate to accept a plea of guilty or nolo contendere not expressly authorized under [MCL 600.8511 or MCL 600.8512a]. A defendant neither demanding nor waiving preliminary examination in writing is deemed to have demanded preliminary examination and a defendant neither demanding nor waiving jury trial in writing is considered to have demanded a jury trial."

Fixing bail and accepting bond. Without any apparent qualification, a district court magistrate has a duty "[t]o fix bail and accept bond in all cases." MCL 600.8511(f). See SCAO Form MC 241 (Bond).

Probable cause conferences. District court magistrates have jurisdiction "[t]o conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge." MCL 600.8511(h)[20]; see also MCR 6.108(B) ("[a] district court magistrate may conduct probable cause conferences when authorized to do so by the chief district judge and may conduct all matters allowed at

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[18] Effective March 31, 2015, 2014 PA 405 repealed MCL 324.81135. 2014 PA 405, enacting section 1. However, MCL 600.8511(c) still provides that "the chief judge may authorize the magistrate to arraign defendants and set bond with regard to violations of . . . [MCL 324.81135.]"

[19] Additionally, MCL 600.8511(d) provides that a district court magistrate, if authorized by the chief judge, has jurisdiction over arraignments for contempt violations and violations of probation when the violation arises directly out of a case in which a judge or district court magistrate conducted the same defendant's arraignment under MCL 600.8511(a), (b), or (c), or the same defendant's first appearance under MCL 600.8513. MCL 600.8511(d) applies only to offenses punishable by imprisonment for not more than one year, a fine, or both. District court magistrates are not authorized to conduct violation hearings or sentencing hearings, but may set bond and accept pleas. *Id*.

[20] See Chapter 4 for discussion of probable cause conferences.

the probable cause conference, except taking pleas and imposing sentences unless permitted by statute to take pleas or impose sentences[]").

Appointing counsel. "When a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed." MCL 775.16. "If the person states that he or she is unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the [Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981—MCL 780.1003]." MCL 775.16. See Section 3.4(B) for discussion of the MIDCA.

Appealing a district court magistrate's ruling. A party may appeal as of right any decision of the district court magistrate to the district court in which the magistrate serves. The appeal must be in writing, must be made within seven days of the entry of the decision being appealed, and should substantially comply with the form and content outlined in MCR 7.104. Except as otherwise provided by statute or court rule, no fee is required to file an appeal of a district court magistrate's ruling. The district court hears the matter de novo. MCR 4.401(D).

District court judge's control of magisterial action. MCR 4.401(C) states that "[a]n action taken by a district court magistrate may be superseded, without formal appeal, by order of a district judge in the district in which the magistrate serves."

Videoconferencing Technology. "A district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006." MCR 4.401(E).

~~**Note:** MCR 4.401(C) does not expressly distinguish between "magistrate" and "district court magistrate."~~

6.4 Record Requirements

Except as provided by law or supreme court rule, all proceedings in district court shall be recorded by the district court recorder by the use of approved recording devices or taken by the district court reporter. MCL 600.8331. MCR 6.104(F) expressly mandates that "[a] verbatim record must be made of [a felony] arraignment."

6.5 Right to an Arraignment

Michigan law mandates that an arrestee be arraigned before a magistrate "without unnecessary delay." MCL 764.13; MCL 764.26; *People v Cipriano*, 431 Mich 315, 319 (1988).

Express statutory authority for felony arraignments is contained in MCL 764.26:

> "Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer."

General statutory authority for arraignments following a *warrantless* arrest for an offense of unspecified severity is contained in MCL 764.13:

> "A peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is charged to have been committed, and shall present to the magistrate a complaint stating the charge against the person arrested."

A defendant's knowledge of the nature and cause of the accusations made against him or her is a fundamental due process right. *People v Thomason*, 173 Mich App 812, 814–815 (1988). A conviction obtained for an offense on which the defendant was not arraigned and where the record does not show that the defendant waived his or her right to an arraignment must be reversed. *Id*. at 815.

6.6 Time Requirements for Arraignments

A. "Without Unnecessary Delay"

Felony arraignments must be held "without unnecessary delay." MCR 6.104(A); MCL 764.1b; MCL 764.13; MCL 764.26. MCR 6.104(A) states:

> **"(A) Arraignment Without Unnecessary Delay.** Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of this rule, or must be arraigned without unnecessary delay

> by use of two-way interactive video technology in accordance with MCR 6.006(A)."

The purpose of a prompt arraignment is

> "to advise the arrestee of his constitutional rights and the nature of the charges against him by an impartial judicial magistrate, to insure that the arrestee's rights are not violated, and to afford the arrestee an opportunity to make a statement or explain his conduct in open court if he so desires. [P]rompt arraignment is of particular importance when . . . a person is arrested without a warrant. In such situations, arraignment provides a *judicial* determination of probable cause which would not otherwise occur until the preliminary examination. [P]rompt arraignment affords the arrestee an opportunity to have his right to liberty on bail determined." *People v Mallory*, 421 Mich 229, 239 (1984) (footnotes omitted; emphasis in original).

In each county, the court with trial jurisdiction over felony cases must submit a plan for making a judicial officer available to conduct felony arraignments on each day of the year, or the plan must make a judicial officer available every day of the year to set bail for felony offenses. MCR 6.104(G)(1)-(2).[21]

Where a court adopts the latter plan of availability and makes an officer available to set bail each day of the year, the court's plan must provide for the prompt transport of any defendant who is unable to post bond to the judicial district where the offense occurred. MCR 6.104(G)(2). "Prompt transportation" requires that the defendant be arraigned "not later than the next regular business day." *Id*.

B. Consequences of a Lengthy Delay

Failure to comply with the time requirements prescribed for a criminal defendant's arraignment may jeopardize the nature or amount of evidence admissible in subsequent court proceedings

[21] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

against the defendant. Pre-arraignment delay is only one factor to be considered when determining whether a defendant's confession was voluntary or whether physical evidence was obtained lawfully. *People v Cipriano*, 431 Mich 315, 319 (1988). Evidence must be excluded when it was obtained during an unlawful detention designed to allow law enforcement personnel additional time to gather evidence. *People v Mallory*, 421 Mich 229, 240 (1984). The exclusionary rule similarly bars the admission of any evidence that would not have been obtained but for the procurement of evidence first obtained by unlawful detention. *Id.* at 241.

The requirement that an accused be arraigned "without unnecessary delay" is more clearly quantified by case law involving defendants' challenges to the length of their post-arrest/pre-arraignment detention. In all "but the most extraordinary situations," an individual arrested without a warrant may not be detained for more than 48 hours without a judicial determination of probable cause. *People v Whitehead*, 238 Mich App 1, 4 (1999). Where there is no bona fide emergency to justify a lengthy detention and circumstances indicate that the detention was prolonged in an effort to obtain more evidence to support the accused's guilt, a person's constitutional right to be free of unreasonable seizure is implicated. *Id.* at 13. The test to determine whether a confession is voluntary is not limited to whether the delay was reasonable; a court must determine whether the delay was used for the purpose of coercing a confession from the arrestee. *People v Bohm*, 49 Mich App 244, 252 (1973).

A delay of more than 48 hours between a defendant's warrantless arrest and the probable cause hearing is presumptively unreasonable and shifts the burden to the government to show the delay was caused by extraordinary circumstances. *Riverside Co v McLaughlin*, 500 US 44, 56–57 (1991). Based on *Riverside*, the Court of Appeals found that a delay in excess of 80 hours was a presumptive violation of the defendant's Fourth Amendment protection against unreasonable seizure. *People v Manning*, 243 Mich App 615, 631 (2000). However, in the absence of police misconduct, such a lengthy delay did not automatically make involuntary any statements the defendant made during the extended detention. *Id.* at 644–645. Notwithstanding the unreasonableness of the seizure, the *Manning* Court concluded that the ultimate admissibility of a defendant's statement required a traditional inquiry into the statement's voluntariness. *Id.* at 645. The *Manning* Court emphasized that even short delays could be unconstitutional if the delay was unreasonable under the circumstances presented. *Id.* at 630, citing *Riverside*, 500 US at 56–57.

See also *People v Cain (Darryl) (Cain I)*, 299 Mich App 27, 48-50 (2012), vacated in part on other grounds 495 Mich 874 (2013) (although the defendant was not arraigned until three days after his arrest, "no evidence was obtained as a direct result of the 'undue delay,' which would have begun . . . 48 hours after [the] defendant's arrest[;]" because the evidence against the defendant, including his statement to police and his identification from a photo lineup, was obtained within 48 hours after his arrest, "there was no evidence to suppress[]").

6.7 Location of Arraignment

Judges and district court magistrates are authorized by statute to conduct arraignments and set bail using interactive video technology. MCL 767.37a states:

> "(1) A judge or district court magistrate may conduct initial criminal arraignments and set bail by 2-way interactive video technology communication between a court facility and a prison, jail, or other place where a person is imprisoned or detained. A judge or district court magistrate may conduct initial criminal arraignments and set bail on weekends, holidays, or at any time as determined by the court.
>
> * * *
>
> (5) This act does not prohibit the use of 2-way interactive video technology for arraignments on the information, criminal pretrial hearings, criminal pleas, sentencing hearings for misdemeanor violations cognizable in the district court, show cause hearings, or other criminal proceedings, to the extent the Michigan supreme court has authorized that use."[22]

[22] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Remote participation as set out in Administrative Order No. 2012-7 is permitted only in the following situations: "1) judicial assignments; 2) circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district; 3) district court districts that have multiple court locations in which a judicial officer would have to travel to a different courthouse within the district; [and] 4) a multiple district plan in which a district court magistrate would have to travel to a different district." *Id*. "The judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." *Id*. Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

A. Arraignment on Arrests Made by Warrant

When a peace officer makes an arrest by warrant, the warrant

> "shall command the peace officer immediately to arrest the person accused and to take that person, without unnecessary delay, before a magistrate of the judicial district in which the offense is charged to have been committed . . . ." MCL 764.1b.

A defendant arrested by warrant must be arraigned before a court specified in the warrant. MCR 6.104(B). If the defendant was arrested by warrant outside the county in which the offense occurred, then "the arresting agency must make arrangements with the authorities in the demanding county to have the accused promptly transported to the latter county for arraignment in accordance with the provisions of this rule." *Id*. If "prompt transportation" cannot be had, the arrestee must be taken "without unnecessary delay" before the nearest available court for a preliminary appearance pursuant to MCR 6.104(C). MCR 6.104(B). MCR 6.104(B) requires the same "prompt transport" to the proper judicial district when an individual is arrested without a warrant and the arrest occurs in a county outside of the one in which the offense allegedly occurred. MCR 6.104(B)'s requirement that an accused be arraigned without unnecessary delay "may be satisfied by use of two-way interactive video technology in accordance with MCR 6.006(A)." MCR 6.104(B).[23]

> **Note:** Because most warrantless arrests result from the accused's conduct as witnessed by a law enforcement officer or citizen, warrantless arrests most often are made in the same county where the offense occurred. Exceptions to this may arise when an individual cannot be apprehended immediately but is later located and arrested in a county different from the county in which the individual's conduct was observed.

[23] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

If an individual is arrested on a warrant for a bailable offense in a county different than the county in which the offense occurred, and the arrestee asks to be taken before a magistrate of the judicial district in which he or she was arrested, the individual must be taken before a magistrate of that district. MCL 764.4. In those circumstances:

- The magistrate before whom the accused appears may take from the person a recognizance with sufficient sureties for the accused's appearance within 10 days before a magistrate in the same district where the charged offense occurred. MCL 764.5.

- The magistrate must certify on the recognizance that the accused was permitted to post bail and deliver the recognizance to the arresting officer. Without unnecessary delay, the arresting officer must see that the recognizance is delivered to a magistrate or clerk of the court where the accused will be appearing. MCL 764.6.

- If the magistrate refuses to permit the arrestee to post bail or if insufficient bail is offered, the official having charge of the arrestee must take him or her before a magistrate in the judicial district where the charged offense was committed. MCL 764.7.

B. Arraignment on Arrests Made Without a Warrant

An accused arrested without a warrant must be arraigned without unnecessary delay before a court in the judicial district where the offense allegedly occurred, or by use of two-way interactive video technology as described in MCR 6.006(A). MCR 6.104(B).[24] Statutory law requires a peace officer who arrests an individual without a warrant to, without unnecessary delay, take the arrestee before a magistrate in the district where the offense occurred and present the magistrate with a complaint stating the offense for which the individual was arrested. MCL 764.13. The complaint must comply with the requirements of MCR 6.101 (discussed below) and must be filed at or before the accused's arraignment. MCR 6.104(D).

[24] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

A complaint's primary function is to cause the magistrate to determine whether to issue a warrant for the accused's arrest. *People v Higuera*, 244 Mich App 429, 443 (2001). A complaint must contain "the substance of the accusation" against the person named in the complaint and may include factual allegations supporting reasonable cause. MCL 764.1d. A warrant issued pursuant to MCL 764.1a must contain "the substance of the accusation" as it is recited in the complaint. MCL 764.1b.

MCR 6.101 contains the requirements of a criminal complaint:

> "A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense." MCR 6.101(A).

When an individual has been arrested without a warrant, the law requires also that a prompt determination of probable cause be made. *People v Mallory*, 421 Mich 229, 239 n 4 (1984). Where an individual is in custody after a warrantless arrest, a magistrate must determine if there exists reasonable cause to believe the individual in custody committed the offense. MCL 764.1c(1). If the court finds reasonable cause, it must either:

- issue a warrant for the accused's arrest according to MCL 764.1b, or
- endorse the complaint according to MCL 764.1c.

If the court endorses the complaint on a finding of reasonable cause, the complaint constitutes a warrant as well as a complaint. MCL 764.1c(2). A magistrate "endorses" the complaint by noting the finding of reasonable cause that a crime was committed and that the individual named in the complaint committed it, and directing that the individual accused of the crime be taken before the court in the district in which the crime allegedly occurred. MCL 764.1c(1)(b).

6.8 Procedure Required for Felony Arraignments in District Court

MCR 6.610(H) specifies the procedure to be employed by a district court when a defendant first appears in district court for arraignment on an offense over which the circuit court has trial jurisdiction. MCR 6.104(E) also expressly applies to matters of procedure involving offenses over which the circuit court has trial jurisdiction.

When a defendant is arraigned on a felony charge or a misdemeanor charge punishable by more than one year of imprisonment,[25] the court must:

- inform the defendant of the nature of the charge, MCR 6.610(H)(1);
- "inform the accused of the nature of the offense charged, and its maximum possible prison sentence and any mandatory minimum sentence required by law," MCR 6.104(E)(1);
- if the defendant is not represented by counsel at his or her arraignment, inform the defendant of the right to be represented by an attorney, MCR 6.610(H)(2)(b);
- if the accused is not represented by a lawyer at the arraignment, advise the accused that he or she has a right to remain silent, that anything said orally or in writing can be used against him or her in court, that the accused is entitled to have an attorney present during any questioning consented to, and that the court will appoint an attorney to represent the accused if he or she cannot afford to hire one, MCR 6.104(E)(2)(a)-(d);
- if the defendant is not represented by counsel, inform him or her of the right to have an attorney appointed at public expense, MCL 775.16; see also MCL 780.991(1)(c)[26]; MCR 6.610(H)(2)(c);
- advise the accused of his or her right to be represented by an attorney at all subsequent proceedings, and if appropriate, the court must appoint a lawyer, MCR 6.104(E)(3);

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[25] The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., applies to an indigent defendant who "is being prosecuted or sentenced for a crime *for which an individual may be imprisoned upon conviction*, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA) (emphasis supplied). Therefore, the requirements of the MIDCA concerning advice of the right to counsel and appointment of counsel apply whenever imprisonment of *any* length of time is a potential penalty. See Section 6.11(A) for additional discussion of advice of the right to counsel at arraignment. See Section 3.4(B) for a thorough discussion of the MIDCA.

[26] The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., applies to an indigent defendant who "is being prosecuted or sentenced for a crime *for which an individual may be imprisoned upon conviction*, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA) (emphasis supplied). Therefore, the requirements of the MIDCA concerning advice of the right to counsel and appointment of counsel apply whenever imprisonment of *any* length of time is a potential penalty. See Section 6.11(A) for additional discussion of advice of the right to counsel at arraignment. See Section 3.4(B) for a thorough discussion of the MIDCA.

- inform the defendant of the right to a preliminary examination, MCR 6.610(H)(2)(a);

- set a date for a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, MCL 766.4(1) and MCR 6.104(E)(4)[27];

- schedule a preliminary examination for a date not less than 5 days or more than 7 days[28] after the date of the probable cause conference, MCL 766.4(1) and MCR 6.104(E)(4)[29];

- if an unrepresented defendant waives the preliminary examination at arraignment, before accepting the waiver the court must determine that the waiver is given freely, understandingly, and voluntarily, MCR 6.610(H)[30];

- inform the defendant of the right to consideration of pretrial release, MCR 6.610(H)(2)(d); and

- determine whether pretrial release is appropriate and if so, what form of pretrial release is proper, MCR 6.104(E)(5).

The court must also "ensure that the accused has been fingerprinted[31] as required by law." MCR 6.104(E)(6).

The court conducting an accused's arraignment on a circuit court offense is prohibited from "question[ing] the accused about the alleged offense or request[ing] that the accused enter a plea." MCR 6.104(E).

6.9 Pretrial Release

Except as otherwise provided by law, an individual charged with a criminal offense is entitled to bail. MCL 765.6(1); Const 1963, art 1, § 15;

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[27] The prosecuting attorney and defense counsel may agree to waive the probable cause conference. MCL 766.4(2); see also MCR 6.110(A). See Section 6.13 for discussion of scheduling the probable cause conference and preliminary examination.

[28] "The parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the [probable cause] conference." MCL 766.4(4). Additionally, under certain circumstances, the prosecuting attorney may request that the preliminary examination "commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present." *Id.*; see also MCR 6.110(B)(2) (adding that "the defendant [must either be] present in the courtroom or [have] waived the right to be present[]"). See Section 6.13 for discussion of scheduling the probable cause conference and preliminary examination.

[29] See Section 6.13 for discussion of scheduling the probable cause conference and preliminary examination.

[30] "The defendant may waive the preliminary examination *with the consent of the prosecuting attorney*." MCL 766.7 (emphasis supplied); MCR 6.110(A); see also MCL 766.4(4).

[31] See Section 6.10(B) for more information on fingerprinting.

MCR 6.106(A). A defendant arraigned in district court for a felony or misdemeanor not cognizable by the district court must be informed of his or her right to consideration of pretrial release. MCR 6.610(H)(2)(d). In addition, when a defendant is arraigned before a court in the same county where the offense allegedly occurred, or before the court specified in the complaint or warrant if the defendant was arrested by warrant, the district court must determine whether pretrial release is appropriate and if so, the court must tailor any conditions of the defendant's pretrial release to the circumstances of the offense and the offender. MCR 6.104(C) and MCR 6.104(E)(5).

In general, where the defendant is preliminarily arraigned, "either in person or by way of two-way interactive video technology," before a court in a county other than the county in which the offense occurred, the court must obtain a recognizance from the accused indicating that he or she will appear within the next 14 days before a court specified in the warrant or, in the case of a warrantless arrest, before a court in the judicial district where the offense occurred, or before another designated court. MCR 6.104(C). After receiving the accused's recognizance, the court must certify the recognizance and deliver it to the appropriate court "without delay." *Id*. If the accused was not released, he or she must be promptly transported to the judicial district of the offense. *Id*. "In all cases, the arraignment is then to continue under [MCR 6.104](D), if applicable, and [MCR 6.104](E) either in the judicial district of the alleged offense or in such court as otherwise is designated." MCR 6.104(C).

See Chapter 7 for more information on pretrial release.

6.10 Fingerprinting

At a defendant's arraignment for a felony or misdemeanor punishable by more than 92 days' imprisonment, both a court rule and a statute require the district court to make sure that the accused's fingerprints have been taken as required by law. MCR 6.104(E)(6) and MCL 764.29.

MCL 764.29 describes the process by which the court should "ensure that the accused has been fingerprinted":

> "(1) At the time of arraignment of a person on a complaint for a felony or a misdemeanor punishable by imprisonment for more than 92 days, the magistrate shall examine the court file to determine if the person has had fingerprints taken as required by [MCL 28.243].
>
> (2) If the person has not had his or her fingerprints taken prior to the time of arraignment for the felony or the misdemeanor punishable by imprisonment for more than 92

days, upon completion of the arraignment, the magistrate shall do either of the following:

> (a) Order the person to submit himself or herself to the police agency that arrested or obtained the warrant for the arrest of the person so that the person's fingerprints can be taken.
>
> (b) Order the person committed to the custody of the sheriff for the taking of the person's fingerprints."

6.11 Required Advice of Rights at Felony Arraignments

A. Right to Counsel[32]

In general. When an unrepresented defendant is arraigned in district court for an offense over which the district court does not have trial jurisdiction, the court must inform the defendant of his or her right to the assistance of counsel and to appointed counsel if he or she is indigent. MCR 6.610(H)(2)(b)-(c).

Whether the prosecutor was involved in or aware of the initial proceeding is irrelevant in determining when a defendant's right to counsel has attached. *Rothgery v Gillespie Co*, 554 US 191 (2008). In *Rothgery*, despite several requests, the defendant was denied the appointment of counsel for six months after his initial appearance. The lower courts concluded that this delay did not interfere with the defendant's right to counsel because the prosecutor was neither aware of the arrest nor present at the initial hearing. The United States Supreme Court disagreed and stated:

> "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Id.* at 213.

The Court declined to decide whether the six-month delay prejudiced the defendant's Sixth Amendment rights. The Court simply reaffirmed its longstanding position that attachment of the right to counsel begins at the first formal proceeding. *Rothgery*, 554 US at 213.

"When a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of

[32] See Chapter 3 for more information on a defendant's right to counsel.

his or her right to have counsel appointed." MCL 775.16. "If the person states that he or she is unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the [Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981—MCL 780.1003[33]]." MCL 775.16. "The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge[; r]epresentation includes but is not limited to the arraignment on the complaint and warrant." Administrative Order No. 2016-2, ___ Mich at ___.

In addition, two different court rules address the court's responsibility, at a defendant's arraignment on the warrant or complaint, to advise a defendant of his or her right to counsel. MCR 6.005(A) and MCR 6.104(E).

MCR 6.005(A)(1) requires the court, at a defendant's arraignment on the warrant or complaint, to advise the defendant of his or her right to the assistance of counsel at all subsequent court proceedings. In addition, at a defendant's arraignment on the warrant or complaint, the court must inform the defendant of the right to appointed counsel at public expense if he or she wants an attorney and cannot afford to retain one. MCR 6.005(A)(2). Whether a defendant wishes an attorney's assistance and whether he or she is financially unable to retain an attorney are matters the court must determine by questioning the defendant.[34] MCR 6.005(A).[35]

MCR 6.104(E)(2) requires a court to convey specific information to a defendant at arraignment "*if the accused is not represented by a lawyer at the arraignment*." (Emphasis added.) Where a defendant is not represented by counsel at arraignment, the court must advise the defendant that he or she is entitled to have an attorney present during any questioning to which the defendant has consented and that the court will appoint an attorney to represent the defendant if he or she is indigent.[36] MCR 6.104(E)(2)(c)-(d). See also MCL 775.16

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[33] The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA). The MIDCA requires the trial court to "assure that each criminal defendant[] is advised of his or her right to counsel[,]" MCL 780.991(1)(c), and to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant . . . not later than at the defendant's first appearance in court[,]" MCL 780.991(3)(a). See Section 3.4(B) for discussion of the MIDCA.

[34] See Chapter 3 for more information on right to counsel, waiver of that right, and determining indigency.

[35] MCR 6.005(A) has not yet been amended following the enactment of the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*. See Section 3.4(B) for discussion of the MIDCA.

[36] See Chapter 3 for information on appointed counsel.

("[w]hen a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed[,]" and the magistrate must appoint counsel if required under the MIDCA).[37]

MCR 6.104(E)(3) further requires the court to advise a defendant at arraignment (whether or not represented by an attorney at the time) that he or she has the right to be represented by an attorney at all subsequent proceedings, and if appropriate, the court must appoint counsel for the defendant.[38] Because "the negotiation of a plea bargain . . . is almost always the critical point for a defendant[,] . . . criminal defendants require effective counsel during plea negotiations" even though they occur out of court and the prosecutor may have little or no notice of a deficiency in defense counsel's conduct. *Missouri v Frye*, 566 US ___, ___ (2012).[39] In order to assist any later review of defense counsel's effectiveness, any party may choose to make any formal plea offers a matter of record at any plea proceeding or before a trial on the merits. *Frye*, 566 US at ___.

B. Advice of Rights at Preliminary Appearance Outside the County of Offense

Whenever an accused is arrested outside the county in which the alleged offense occurred *and* prompt transportation to that county cannot be arranged, the accused must be taken to the nearest available court for a preliminary appearance. MCR 6.104(B). The requirements of MCR 6.104(B) "may be satisfied by use of two-way interactive video technology in accordance with MCR 6.006(A)." MCR 6.104(B).[40]

If, at the preliminary appearance, the accused is not represented by counsel, the court must advise the defendant of his or her *Miranda*[41]

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[37] The MIDCA applies to an indigent defendant who "is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge." MCL 780.983(d)(*i*) (defining "'[i]ndigent criminal defense services'" for purposes of the MIDCA). The MIDCA requires the trial court to "assure that each criminal defendant[] is advised of his or her right to counsel[,]" MCL 780.991(1)(c), and to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant . . . not later than at the defendant's first appearance in court[,]" MCL 780.991(3)(a). See Section 3.4(B) for discussion of the MIDCA.

[38] The MIDCA requires the trial court to "assure that each criminal defendant[] is advised of his or her right to counsel[,]" MCL 780.991(1)(c), and to make "[a] preliminary inquiry regarding, and . . . determin[e,] . . . the indigency of any defendant . . . not later than at the defendant's first appearance in court[,]" MCL 780.991(3)(a). See Section 3.4(B) for discussion of the MIDCA.

[39] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US ___, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2).

rights in accordance with MCR 6.104(E)(2) and to determine whether pretrial release is appropriate. MCR 6.104(C). Specifically, when an accused appears before a court outside the county in which the alleged offense occurred, the court is responsible for advising the accused that

> "(a) the accused has a right to remain silent,
>
> (b) anything the accused says orally or in writing can be used against the accused in court,
>
> (c) the accused has a right to have a lawyer present during any questioning consented to, and
>
> (d) if the accused does not have the money to hire a lawyer, the court will appoint a lawyer for the accused[.]" MCR 6.104(E)(2).

6.12 Waiver of Rights

A. Right to Arraignment

Determining whether a defendant waived his or her right to an arraignment requires an examination of all the circumstances. For a defendant's waiver to be valid, the record must establish that the defendant was entitled to an arraignment, that the defendant knew he or she was entitled to an arraignment, and that the defendant voluntarily elected not to exercise that entitlement. *People v Thomason*, 173 Mich App 812, 815–816 (1988).

A defendant does not have the burden of coming forward to request an arraignment even when the defendant is aware that he or she was entitled to an arraignment and the arraignment did not occur. *Thomason*, 173 Mich App at 816.

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[40] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

[41] *Miranda v Arizona*, 384 US 436, 444 (1966).

B. Right to Counsel

A court cannot accept a defendant's waiver of the right to be represented by an attorney unless the court first

- advises the defendant of the charge against him or her, the maximum possible prison sentence the defendant could face if convicted of the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
- offers the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed attorney. MCR 6.005(D)(1)-(2).[42]

C. Right to Probable Cause Conference

MCL 766.4(2)[43] provides:

> "The probable cause conference may be waived by agreement between the prosecuting attorney and the attorney for the defendant. The parties shall notify the court of the waiver agreement and whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea."

D. Right to Preliminary Examination

"The defendant may waive the preliminary examination with the consent of the prosecuting attorney." MCL 766.7;[44] MCR 6.110(A). See also MCL 767.42(1), which states in part:

> "If any person waives his [or her] statutory right to a preliminary examination without having had the benefit of counsel at the time and place of the waiver, upon proper and timely application by the person or his [or her] counsel, before trial or plea of guilty, the court having jurisdiction of the cause, in its discretion, may remand the case to a [judge] for a preliminary examination."

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[42] See Chapter 3 for more information on waiving the right to counsel.

[43] See Chapter 4 for discussion of probable cause conferences.

[44] See Chapter 4 for discussion of preliminary examinations.

6.13 Scheduling the Probable Cause Conference and Preliminary Examination[45]

Unless waived by agreement of the parties, the court at a felony arraignment must schedule a probable cause conference.[46] MCL 766.4(1); MCL 766.4(2); MCR 6.104(E)(4); MCR 6.108(A). Additionally, adult defendants charged with a felony offense or a misdemeanor offense punishable by more than one year of imprisonment are statutorily entitled to a prompt, fair, and impartial examination, MCL 766.1, which, unless waived by the defendant with the consent of the prosecuting attorney, must also be scheduled at arraignment, MCL 766.4(1); MCL 766.7; MCR 6.104(E)(4).

MCL 766.4(1) provides, in relevant part:

> "Except as provided in . . . MCL 712A.4,[47] the [judge] before whom any person is arraigned on a charge of having committed a felony shall set a date for a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, and a date for a preliminary examination of not less than 5 days or more than 7 days after the date of the probable cause conference. The dates for the probable cause conference and preliminary examination shall be set at the time of arraignment."

However, "[t]he parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference." MCL 766.4(4). Additionally, "[u]pon the request of the prosecuting attorney, . . . the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present." *Id.*; see also MCR 6.110(B)(2) (adding that "the defendant [must either be] present in the courtroom or [have] waived the right to be present[]").[48]

MCR 1.108(1) governs the method of computing the relevant time periods under MCL 766.4:

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[45] See Chapter 4 for discussion of probable cause conferences and preliminary examinations.

[46] District court magistrates have jurisdiction "[t]o conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge." MCL 600.8511(h).

[47] MCL 712A.4 governs traditional waiver of Family Division jurisdiction over a juvenile between the ages of 14 and 17 who is accused of an act that if committed by an adult would be a felony. For discussion of traditional waiver proceedings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 14.

[48] See Section 4.12(A) for discussion of the immediate commencement of the preliminary examination for purposes of taking a victim's testimony.

> "The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order."

6.14 Juvenile Arraignments in "Automatic Waiver" Cases

Where a "specified juvenile violation" (discussed below) is alleged, the "automatic waiver" procedure allows a prosecuting attorney to vest jurisdiction in the "Criminal Division" of the circuit court by filing a complaint and warrant in district court rather than filing a petition in the Family Division of Circuit Court. See MCL 600.606(1), MCL 764.1f(1), and MCL 712A.2(a)(1).[49]

Subchapter 6.900 of the Michigan Court Rules is dedicated to "automatic waiver" cases. MCR 6.901(B) defines the scope of these rules:

> "The rules apply to criminal proceedings in the district court and the circuit court concerning a juvenile against whom the prosecuting attorney has authorized the filing of a criminal complaint charging a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court. The rules do not apply to a person charged solely with an offense in which the family division has waived jurisdiction pursuant to MCL 712A.4 ['traditional waiver' procedure]."

For purposes of the applicable court rules, "juvenile" means an individual at least 14 years of age who allegedly committed a "specified juvenile violation" on or after the individual's 14th birthday and before the individual's 17th birthday.[50] MCR 6.903(E).

In addition to its inclusion in MCR 6.903(H), the list of "specified juvenile violations" is found in MCL 712A.2(a)(1), MCL 600.606(2), and MCL 764.1f(2). In its entirety, the list includes:

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[49] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for more information.

[50] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth[,]" is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred[]") (emphasis supplied; citations omitted).

- first-degree arson, MCL 750.72;
- assault with intent to murder, MCL 750.83;
- assault with intent to maim, MCL 750.86;
- assault with intent to rob while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529;
- carjacking, MCL 750.529a;
- bank, safe, or vault robbery, MCL 750.531;
- assault with intent to do great bodily harm or assault by strangulation or suffocation, MCL 750.84, if armed with a dangerous weapon;
- first-degree home invasion, MCL 750.110a(2), if armed with a dangerous weapon;
- escape or attempted escape from a medium- or high-security juvenile facility operated by the Department of Human Services or a county juvenile agency, or a high-security facility operated by a private agency under contract with the Family Independence Agency or a county juvenile agency, MCL 750.186a;
- manufacture, sale, or delivery of 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7401(2)(a)(i), or possession of 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7403(2)(a)(i);
- any attempt to commit any of the above crimes, MCL 750.92;
- any solicitation to commit any of the above crimes, MCL 750.157b;
- any conspiracy to commit any of the above crimes, MCL 750.157a;

- lesser included offenses of any of the above crimes, MCR 6.903(H)(18); and

- any other violations arising out of the same transaction if the juvenile is charged with committing one of the above offenses. MCR 6.903(H)(19).

MCL 764.27 states that "[e]xcept as provided in [MCL 600.606]," a person under 17 years of age arrested with or without a warrant must be taken immediately before the Family Division of Circuit Court. The "automatic waiver" provision of MCL 600.606 operates as an exception to MCL 764.27's mandate that a juvenile first be taken before a Family Division court after his or her arrest. *People v Brooks*, 184 Mich App 793, 797–798 (1990). In *Brooks*, the trial court suppressed a juvenile defendant's statement to police because the juvenile was not "taken immediately before the family division of the circuit court" as required by MCL 764.27. In reversing the trial court's decision, the Court of Appeals explained:

> "[T]he Legislature intended that those juveniles charged as adult offenders pursuant to §606 fall outside of the juvenile court's jurisdiction. Because §606 divests the juvenile court of jurisdiction and gives the circuit court original jurisdiction in the matter, the mandatory provisions set forth in [MCL 764.]27 do not apply to those juveniles charged as adult offenders." *Brooks*, 184 Mich App at 798.

6.15 Procedure Required for Juvenile Arraignments in District Court

MCR 6.907 specifies the procedure for conducting juvenile arraignments in district court. Specific time limits apply to juvenile arraignments when the prosecutor has decided to proceed against the juvenile by complaint and warrant for the juvenile's alleged commission of a specified juvenile violation. MCR 6.907(A)(1)–(2) state:

> **"(A) Time.** When the prosecuting attorney authorizes the filing of a complaint and warrant charging a juvenile with a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court, the juvenile in custody must be taken to the magistrate for arraignment on the charge. The prosecuting attorney must make a good-faith effort to notify the parent of the juvenile of the arraignment. The juvenile must be released if arraignment has not commenced:
>
> (1) within 24 hours of the arrest of the juvenile; or

> (2) within 24 hours after the prosecuting attorney authorized the complaint and warrant during special adjournment pursuant to MCR 3.935(A)(3), provided the juvenile is being detained in a juvenile facility."

Note: MCR 3.935(A)(3), the special adjournment provision referred to above, requires the Family Division of Circuit Court, upon the prosecuting attorney's request, to adjourn a preliminary hearing in a delinquency proceeding for up to five days to allow the prosecutor to decide whether to proceed under the "automatic waiver" statutes.[51]

At a juvenile's arraignment on the complaint and warrant charging him or her with a "specified juvenile violation," the court must first determine whether the juvenile is accompanied by a parent, guardian, or adult relative. MCR 6.907(C)(1). The court may conduct a juvenile's arraignment in the absence of the juvenile's parent, guardian, or adult relative, as long as the court has appointed an attorney to appear with the juvenile at arraignment or an attorney retained by the juvenile appears with him or her at arraignment. *Id*.[52]

Note: The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., requires the court to advise the juvenile of the right to counsel, MCL 780.991(1)(c), and to screen the juvenile for eligibility for appointed counsel "not later than at the [juvenile's] first appearance in court[,]" MCL 780.991(3)(a).[53] See also MCL 775.16. See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 17, for discussion of the MIDCA as it applies to juveniles.

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[51] See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 6, for more information.

[52] MCL 766.4 previously provided that the preliminary examination was to be scheduled for a date "not exceeding 14 days after the arraignment." Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015, 2014 PA 123 amended MCL 766.4 to require the court, at arraignment for a felony charge, to schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1.

Under MCR 6.907(C)(2), a juvenile's preliminary examination must be scheduled within 14 days of the juvenile's arraignment, and under the special adjournment provision of MCR 3.935(A)(3), this 14-day period may be reduced by as many as three days for time given and used by the prosecutor. Furthermore, MCR 6.911(A) provides that a juvenile may waive his or her right to a preliminary examination if the juvenile is represented by an attorney and makes a written waiver of the right in open court. These court rules have not been amended to reflect the statutory changes adopted by 2014 PA 123.

[53] The MIDCA applies to "[a]n individual less than 17 years of age at the time of the commission of a felony" if "[t]he prosecuting attorney authorizes the filing of a complaint and warrant for a specified juvenile violation under . . . MCL 764.1f." MCL 780.983(a)(*ii*)(D).

6.16 Juvenile Pretrial Release

MCR 6.909 governs the release or detention of juveniles pending trial and other court proceedings.[54]

Bail. Except when bail may be denied, the court must advise a juvenile defendant of the right to bail as that right is provided for adults accused of bailable criminal offenses. MCR 6.909(A)(1). The court may order a juvenile released to a parent or guardian and impose any lawful conditions on the juvenile's release, including the condition that bail be posted. *Id*.

Detention without bail. MCR 6.909(A)(2) specifies the circumstances in which a juvenile may be denied bail:

> "(2) If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or the court may deny bail:
>
> (a) to a juvenile charged with first-degree murder, second-degree murder, or
>
> (b) to a juvenile charged with first-degree criminal sexual conduct, or armed robbery,
>
> (*i*) who is likely to flee, or
>
> (*ii*) who clearly presents a danger to others." MCR 6.909(A)(2)(a)-(b).

Juvenile's place of confinement during detention without bail. A juvenile charged with a crime and not released while awaiting trial or sentencing must be placed in a juvenile facility. MCR 6.909(B)(1). On motion of the prosecuting attorney or the superintendent of the juvenile facility where a juvenile is detained, the court may order that the juvenile be lodged in a facility used to incarcerate adult prisoners if the juvenile's conduct is a menace to other juveniles or if "the juvenile may not otherwise be safely detained in a juvenile facility." MCR 6.909(B)(2)(a)-(b).

A juvenile shall not be placed in an institution operated by the family division of the circuit court unless the family division consents to the placement or the circuit court orders the placement. MCR 6.909(B)(3). A juvenile in custody or otherwise detained must be maintained separately from adult prisoners or defendants pursuant to MCL 764.27a. MCR 6.909(B)(4).

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[54] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for detailed information.

6.17 A Crime Victim's Rights Following Arraignment

Article 1 of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, assigns certain rights and responsibilities to victims of felonies.[55] Although most provisions of the CVRA deal with a law enforcement agency's obligations, the court may find it helpful to be cognizant of the following sections of the CVRA as early as the arraignment.

Identifying information about a crime victim is protected. MCL 780.758(2) provides that a victim's home and work addresses and telephone numbers must not be in the court file or "ordinary" court documents unless they are contained in a trial transcript or are used to identify the place of a crime. In addition, the following information is exempt from disclosure under the Freedom of Information Act[56]:

> "(a) The home address, home telephone number, work address, and work telephone number of the victim unless the address is used to identify the place of the crime.
>
> (b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim.
>
> (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent to commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed:
>
> > (*i*) The victim's name and address.
> >
> > (*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.
> >
> > (*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused." MCL 780.758(3).

Notice required when the defendant is available for pretrial release. Within 24 hours of a felony defendant's arraignment, the investigating law enforcement agency must notify the victim "of the availability of pretrial release for the defendant." MCL 780.755(1). The notice must include the sheriff's telephone number and must inform the crime victim

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[55] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for a detailed and comprehensive discussion of the Crime Victim's Rights Act.

[56] MCL 15.231 *et seq.*

that he or she may contact the sheriff to find out whether the defendant was released from police custody. *Id*. If a victim has requested notification of a defendant's arrest or release under MCL 780.753, the investigating law enforcement agency must promptly notify the victim of these events. MCL 780.755(1).

Notice requirements in cases involving deferred judgments or delayed sentences. In all cases, the department of corrections, the department of human services, a county sheriff, or a prosecuting attorney must provide notice to a victim if the case against the defendant is resolved by assignment of the defendant to trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal. In performing this duty, the court, department of corrections, department of human services, county sheriff, or prosecuting attorney may furnish information or records to the victim that would otherwise be closed to public inspection, including information or records related to a defendant's youthful trainee status. MCL 780.752a; MCL 780.781a; MCL 780.811b.

Notice requirements prior to the defendant's admission to drug treatment court.[57] Circuit and district courts are authorized to institute or adopt a drug treatment court. MCL 600.1062(1). Family divisions are also authorized to institute or adopt a drug treatment court for juveniles. MCL 600.1062(2). If an offender is admitted to a drug treatment court, adjudication of his or her crime may be deferred. MCL 600.1070(1)(a)-(c). A crime victim and others must be permitted to submit a written statement to the court prior to an offender's admission to drug treatment court. MCL 600.1068(4) provides:

> "In addition to rights accorded a victim under the [CVRA], . . . MCL 780.751 to [MCL] 780.834, the drug treatment court must permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted, and members of the community in which either the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the drug treatment court."
>
> **Note:** Subject to the agreement of the defendant, the defendant's attorney, the prosecutor, the judge of the transferring court, the judge of the receiving court, and the prosecutor of the receiving drug treatment court's

[57] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for discussion of drug treatment courts.

> funding unit, a drug treatment court may accept participants from any other jurisdiction based on the participant's residence or the unavailability of a drug treatment court in the jurisdiction where the participant is charged. MCL 600.1062(4).

Notice requirements prior to the defendant's admission to veterans treatment court.[58] Circuit and district courts are authorized to adopt or institute a veterans treatment court. MCL 600.1201(2). If an offender is admitted to a veterans treatment court, adjudication of his or her crime may be deferred. MCL 600.1206(1)(c). Crime victims and community members must be permitted to submit written statements to the veterans treatment court prior to an offender's admission to that court. MCL 600.1205(4) provides:

> "In addition to rights accorded a victim under the [CVRA], . . . MCL 780.751 to [MCL] 780.834, the veterans treatment court shall permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted, and members of the community in which the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the veterans treatment court."

A participant in veterans treatment court must "[p]ay all crime victims' rights assessments under . . . MCL 780.905." MCL 600.1208(1)(d).

> **Note:** Subject to the agreement of the defendant, the defendant's attorney, the prosecutor, the judge of the transferring court, the judge of the receiving veterans treatment court, and the prosecutor of the receiving veterans treatment court's funding unit, a veterans treatment court may accept participants from any other jurisdiction in the state based on either the participant's residence in the receiving jurisdiction or the unavailability of a veterans treatment court in the jurisdiction in which the participant is charged. MCL 600.1201(4).

- **Notice requirements prior to the defendant's admission to mental health court.**[59] Circuit and district courts are authorized to adopt or institute a mental health court, and

[58] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for discussion of veterans treatment courts.

the family divisions of circuit courts are authorized to adopt or institute a juvenile mental health court. MCL 600.1091(1)-(2). If an offender is admitted to a mental health court, he or she may be entitled to discharge and dismissal of the proceedings. MCL 600.1098(2)-(5). Crime victims must be permitted to submit written statements to the mental health court prior to an offender's admission to that court. MCL 600.1094(4) provides:

> "In addition to rights accorded a victim under the [CVRA], . . . MCL 780.751 to [MCL] 780.834, the mental health court shall permit any victim of the offense or offenses of which the individual is charged or, in the case of a juvenile, any victim of the activity that the individual is alleged to have committed and that would constitute a criminal act if committed by an adult, as well as any victim of a prior offense of which that individual was convicted or, in the case of a juvenile, a prior offense for which the individual has been found responsible, to submit a written statement to the court regarding the advisability of admitting the individual into the mental health court."

A participant in mental health court must "pay all . . . restitution[] and assessments[.]" MCL 600.1097(3).

> **Note:** The court may, but is not required to, "accept participants from any other jurisdiction in [the] state based upon the residence of the participant in the receiving jurisdiction, the nonavailability of a mental health court in the jurisdiction where the participant is charged, and the availability of financial resources for both operations of the mental health court program and treatment services." MCL 600.1091(3).

Part B: Felony Pleas in Circuit Court

6.18 Introduction

A person accused of an offense cannot be convicted of the offense unless he or she is found guilty of the charge by a judge or jury, or unless he or she confesses guilt for the offense or admits to the truth of the charge.

[59] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for discussion of mental health courts.

MCL 763.2. Subchapter MCR 6.300 of the Michigan Court Rules contains detailed information about the kinds of pleas available to defendants charged with criminal offenses cognizable by circuit courts. MCR 6.001(A).

See the Appendix for the following resources: a chart including information on the jurisdiction of district court judges and magistrates over preliminary matters in criminal proceedings; a checklist of requirements for plea proceedings involving guilty and no contest pleas; a flowchart for guilty and no contest pleas; a flowchart for not guilty pleas; and a script for conducting felony plea proceedings.

A. Authority of District Court Judges to Accept Felony Pleas

MCL 766.4, governing the scheduling of probable cause conferences and preliminary examinations at the initial arraignment in district court, grants authority to district court judges to accept felony pleas before bindover to circuit court. MCL 766.4(3) provides:

> "A district judge has the authority to accept a felony plea. A district judge shall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. Sentencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken."

See also MCR 6.111, which permits the district court, *following* bindover, to conduct circuit court arraignments under certain circumstances and to take pleas at those proceedings.

B. Available Pleas

MCR 6.301, which governs the types of pleas that are available, provides:

> "**(A) Possible Pleas.** Subject to the rules in [Subchapter 6.300], a defendant may plead not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. If the defendant refuses to plead or stands mute, or the court, pursuant to the rules, refuses to accept the defendant's plea, the court must enter a not guilty plea on the record. A plea of not guilty places in issue every material allegation in the information and permits the defendant to raise any defense not otherwise waived.

(B) Pleas That Require the Court's Consent. A defendant may enter a plea of nolo contendere only with the consent of the court.

(C) Pleas That Require the Consent of the Court and the Prosecutor. A defendant may enter the following pleas only with the consent of the court and the prosecutor:

(1) A defendant who has asserted an insanity defense may enter a plea of guilty but mentally ill or a plea of not guilty by reason of insanity. Before such a plea may be entered, the defendant must comply with the examination required by law.

(2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only.

(D) Pleas to Lesser Charges. The court may not accept a plea to an offense other than the one charged without the consent of the prosecutor."

6.19 Plea of Guilty or Nolo Contendere

A. Generally

"A no-contest or a guilty plea constitutes a waiver of several constitutional rights, including the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers." *People v Cole (David)*, 491 Mich 325, 332 (2012). However, "[f]or a plea to constitute an effective waiver of these rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing." *Id.* at 332-333. In Michigan, portions of MCR 6.302(A) are "premised on the requirements of constitutional due process[.]" *Cole (David)*, 491 Mich at 332.

It is the duty of the judge to be satisfied that a felony plea is made freely, with full knowledge of the nature of the accusation, and without undue influence. MCL 768.35. The court may not accept a guilty or nolo contendere (no contest) plea unless it is convinced that the plea is understanding, voluntary, and accurate. MCR 6.302(A). In other words, a defendant must be afforded due process. See *Cole (David)*, 491 Mich at 332. Before accepting a guilty or nolo contendere plea, the court must place the defendant under oath and personally carry out MCR 6.302(B)–MCR 6.302(E). MCR 6.302(A). However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *Cole (David)*, 491 Mich at 330-332, 337-338 (holding that, "regardless of the explicit wording of" former MCR 6.302(B)–MCR 6.302(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea[;]" however, MCR 6.302(B)(2) was subsequently amended to require this advice by the court).

MCR 6.302, governing pleas of guilty and nolo contendere, provides, in part:

> "**(A) Plea Requirements.** The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out [MCR 6.302(B)-(E)].
>
> **(B) An Understanding Plea.** Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:
>
> > (1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;
> >
> > (2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or [MCL] 750.520c;
> >
> > (3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:

(a) to be tried by a jury;

(b) to be presumed innocent until proved guilty;

(c) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;

(d) to have the witnesses against the defendant appear at the trial;

(e) to question the witnesses against the defendant;

(f) to have the court order any witnesses the defendant has for the defense to appear at the trial;

(g) to remain silent during the trial;

(h) to not have that silence used against the defendant; and

(i) to testify at the trial if the defendant wants to testify.

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea;

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right.

The requirements of [MCR 6.302(B)(3) and MCR 6.302(B)(5)] may be satisfied by a writing on a form approved by the State Court Administrative Office.[60] If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights."

[60] See SCAO form CC 291, *Advice of Rights (Circuit Court Plea)*.

B. Requirements for Guilty or Nolo Contendere Pleas[61]

1. An Understanding Plea

For an understanding plea, the court must advise the defendant of the name of the offense; the maximum possible prison sentence; any mandatory minimum sentence for the offense, "including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or [MCL] 750.520c;"[62] and the rights that will be given up (both at trial and on appeal) if the defendant's plea is accepted. MCR 6.302(B).[63]

"The requirements of MCR 6.302(B)(3) and MCR 6.302(B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office." MCR 6.302(B)(3). "If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights." *Id*. The form must be approved by the State Court Administrative Office. See SCAO form CC 291, *Advice of Rights (Circuit Court Plea)*.[64]

"MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual offender before accepting a guilty plea[,]" and MCR 6.310(C) permits a defendant who is not so apprised to elect either to allow his or her plea and sentence to stand or to withdraw the plea. *People v Brown (Shawn)*, 492 Mich 684, 687 (2012). In *Brown (Shawn)*, 492 Mich at 687-688, the defendant pleaded guilty, as a second-offense habitual offender under MCL 769.10, to second-degree home invasion. The defendant was advised at his plea hearing that the maximum sentence for second-degree home invasion was 15 years in prison; however,

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[61] See the Appendix for a checklist and script for conducting a felony plea proceeding.

[62] Advising the defendant of a requirement for mandatory lifetime electronic monitoring is required because "mandatory lifetime electronic monitoring is part of the sentence itself." *Cole (David)*, 491 Mich at 327. "Accordingly, when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring." *Id.* at 337.

[63] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *Cole (David)*, 491 Mich at 330-332, 337-338 (holding that, "regardless of the explicit wording of" former MCR 6.302(B)–MCR 6.302(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea[;]" however, MCR 6.302(B)(2) was subsequently amended to require this advice by the court).

[64] Available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/felonycriminal/cc291.pdf.

the defendant was subsequently sentenced, as an habitual offender, to a maximum prison term of more than 22 years. *Brown (Shawn)*, 492 Mich at 688. The Michigan Supreme Court concluded that MCR 6.302(B)(2) requires that "before pleading guilty, a defendant must be notified of the maximum possible prison sentence with habitual-offender enhancement[,] because the enhanced maximum becomes the 'maximum possible prison sentence' for the principal offense." *Brown (Shawn)*, 492 Mich at 693-694, overruling *People v Boatman*, 273 Mich App 405, 406-410 (2006). The *Brown (Shawn)* Court additionally held that "MCR 6.310(C) . . . provides the proper remedy for a plea that is defective under MCR 6.302(B)(2), which is to allow the defendant the opportunity to withdraw his or her plea." *Brown (Shawn)*, 492 Mich at 698.

For a nolo contendere plea, it is good practice to ensure that the defendant understands that he or she will be sentenced in the same manner as if he or she had tendered a guilty plea. MCL 767.37.

2. A Voluntary Plea

"In assessing voluntariness, . . . a defendant entering a plea must be 'fully aware of the direct consequences' of the plea." *Cole (David)*, 491 Mich at 333, quoting *Brady v United States*, 397 US 742, 755 (1970). To ensure that a plea is voluntary, the court must determine whether the parties have made a plea agreement, "which may include an agreement to a sentence to a specific term or within a specific range[.]" MCR 6.302(C)(1).[65] Any agreement "must be stated on the record or reduced to writing and signed by the parties[,]"[66] and "[t]he written agreement shall be made part of the case file." *Id*.

"If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant." MCR 6.302(C)(2).[67]

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[65] See Section 6.24 for discussion of sentence bargaining.

[66] "The parties may memorialize their agreement on a form substantially approved by the SCAO." MCR 6.302(C)(1). See SCAO Form CC 414, *Plea Agreement*.

[67] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *Cole (David)*, 491 Mich at 330-332, 337-338 (holding that, "regardless of the explicit wording of" former MCR 6.302(B)–MCR 6.302(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea[;]" however, MCR 6.302(B)(2) was subsequently amended to require this advice by the court).

3. An Accurate Plea

For an accurate guilty plea, "the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." MCR 6.302(D)(1).[68] A guilty plea should not be accepted by a trial court until facts sufficient to establish the defendant's guilt have been placed on the record. *People v Haack*, 396 Mich 367, 375 (1976).

For an accurate nolo contendere plea, the court may not question the defendant about participation in the crime, but must state why a plea of nolo contendere is appropriate, and hold a hearing (unless there has already been one) that establishes support for finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading. MCR 6.302(D)(2). It is appropriate for a trial court to rely on a preliminary examination transcript to furnish the factual basis for a nolo contendere plea. *People v Chilton*, 394 Mich 34, 38-39 (1975).

4. Additional Inquiries

After questioning the defendant, the court is required to ask the attorneys whether there are any promises, threats, or inducements other than those already disclosed on the record and whether the court has complied with MCR 6.302(B), MCR 6.302(C), and MCR 6.302(D). MCR 6.302(E).

Committee Tip: After advising a defendant of his or her rights, it is good practice to also advise the defendant that there is no absolute right to withdraw a plea, but that he or she may file a motion to withdraw his or her plea before sentencing. MCR 6.310(B).

C. Nolo Contendere Plea Details

A nolo contendere plea may be appropriate "where the defendant would not be able to supply a sufficient factual basis for a guilty plea because he or she was intoxicated on the night of the incident, where there is the possibility of future civil litigation resulting from

[68] However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *Cole (David)*, 491 Mich at 330-332, 337-338 (holding that, "regardless of the explicit wording of" former MCR 6.302(B)–MCR 6.302(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea[;]" however, MCR 6.302(B)(2) was subsequently amended to require this advice by the court).

the offense, or where a defendant cannot remember the events which led to his or her being charged with a crime." 1A Gillespie Michigan Criminal Law & Procedure, § 16:15.

A nolo contendere plea may only be entered with the consent of the court. MCR 6.301(B).

If a no contest plea to a specific intent crime is based on intoxication, the prosecution must offer evidence to refute an intoxication defense. *People v Polk*, 123 Mich App 737, 740 (1983). "However, a prosecutor is not required to produce evidence negating a defendant's claimed intoxication defense in a case where sufficient evidence has been presented to the trial court to establish that the defendant acted with the required specific intent, thereby providing a sufficient basis for acceptance of a proffered nolo contendere plea." 1A Gillespie Mich Criminal Law & Procedure, § 16:15, citing *People v Stevens (Donald)*, 138 Mich App 438, 441 (1984).

If the defendant's competency is in question, the trial court must render a finding of competence at the time the plea is offered. *People v Matheson*, 70 Mich App 172, 179 (1976). Where there is significant evidence of incompetence, the trial court should make a record of its deliberation, rather than merely allowing its acceptance of the plea to serve as an implicit finding of competence. *Id.* at 179.

D. Admissibility of Felony Pleas and Plea Discussions

MRE 410 governs the admissibility of pleas, plea discussions, and related statements:

> "Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> > (1) A plea of guilty which was later withdrawn;
> >
> > (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
> >
> > (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or

> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (*i*) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (*ii*) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel."

"MRE 410(4) does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority[; i]t only requires that the defendant's statement be made 'in the course of plea discussions' with the prosecuting attorney." *People v Smart*, 497 Mich 950, 950 (2015) (overruling the "statement to the contrary in *People v Hannold*, 217 Mich App 382, 391 (1996)[]").

MRE 803(22) concerns the hearsay exception for a judgment of previous conviction. Specifically, MRE 803(22) provides that the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

> "Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

E. Remedy for a Defective Plea

When a plea is taken and all of the required elements are not satisfied, the case should be remanded to allow the prosecution to establish the missing elements. *People v Mitchell (Donald)*, 431 Mich 744, 749-750 (1988). If the prosecution is able to do so and there is no contrary evidence, the defendant's conviction should stand. *Id.* at 750. However, if the prosecution is unable to establish that the defendant committed the offense, the trial court must set aside the defendant's conviction. *Id.* If contrary evidence is produced, the

matter should be treated as a motion to withdraw the guilty plea, and the trial court must exercise its discretion to decide the matter. *Id*. If the motion is granted, the trial court must set aside the conviction. *Id*.

Strict compliance with all of the requirements of MCR 6.302 is not required; rather, the Michigan Supreme Court has adopted a doctrine of substantial compliance in determining whether the defendant was properly apprised of the "rights that a defendant gives up by not going to trial and the effect of a guilty plea on those rights." *People v Brown (Shawn)*, 492 Mich 684, 697-698 (2012); see *People v Saffold*, 465 Mich 268, 270-271, 278-280, 287 (2001). Whether a particular departure from the rule justifies or requires reversal or remand for additional proceedings depends on the nature of the noncompliance. *People v Plumaj*, 284 Mich App 645, 649 (2009). Automatic reversal is required if the trial court fails to obtain an enumeration and waiver on the record of (1) the privilege against self-incrimination; (2) the right to a jury trial; and (3) the right to confrontation, known as "*Jaworski* rights." See *People v Jaworski*, 387 Mich 21, 27 (1972); *People v Al-Shara*, 311 Mich App 560, 573 (2015); *Plumaj*, 284 Mich App at 649, citing *Boykin v Alabama*, 395 US 238 (1969). A reviewing court may consider the entire record in determining whether these requirements were satisfied and whether the guilty plea was knowingly and voluntarily made. *Plumaj*, 284 Mich App at 649.

In *Plumaj*, 284 Mich App at 649, the defendant moved to set aside his pleas on the basis that he was not placed under oath before he tendered them. The Court of Appeals reversed the trial court's decision to allow the defendant to withdraw his pleas, noting that "[w]hile MCR 6.302(A) requires that the court place the defendant under oath before accepting a plea of guilty or nolo contendere, the failure in and of itself is not self-determinative. Because the oath obligation is not one of the protected rights requiring reversal, the trial court must make the initial determination as to whether or not the pleas were accurate, understanding or knowingly made, and voluntary. While an oath may assist the trial court in making its determination, an oath in and of itself does not establish any of the necessary requisites to a valid plea." *Plumaj*, 284 Mich App at 649.

However, "a written advice of rights alone—signed by a defendant off the record and outside of the court's presence, and unreferenced by the court or anyone else during the plea hearing—cannot satisfy, substantially or otherwise, a trial court's obligation under MCR 6.610(E)(4) to ensure that the defendant's plea is understandingly and voluntarily made with knowledge of his or her *Jaworski* rights." *Al-Shara*, 311 Mich App at 576. In *Al-Shara*, 311 Mich App at 563, the defendant "signed a written Pre-Trial Conference Summary' form

detailing the terms of [his nolo contendere] plea agreement[]" and waiving his trial rights, including his *Jaworski* rights. However, "[a]t the plea hearing, the district court . . . referenced [only the] defendant's right to a jury trial [and] wholly failed to inform [him] of his right to remain silent and his right to confront his accusers[]" as required under MCR 6.610(E)(3)(b); additionally, the district court "failed to make any reference to [the] defendant's execution of a written advice-of-rights form or to verify that [he] actually read and understood the rights communicated on the form he signed[as required under MCR 6.610(E)(4)]." *Al-Shara*, 311 Mich App at 573. The Court of Appeals affirmed the circuit court's order vacating the defendant's plea and remanding for a trial, rejecting the prosecutor's contention that the defendant's signature on the written waiver form constituted "substantial compliance" with MCR 6.610(E)(4):

> "[E]ven when a written advice-of-rights form has been signed by a defendant, there cannot be a total omission of any reference during the in-court proceedings to either the enumerated rights in question or to the form itself signed by [the] defendant off the record[,] . . . [and] when the rights implicated by the plea-taking procedure include a defendant's *Jaworski* rights, the defendant is *automatically entitled* to set aside his or her plea when reference to those rights, either by their express enumeration or by reference to the written document, is omitted from the in-court plea proceedings." *Al-Shara*, 311 Mich App at 576-577, citing *Saffold*, 465 Mich at 273; *Jaworski*, 387 Mich at 31 (emphasis added).

"Because trial rights and sentencing consequences are distinct, [the substantial compliance rule set out in] *Saffold*[, 465 Mich at 270-271, 278-280, 287] does not apply to . . . a defendant's right to be informed of his or her maximum possible prison sentence[under MCR 6.302(B)(2)]." *Brown (Shawn)*, 492 Mich at 698 (holding that where the defendant was not "notified of the maximum possible prison sentence with habitual-offender enhancement[,]" the plea was defective under MCR 6.302(B)(2), and that the appropriate remedy was to remand to the trial court "to allow the defendant the opportunity to withdraw his . . . plea[]").

F. Standard of Review

The adequacy of the factual basis for a guilty plea is reviewed by examining "whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Brownfield (After Remand)*, 216 Mich App 429, 431 (1996). A response of "guilty" in answer to how a defendant wished to plead was held

"not a sufficient factual basis *elicited from [the] defendant* to support a finding that [the] defendant was guilty of the offense." *People v Holoweski,* unpublished opinion per curiam of the Court of Appeals, issued June 3, 2008 (Docket No. 278029), slip op p 2.[69] "The trial court must elicit factual support sufficient to permit a trier of fact to conclude that [the] defendant is guilty, not the bare conclusion itself." *Id*.

In deciding whether the defendant was properly apprised of the "rights that a defendant gives up by not going to trial and the effect of a guilty plea on those rights[]" as required under MCR 6.302 when accepting a plea, the test is whether there was substantial, as opposed to strict, compliance. *People v Brown (Shawn)*, 492 Mich 684, 697-698 (2012); see *People v Saffold*, 465 Mich 268, 270-271 (2001) (trial court's failure to inform the defendant of his presumption of innocence during the guilty plea hearing did not require reversal of the defendant's conviction where, earlier in the day, the defendant was present while the trial court instructed the jury that had convened for the defendant's trial that the defendant was presumed innocent until proven guilty beyond a reasonable doubt). In determining whether there was compliance with the court rule, review is not limited to the exchange between the defendant and the trial court at the time the plea was entered. *United States v Vonn*, 535 US 55, 59 (2002); *Saffold*, 465 Mich at 281. Rather, the entire record may be considered, beginning at the defendant's first appearance in the matter leading to his or her eventual plea. *Vonn*, 535 US at 59; *Saffold*, 465 Mich at 281.

However, "a defendant is automatically entitled to set aside his or her plea when reference to [his or her] rights[under *People v Jaworski*, 387 Mich 21 (1972)], either through express enumeration of those rights or reference to [a] written document, is omitted from the in-court plea proceedings." *People v Al-Shara*, 311 Mich App 560, 577 (2015), citing *Saffold*, 465 Mich at 273-274 (additional citations omitted).

Additionally, "[b]ecause trial rights and sentencing consequences are distinct, [the substantial compliance rule set out in] *Saffold*[, 465 Mich at 270-271, 278-280, 287] does not apply to . . . a defendant's right to be informed of his or her maximum possible prison sentence[under MCR 6.302(B)(2)]." *Brown (Shawn)*, 492 Mich at 698 (holding that where the defendant was not "notified of the maximum possible prison sentence with habitual-offender enhancement[,]" the plea was defective under MCR 6.302(B)(2), and that the appropriate remedy was to remand to the trial court "to allow the defendant the opportunity to withdraw his . . . plea[]").

[69] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

Generally, guilty and nolo contendere pleas waive all nonjurisdictional[70] defects in the proceedings. *People v New*, 427 Mich 482, 488 (1986) (defendant's claim that trial court erred in failing to suppress statements he gave to the police was waived by nolo contendere plea and codefendant's claim that trial court erred in denying his motion to suppress evidence of drugs was waived by guilty plea; both defenses related to evidentiary matters and challenged state's ability to prove factual guilt but did not challenge state's authority to prosecute defendants). However, a guilty plea does not waive the defendant's right to subsequently raise a claim that would have precluded the state from ever prosecuting the defendant for the crime regardless of his or her factual guilt. *Id.* at 488. While the parties may agree to preserve an issue by entry of a conditional plea, the appeal of a conditional plea is by application only. MCR 6.301(C)(2).

"[I]ndigent defendants who plead guilty or nolo contendere in a Michigan court have a federal constitutional right to the appointment of appellate counsel with regard to first-tier review in th[e] Court [of Appeals]." *People v James (William)*, 272 Mich App 182, 188-189 (2006), citing *Halbert v Michigan*, 545 US 605 (2005). "*Halbert* should not be applied retroactively to cases in which a defendant's conviction has become final." *People v Maxson (Mark)*, 482 Mich 385, 387 (2008).

A trial court's ruling on a motion to withdraw a plea is reviewed for an abuse of discretion. *Brown (Shawn)*, 492 Mich at 688.

6.20 Plea of Guilty but Mentally Ill

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. "In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or [MCR 6.302](D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill at the time of the offense to which the plea is entered." MCR 6.303. The reports must be made a part of the record. *Id.*

Additionally, the following statutory conditions must be met under MCL 768.36(2) before a guilty but mentally ill plea may be accepted:

[70] Jurisdictional defects have been found where a defendant raises issues such as "improper personal jurisdiction, improper subject matter jurisdiction, double jeopardy, imprisonment when the trial court had no authority to sentence defendant to the institution in question, and the conviction of a defendant for no crime whatsoever." *People v Carpentier*, 446 Mich 19, 47-48 (1994) (Riley, J., concurring). Nonjurisdictional defects include violations of the Interstate Agreement on Detainers (IAD), *People v Wanty*, 189 Mich App 291, 293 (1991); noncompliance with the 180-day rule, *People v Eaton (Clifford)*, 184 Mich App 649, 657 (1990); and claims of unlawful search and seizure, *People v West (Halton)*, 159 Mich App 424, 426 (1987).

> (1) the defendant has asserted a defense of insanity;
>
> (2) the defendant has waived his or her right to trial by jury or judge;
>
> (3) the prosecuting attorney has approved the plea of guilty but mentally ill;
>
> (4) with the defendant's consent, the court has examined the report or reports on criminal responsibility prepared as a result of examinations required by the defendant's assertion of the defense;
>
> (5) a hearing on the issue of defendant's mental illness has been conducted; and
>
> (6) the court is satisfied that the defendant proved by a preponderance of the evidence that he or she was mentally ill at the time of the offense.

These requirements are also incorporated in MCR 6.301(C)(1).

A trial court has discretion whether to accept a defendant's guilty but mentally ill plea. *People v Blue*, 428 Mich 684, 694 (1987).

6.21 Plea of Not Guilty by Reason of Insanity

Before accepting a plea of not guilty by reason of insanity, the court must comply with the requirements of MCR 6.302, except that MCR 6.304(C) (rather than MCR 6.302(D)) governs the manner of determining the accuracy of the plea. MCR 6.304(A).

"Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports prepared and hold a hearing that establishes support for findings that (1) the defendant committed the acts charged, and (2) that, by a preponderance of the evidence, the defendant was legally insane at the time of the offense." MCR 6.304(C).

Legal insanity means that, "as a result of mental illness[71] . . . or as a result of having an intellectual disability[,[72]]" a "person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). However, "[m]ental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity." *Id*.

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[71] *Mental illness* "means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g); see also MCL 768.21a(1).

"After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands that the plea will result in the defendant's commitment for diagnostic examination at the center for forensic psychiatry for up to 60 days, and that after the examination, the probate court may order the defendant to be committed for an indefinite period of time." MCR 6.304(B).

After accepting the defendant's plea, the trial court must immediately commit the defendant to the custody of the center for forensic psychiatry for a period not to exceed 60 days. MCL 330.2050(1).

The court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime. MCR 6.304(D); MCL 330.2050(1).

The defendant may secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. MCL 768.20a(3). If the defendant is indigent and makes a showing of good cause, the trial court may order the county to pay for an independent psychiatric evaluation. *Id*.

6.22 Refusing to Accept a Defendant's Plea

MCR 6.301(A) permits a court to refuse a defendant's plea as long as the refusal is made pursuant to the court rules.[73] MCR 6.301 applies to circuit court arraignments conducted in district court pursuant to MCR 6.111. MCR 6.111(C).[74] Where a court refuses to accept a defendant's plea, the court must enter a plea of not guilty on the record. MCR 6.301(A). Similar language appears in MCL 774.1a. Where a plea of not guilty is entered, "every material allegation in the information [is placed in issue] and []

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[72] *Intellectual disability* "means a condition manifesting before the age of 18 years that is characterized by significantly subaverage intellectual functioning and related limitations in 2 or more adaptive skills and that is diagnosed based on the following assumptions:

"(a) Valid assessment considers cultural and linguistic diversity, as well as differences in communication and behavioral factors.

(b) The existence of limitation in adaptive skills occurs within the context of community environments typical of the individual's age peers and is indexed to the individual's particular needs for support.

(c) Specific adaptive skill limitations often coexist with strengths in other adaptive skills or other personal capabilities.

(d) With appropriate supports over a sustained period, the life functioning of the individual with an intellectual disability will generally improve." MCL 330.1100b(12); see also MCL 768.21a(1).

[73] See Section 5.29 for more information on refusing a plea.

[74] However, see MCR 6.111(A), which provides that "[a] district court judge *shall* take a felony plea as provided by court rule if a plea agreement is reached between the parties[]" (emphasis supplied).

the defendant [is permitted] to raise any defense not otherwise waived." MCR 6.301(A).

6.23 Withdrawal of a Guilty Plea

A. Withdrawal of Plea Before Acceptance

A defendant has a right to withdraw any plea until the court accepts the plea on the record. MCR 6.310(A).

B. Withdrawal of Plea Before Sentencing

MCR 6.310(B), which sets out the requirements for withdrawing a plea after the court accepts it, but before the court imposes sentence, provides:

> "Except as provided in [MCR 6.310(B)(3)], after acceptance but before sentence,
>
> > (1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by [MCR 6.310](C).
> >
> > (2) the defendant is entitled to withdraw the plea if
> >
> > > (a) the plea involves an agreement for a sentence for a specified term or within a specified range, and the court states that it is unable to follow the agreement; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or
> > >
> > > (b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

> (3) Except as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct after the plea is accepted but before sentencing. For purposes of this rule, misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing."

"MCR 6.310(B) permits [a] defendant to withdraw his [or her] plea before sentencing if withdrawal is in the interest of justice, unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea." *People v Allen (Demarcus)*, ___ Mich ___, ___ (2015) (citing MCR 6.310(B)(1) and *People v Jackson (Dwayne)*, 203 Mich App 607, 611-612 (1994), and noting that "[t]he trial court applied an erroneous legal standard when it concluded that there was no legal basis for the court to allow the defendant to withdraw his plea unless there was a defect in the plea-taking process[]") (additional citations omitted).

In the absence of a procedural error in receiving the plea, a defendant must establish a fair and just reason for withdrawal of the plea. *People v Harris (Lamar)*, 224 Mich App 130, 131 (1997). Examples of fair and just reasons for withdrawal include when the plea resulted from fraud, duress, or coercion, *People v Gomer*, 206 Mich App 55, 58 (1994), when the plea involved erroneous legal advice coupled with actual prejudice to legal rights, *People v Jackson (Andrew)*, 417 Mich 243, 246 (1983), or when the bargain on which the plea was based was illusory, meaning that the defendant received no benefit from the agreement. *Harris (Lamar)*, 224 Mich App at 132. If the facts of the case indicate that the plea was voluntary, the plea will be upheld regardless whether the defendant received consideration in return. *Id*. at 132-133.

If the defendant establishes a fair and just reason for withdrawal of the plea, the burden then shifts to the prosecution to establish that substantial prejudice would result from allowing the defendant to withdraw the plea. *Jackson (Dwayne)*, 203 Mich App at 611-612. To constitute substantial prejudice, the prosecution must demonstrate that its ability to prosecute is impeded by the delay. *People v Spencer*, 192 Mich App 146, 151-152 (1991) (substantial prejudice not established where trial was set to begin at the time the pleas were entered, and some witnesses were from out of state). In deciding whether a defendant may withdraw a plea, the trial court should

bear in mind what is in the interests of justice. *Id.* at 151-152 ("the fact that [the] defendant's pleas may have been induced by inaccurate legal advice combined with his refusal or inability to personally recount a sufficient basis to substantiate the[] charges made it incumbent upon the trial court to allow [the] defendant to withdraw his pleas").

"MCR 6.310(B)(1) [does] not permit [a] circuit court to vacate [a] defendant's plea" where the "defendant [has] neither moved for [withdrawal] nor consented to it." *People v Martinez (Gilbert)*, 307 Mich App 641, 647, 653-654 (2014) (holding that where the defendant entered a guilty plea in exchange for the prosecutor's agreement not to bring any additional charges regarding contact with the complainant "'grow[ing] out of [the] same investigation that occurred during [a certain period of years,]'" the "fact that the complainant, after [the] defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact[]" permitting the court to vacate the defendant's plea under either MCR 6.310 or contract principles).

"[R]equests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant's true motivation for moving to withdraw is a concern regarding sentencing." *People v Haynes (Kermit)*, 221 Mich App 551, 559 (1997). However, MCR 6.310(B)(2)(a) and MCR 6.310(B)(2)(b) provide that a defendant is entitled to withdraw the plea if the plea involves an agreement for a sentence for a specified term or within a specified range, and the court states that it is unable to follow the agreement, or the trial court states that it will sentence the defendant to a specified term or within a specified range, and then finds that it is unable to do so.[75]

Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea[]'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012). In *Franklin (Joseph)*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin (Joseph)* Court clarified that "*Grove* has been superseded by MCR 6.310(B)[,]" and cautioned that

[75] However, "[e]xcept as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct after the plea is accepted but before sentencing." MCR 6.310(B)(3).

"in the future, such an error will be 'plain[.]'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin (Joseph)*, 491 Mich 916, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Id.* at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

A sentencing judge who decides not to abide by the terms of a sentence agreement (*Cobbs*[76] agreement) may not tell a criminal defendant what sentence might be imposed before the defendant decides whether to withdraw a guilty plea. MCR 6.310(B)(2)(b); *People v Williams (Avana)*, 464 Mich 174, 180 (2001).

A trial court may not sua sponte vacate an accepted plea without the defendant's consent, even if the defendant indicates that he or she is innocent. *People v Strong*, 213 Mich App 107, 112 (1995) (after trial court sua sponte vacated the defendant's plea without the defendant's consent, he was found guilty following a jury trial; Court of Appeals reversed the defendant's convictions and remanded to permit the defendant to plead guilty in exchange for the terms of the parties' previous plea agreement).

"When reviewing whether the factual basis for a plea is adequate, th[e] [c]ourt considers whether the fact finder could find the defendant guilty based on the facts elicited from him [or her] at the plea proceeding." *People v Fonville*, 291 Mich App 363, 377 (2011). "'A factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted. This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference. Even if the defendant denies an element of the crime, the court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says.'" *Id.* at 377, quoting *People v Thew*, 201 Mich App 78, 85 (1993), quoting *People v Jones (Delrita)*, 190 Mich App 509, 511-512 (1991) (internal citations omitted) (trial court did not abuse its discretion in denying the defendant's motion to withdraw his plea where his statements "were in line with the elements of the charged crime[,]" an inculpatory inference could be drawn from the his admissions, and although he "claimed that he was innocent of the crime as charged because he did not have an 'evil intent,' he never argued that he was actually innocent of the alleged conduct").

[76] *People v Cobbs*, 443 Mich 276 (1993).

Doubt about the veracity of a defendant's nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, 264 Mich App 139, 150 (2004). When recanted testimony provides a substantial part of the factual basis underlying a defendant's nolo contendere plea, the defendant must prove by a preponderance of credible evidence that the original testimony was untruthful, in order to constitute a fair and just reason for allowing the defendant to withdraw his or her plea. *Id.* at 152. If the defendant meets the burden, the trial court must then determine whether other evidence is sufficient to support the factual basis of the defendant's plea. *Id*. If the defendant fails to meet the burden, or if other evidence is sufficient to support the plea, then the defendant has failed to present a fair and just reason to warrant withdrawal of his or her plea. *Id*.

C. Withdrawal of Plea After Sentencing

"MCR 6.310(C) permits a defendant to withdraw a guilty plea after sentencing only if the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside." *People v Sanford (Davontae)*, 495 Mich 989 (2014). MCR 6.310(C) provides:

> "The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in [MCR] 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals."

"'A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process.'" *Sanford (Davontae)*, 495 Mich at 989-990, quoting *People v Brown (Shawn)*, 492 Mich 684, 693 (2012).

"[In general], criminal defendants may not withdraw a guilty plea on the ground that they were unaware of the future collateral or incidental effects of the initial valid plea." *People v Haynes (Joseph)*, 256 Mich App 341, 349 (2003). However, defense counsel is

constitutionally required to inform his or her client that a plea "may carry a risk of adverse immigration consequences[,]" e.g., deportation. *Padilla v Kentucky*, 559 US 356, 369 (2010).[77]

"MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual offender before accepting a guilty plea[,]" and MCR 6.310(C) permits a defendant who is not so apprised to elect either to allow his or her plea and sentence to stand or to withdraw the plea. *Brown (Shawn)*, 492 Mich at 687. In *Brown (Shawn)*, 492 Mich at 687, the defendant pleaded guilty, as a second-offense habitual offender under MCL 769.10, to second-degree home invasion. The defendant was advised at his plea hearing that the maximum sentence for second-degree home invasion was 15 years in prison; however, the defendant was subsequently sentenced, as an habitual offender, to a maximum prison term of more than 22 years. *Brown (Shawn)*, 492 Mich at 687-688. The Michigan Supreme Court concluded that MCR 6.302(B)(2) requires that "before pleading guilty, a defendant must be notified of the maximum possible prison sentence with habitual-offender enhancement[,] because the enhanced maximum becomes the 'maximum possible prison sentence' for the principal offense." *Brown (Shawn)*, 492 Mich at 693-694, overruling *People v Boatman*, 273 Mich App 405, 406-410 (2006). The *Brown (Shawn)* Court additionally held that "MCR 6.310(C) . . . provides the proper remedy for a plea that is defective under MCR 6.302(B)(2), which is to allow the defendant the opportunity to withdraw his or her plea." *Brown (Shawn)*, 492 Mich at 698.

"[W]hen a sentence is modified to make it consistent with state law and to give the defendant the benefit of his [or her] original plea agreement, the Constitution does not require the withdrawal of a once-illegal plea." *Pickens v Howes*, 549 F3d 377, 381-382 (CA 6, 2008).

D. Divisibility of Multiple Pleas Arising From Single Plea Agreement

In *People v Blanton*, ___ Mich App ___, ___ (2016), the parties disputed whether, when a defendant pleads guilty to multiple

[77] "[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law[.]" *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004). However, because *Padilla*, 559 US 356, "announced a 'new rule[,]'" it does not apply retroactively on collateral review. *Chaidez v United States*, 568 US ___, ___ (2013). See also *People v Gomez*, 295 Mich App 411, 413-414, 418-419 (2012) (holding that "the new rule of criminal procedure announced in *Padilla*[, 559 US 356,] has prospective application only[]" under both federal and state rules of retroactivity, and that the defendant, who entered a no-contest plea to a drug-possession charge and was subsequently notified that his conviction rendered him subject to deportation, was not entitled to relief from judgment based on *Padilla*, 559 US 356, which was decided several years after he completed his sentence).

charges under a single plea agreement, MCR 6.310(C) "allows [the] defendant to withdraw his [or her] entire plea or only his [or her] plea to" a charge affected by a defect in the plea-taking process. Before accepting the defendant's guilty plea to charges of felony-firearm and two other offenses, the trial court in *Blanton*, ___ Mich App at ___, failed to advise the defendant of the mandatory minimum sentence (or consecutive nature of the sentence) applicable to the felony-firearm charge. After sentencing, the defendant moved to withdraw his guilty plea in its entirety under MCR 6.310(C) based on the defect in the plea proceeding with respect to the felony-firearm charge. *Blanton*, ___ Mich App at ___. The trial court agreed, rejecting the prosecution's assertion that the defendant should be permitted to withdraw only the plea of guilty of felony-firearm. *Id*. at ___. Noting that there was no binding Michigan precedent on point, the trial court cited *State v Turley*, 149 Wash 2d 395 (2003), for the proposition that "'plea agreements are "package deals" and indivisible[,]'" and that the defendant was therefore not limited to withdrawing only the "'"defective" portion of his plea.'" *Blanton*, ___ Mich App at ___ (citation omitted).

The Court of Appeals affirmed. "Given that there was no precedential authority on [the] issue in Michigan, . . . the trial court [did not] abuse[] its discretion in applying the contractual approach set forth in *Turley*[, 149 Wash 2d 395,]" and in concluding that its failure to advise the defendant of the full nature of the penalty for felony-firearm, in violation of MCR 6.302(B)(2), permitted him to withdraw his guilty pleas to all three charges. *Blanton*, ___ Mich App at ___. "'[C]ontractual analogies may be applied in the context of a plea agreement' if to do so would not 'subvert the ends of justice.'" *Id*. at ___, quoting *People v Swirles (After Remand)*, 218 Mich App 133, 135 (1996). "Given the nature of the plea-bargaining process in Michigan where both parties often tend to negotiate a 'package deal,' . . . adherence to the [contractual] approach set forth in *Turley* would not 'subvert the ends of justice.'" *Blanton*, ___ Mich App at ___ (noting that the "references in MCR 6.302 and MCR 6.310 to the singular terms 'plea' and 'plea proceeding' [did] not necessarily resolve the issue[]") (citations omitted). The Court noted that "the objective facts reveal[ed] an intent by the prosecution and [the] defendant to treat the plea agreement as indivisible[]" where "[the] defendant was charged with multiple offenses in a single Information; he negotiated with the prosecution to allow him to plead guilty to three charges contemporaneously in exchange for the dismissal of the remaining charges and the habitual offender enhancement; a single document contained the terms of the plea agreement; and the trial court accepted [the] defendant's pleas to all three charges at one hearing." *Blanton*, ___ Mich App at ___, citing *Turley*, 149 Wash 2d at 400. Accordingly, "the trial court did not abuse its discretion in allowing [the] defendant to withdraw his plea

in its entirety rather than only partially because the plea agreement [was] indivisible." *Blanton*, ___ Mich App at ___.

E. Motion to Withdraw Based on Ineffective Assistance of Counsel

"[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v Kentucky*, 559 US 356, 373 (2010)[78]; see also *Missouri v Frye*, 566 US ___, ___ (2012)[79] ("plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages[]"). Accordingly, a claim of ineffective assistance of counsel may be reviewable following a guilty plea. *People v New*, 427 Mich 482, 491 (1986) ("a defendant, after pleading guilty, may raise on appeal only those defenses and rights which would preclude the state from obtaining a valid conviction against the defendant"). However, "[w]here the alleged deficient actions of defense counsel relate to issues that are waived by a valid unconditional guilty plea, the claim of ineffective assistance of counsel relating to those actions is also waived." *People v Vonins (After Remand)*, 203 Mich App 173, 176 (1993). For example, in *People v Stammer*, 179 Mich App 432, 440 (1989), the defendant, "by complaining of ineffective assistance, [sought] to get through the back door appellate relief that could not be obtained by directly invoking review on issues of evidentiary suppression and the insanity defense."

To establish ineffective assistance of counsel in the context of a guilty plea, the inquiry is whether the defendant tendered the plea voluntarily and understandingly. *In re Oakland Co Prosecutor*, 191 Mich App 113, 120 (1991). See also MCR 6.302(A) ("[t]he court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate"). Absent unusual circumstances, where counsel has adequately apprised a defendant of the nature of the charges and the consequences of a plea, the defendant can make an informed and voluntary choice whether to plead guilty or go to trial without a specific

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[78] *Padilla*, 559 US 356, announced a "new rule" and therefore has prospective application only under both federal and state rules of retroactivity. See *Chaidez v United States*, 568 US ___, ___ (2013); *People v Gomez*, 295 Mich App 411, 413 (2012).

[79] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US ___, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2).

recommendation from counsel. *People v Corteway*, 212 Mich App 442, 446 (1995); see also *People v Armisted*, 295 Mich App 32, 49 (2011) (the defendant's affidavit, stating that trial counsel misinformed him about the minimum sentence that would likely be imposed if he were convicted of the charged offense, "was insufficient to contradict or overcome his previous sworn statements at the plea proceeding . . . that he understood the plea and sentencing agreement[]"); *People v White (Rickey)*, 307 Mich App 425, 429-430, 432 (2014) ("[the d]efendant's contradictory affidavit [was] insufficient to contradict his sworn testimony in open court[]" that his plea was entered knowingly and voluntarily, and "the trial court did not abuse its discretion when it denied [his] request for an evidentiary hearing[]" regarding the voluntariness of his plea and the effectiveness of trial counsel).

"[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*[, 466 US at 687]." *Frye*, 566 US at ___, citing *Hill v Lockhart*, 474 US 52, 57 (1985). First, "[w]here . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 US at 56 (citation omitted). "The second, or 'prejudice,' requirement[] . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59.[80]

Defense counsel's decision to concede the defendant's responsibility for a lesser offense may be a tactical strategy where evidence clearly indicates the defendant is guilty of a crime; in such circumstances, counsel's concession of guilt is not necessarily ineffective assistance. *People v Savoie*, 419 Mich 118, 134-135 (1984).

Counsel may be found ineffective and a defendant's plea found involuntary or unknowing if counsel failed to explain to the defendant the nature of the criminal charges against him or her, or if counsel failed to discuss with the defendant the possible defenses he or she might have against the charges to which the defendant was pleading guilty. *People v Jackson (Dwayne)*, 203 Mich App 607, 614 (1994). A defendant's attorney is required to explain to the defendant the range and consequences of the choices available to the defendant with enough detail to allow the defendant to make an

[80] See Section 4.5(C) for discussion of claims of ineffective assistance of counsel resulting in the lapse or rejection of plea offers.

intelligent and informed choice. *Id.* at 614. Absent unusual circumstances, where counsel has adequately apprised the defendant of the nature of the charges and the consequences of a plea, a defendant can make an informed and voluntary choice whether to plead guilty or go to trial without a specific recommendation from counsel. *People v Corteway*, 212 Mich App 442, 446 (1995). Counsel is not required to make a recommendation, and the failure to provide such advice does not necessarily constitute the ineffective assistance of counsel. *Id.* at 446.

Defense counsel is constitutionally required to inform his or her client that a plea "may carry a risk of adverse immigration consequences[,]" e.g., deportation. *Padilla*, 559 US at 356. In *Padilla*, 559 US at 360, 374, the United States Supreme Court stated that "constitutionally competent counsel would have advised [the defendant] that his conviction for drug distribution made him subject to automatic deportation[,]" and held that whether the defendant was entitled to relief was dependent on whether he could demonstrate that counsel's ineffectiveness amounted to prejudice.[81] See also *People v Fonville*, 291 Mich App 363, 392 (2011), where the Court of Appeals applied the *Padilla* rationale to support its holding that "defense counsel must advise a defendant that registration as a sexual offender is a consequence of his [or her] guilty plea. The failure to inform a pleading defendant that his [or her] plea will necessarily require registration of a sex offender affects whether the plea was knowingly made." In *Fonville*, 291 Mich App at 395, "defense counsel's performance was constitutionally defective where he failed to inform [the defendant] of the sex offender registration requirement[,]" and that failure prejudiced the defendant such that reversal of his conviction and sentence was required.

Issues that relate solely to the state's capacity to prove factual guilt are waived by an unconditional guilty or nolo contendere (no contest) plea. *New*, 427 Mich at 493-494. Where the alleged deficient actions of defense counsel do not relate to issues implicating the state's authority to prosecute the defendant and were waived by the defendant's valid guilty plea, the claims of ineffective assistance of

[81] "[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law[.]" *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004). However, because *Padilla*, 559 US 356, "announced a 'new rule[,]'" it does not apply retroactively on collateral review. *Chaidez v United States*, 568 US ___, ___ (2013). See also *People v Gomez*, 295 Mich App 411, 413-414, 418-419 (2012) (holding that "the new rule of criminal procedure announced in *Padilla*[, 559 US 356,] has prospective application only[]" under both federal and state rules of retroactivity, and that the defendant, who entered a no-contest plea to a drug-possession charge and was subsequently notified that his conviction rendered him subject to deportation, was not entitled to relief from judgment based on *Padilla*, 559 US 356, which was decided several years after he completed his sentence).

counsel relating to those actions are also waived. *People v Vonins (After Remand)*, 203 Mich App 173, 175-176 (1993).

F. Effect of Withdrawal or Vacation of Plea

"If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered." MCR 6.312. See also *People v Johnson (Ricardo)*, 197 Mich App 362, 364 (1992) ("[w]hen defendant withdrew his guilty plea, he reopened this matter to any of the charges which had been brought or could have been brought against him at the time his plea of guilty was entered").

G. Inadmissibility of Withdrawn Plea

Ordinarily, evidence of a withdrawn plea and statements made during the plea proceedings are not admissible in any civil or criminal proceedings. MRE 410.[82] However, a criminal defendant may waive MRE 410 protections, so long as he or she is appropriately advised and so long as the statements admitted into evidence are voluntarily, knowingly, and understandingly made. *People v Stevens (James)*, 461 Mich 655, 656-657, 661-663, 668-670 (2000) (the defendant acknowledged his guilt during plea discussions arising out of proceedings pursuant to an investigative subpoena; the plea was ultimately not entered and the Supreme Court ruled that the statements were "not rendered inadmissible by MRE 410, and, if otherwise admissible, c[ould] be introduced in the prosecutor's case in chief").

H. Appealing a Guilty Plea[83]

"A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in [MCR 6.310], or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial, court, raising as a basis for withdrawal the claim sought to be raised on appeal." MCR 6.310(D). See also *People v Gaines*, 198 Mich App 130, 131 (1993) ("defendant's challenge concerning the validity of his [] plea is not properly before [the Court] because he did not move to withdraw the plea in the trial court").

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[82] See Section 6.19(D) for discussion of MRE 410.

[83] See Section 5.19(C) and Section 6.24(C) for discussion of postconviction relief based on ineffective assistance of counsel in the plea bargain context.

"[I]ndigent defendants who plead guilty or nolo contendere in a Michigan court have a federal constitutional right to the appointment of appellate counsel with regard to first-tier review in th[e] Court [of Appeals]." *People v James (William)*, 272 Mich App 182, 188-189 (2006), citing *Halbert v Michigan*, 545 US 605 (2005). "*Halbert* should not be applied retroactively to cases in which a defendant's conviction has become final." *People v Maxson (Mark)*, 482 Mich 385, 387 (2008). "For those indigent defendants whose pleas were taken after *Halbert* [*v Michigan*, 545 US 605 (2005),] was issued, but before the repeal of MCL 770.3a, there can be no finding of waiver [of the right to counsel]. Because indigent defendants whose pleas were taken after June 23, 2005, but before January 9, 2007, could not have clearly understood that they had the right to appointed counsel, they could not have executed a knowing and intelligent waiver of this right." *People v Billings*, 283 Mich App 538, 544-545 (2009). The Court also held that requiring a defendant to waive his or her right to appointed appellate counsel as a plea condition was unconstitutional. *Id.* at 545.

"In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that: (a) the defendant is entitled to file an application for leave to appeal, (b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and (c) the request for a lawyer must be made within 42 days after sentencing." MCR 6.425(F)(2). A legally erroneous instruction (e.g., that by pleading no contest, the defendant waived his right to court-appointed counsel except under certain circumstances) under MCR 6.425(F)(2), and *Halbert v Michigan*, 545 US 605 (2005), may be harmless if the advice-of-rights form the defendant receives at sentencing informs him or her of the right to appointed counsel under all circumstances, regardless of whether the conviction is plea- or trial-based. *People v Frazier*, 485 Mich 1044 (2010), citing MCR 6.425(F)(3). The Court noted, however, that "trial judges should take care to advise defendants in plea proceedings of their continuing right to court-appointed counsel if they cannot afford counsel." *Frazier*, 485 Mich at 1044.

See also MCR 6.425(G)(1)(c) ("[i]n a case involving a conviction following a plea of guilty or nolo contendere, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing"). "In a case involving a conviction following a guilty plea, the denial of appointed appellate counsel on the basis of the defendant's failure to comply with the 42-day deadline for requesting counsel in MCR 6.425(G)(1)(c) does not violate *Halbert v Michigan*, 545 US 605 (2005)." *People v McCoy*, 483 Mich 898 (2009).

I. Standard of Review

A trial court's decision whether to grant a motion to withdraw a plea is reviewed for an abuse of discretion. *People v Brown (Shawn)*, 492 Mich 684, 688 (2012); *People v Parker (Charles William III)*, 275 Mich App 213, 217 (2007).

6.24 Sentence Bargaining

A. Sentence Agreements and Recommendations

A defendant does not have a right to engage in plea negotiations with the prosecution. *People v Payne*, 285 Mich App 181, 191 (2009). Neither the United States Supreme Court nor the Michigan Supreme Court "'has recognized that the parties have a right to present a plea.'" *Id.* at 191, quoting *People v Grove*, 455 Mich 439, 469 n 36 (1997).[84]

Where a defendant's sentence will result from a plea-based conviction, the trial court must determine whether the parties have made a plea agreement, "which may include an agreement to a sentence to a specific term or within a specific range[.]" MCR 6.302(C)(1). Any agreement "must be stated on the record or reduced to writing and signed by the parties[,]"[85] and "[t]he written agreement shall be made part of the case file." *Id.*

"If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant." MCR 6.302(C)(2).

Before a trial court may sentence a defendant whose guilty or no contest plea is part of a plea agreement, the court must comply with the procedure in MCR 6.302(C)(3):

> "(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a sentence to a specified term or within a specified range or a prosecutorial sentence recommendation, the court may
>
> (a) reject the agreement; or

[84] *Grove*, 455 Mich 439, "has been superseded by MCR 6.310(B)." *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012).

[85] "The parties may memorialize their agreement on a form substantially approved by the SCAO." MCR 6.302(C)(1). See SCAO Form CC 414, *Plea Agreement*.

> (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to a specified term or within a specified range as agreed to; or
>
> (c) accept the agreement without having considered the presentence report; or
>
> (d) take the plea under advisement.
>
> If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow an agreement to a sentence for a specified term or within a specified range or a recommendation agreed to by the prosecutor, and that if the court chooses not to follow an agreement to a sentence for a specified term or within a specified range, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea."

If there is a plea agreement, the court must ask the defendant "whether anyone has promised anything beyond what is in the plea agreement"; "whether anyone has threatened the defendant"; and "whether it is the defendant's own choice to plead guilty." MCR 6.302(C)(4).

Negotiating a plea agreement or sentence bargain. A prosecutor and a defendant may reach a sentence agreement whereby the defendant agrees to plead guilty in exchange for a sentence to a specified term or within a specified range, or in exchange for a nonbinding prosecutorial sentence recommendation. See MCR 6.302(C). However, if the offense to which the defendant is to enter a plea is subject to a mandatory minimum sentence, "the trial court is without authority to impose[]" a lesser sentence. *People v Kreiner*, 497 Mich 1024, 1024-1025 (2015) (where the terms of a plea offer called for the defendant to plead guilty of first-degree criminal sexual conduct in exchange for a ten-year minimum sentence, the trial court was "without authority to impose[]" the proposed sentence because "MCL 750.520b(2)(b) provides that the statutorily authorized punishment for the offense to which [the] defendant [was] to plead guilty under the proposed plea agreement is 'imprisonment for . . . not less than 25 years[]'").

The extent to which a trial court may involve itself in sentence negotiations has been set out by the Michigan Supreme Court in *People v Killebrew*, 416 Mich 189 (1982), effectively superseded in part

by ADM File No. 2011-19,[86] and *People v Cobbs*, 443 Mich 276 (1993). In *Killebrew*, 416 Mich at 205, the Supreme Court held that a trial court may not initiate or participate in discussions regarding a plea agreement. In *Cobbs*, 443 Mich at 283, the Supreme Court modified *Killebrew* to allow the trial court, at the request of a party, to state on the record the length of the sentence that appeared to be appropriate, based on the information available to the trial court at the time. The *Cobbs* Court made clear that the trial court's preliminary evaluation did not bind the court's ultimate sentencing discretion, because additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources. *Cobbs*, 443 Mich at 283.

Sentence recommendation under *Killebrew*. *Killebrew* limits a trial court's involvement to the approval or disapproval of a nonbinding prosecutorial sentence recommendation linked to a defendant's guilty plea. *Killebrew*, 416 Mich at 209. Under *Killebrew*, 416 Mich at 209, a trial court may accept a defendant's guilty plea without being bound by any agreement between the defendant and the prosecution. Where a trial court has decided not to adhere to the sentence recommendation accompanying the defendant's plea agreement, the court must explain to the defendant that the recommendation was not accepted and state the sentence that the court finds is the appropriate disposition. *Id*. at 209-210.[87] However, "[a] judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea." MCR 6.302(C)(3).[88]

***Cobbs* plea.** *Cobbs* authorizes the trial court, at the request of a party, to state on the record the sentence that appears appropriate for the

[86] Effective January 1, 2014. See 495 Mich lxxix (2013).

[87] Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea[]'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012). In *Franklin (Joseph)*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin (Joseph)* Court clarified that "*Grove* has been superseded by MCR 6.310(B)[,]" and cautioned that "in the future, such an error will be 'plain[.]'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin (Joseph)*, 491 Mich 916, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Franklin (Joseph)*, 491 Mich at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

[88] See ADM File No. 2011-19, effective January 1, 2014, effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation. See 495 Mich lxxix (2013).

charged offense, on the basis of information available to the court at the time. *Cobbs,* 443 Mich at 283. Even when a defendant pleads guilty or nolo contendere to the charged offense in reliance on the court's preliminary determination regarding the defendant's likely sentence, the court retains discretion over the actual sentence imposed should additional information dictate the imposition of a longer sentence. *Id.* at 283. If the court determines it will exceed its previously stated sentence, the defendant has an absolute right to withdraw the plea. *Id.*[89]

"[T]he fact that new information [comes] to light after [a] *Cobbs* plea [is] entered does not justify the circuit court in vacating [a] defendant's bargained-for plea." *People v Martinez (Gilbert),* 307 Mich App 641, 650-651, 653-654 (2014) (holding that where the defendant entered a guilty plea in exchange for the prosecutor's agreement not to bring any additional charges regarding contact with the complainant "'grow[ing] out of [the] same investigation that occurred during [a certain period of years,]'" the "fact that the complainant, after [the] defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor [did] not create a mutual mistake of fact[]" permitting the court to vacate the defendant's plea under either MCR 6.310 or contract principles).

Committee Tip:

Make the attorneys do the extra work to provide the court with information regarding the reasons why a Cobbs hearing is appropriate, and, if a hearing is held, why a particular plea is appropriate. Even if the parties cannot agree on the terms, the court may still proceed with a Cobbs plea; it is not dependent on the assent of the parties. If the defendant elects to withdraw his or her plea, the trial court may consider a new Cobbs agreement, or proceed to trial.

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[89] Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea[]'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012). In *Franklin (Joseph)*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin (Joseph)* Court clarified that "*Grove* has been superseded by MCR 6.310(B)[,]" and cautioned that "in the future, such an error will be 'plain[.]'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin (Joseph)*, 491 Mich 916, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Franklin (Joseph)*, 491 Mich at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

In *People v Williams (Avana)*, 464 Mich 174 (2001), the Michigan Supreme Court distinguished between a trial court's role in sentence negotiations occurring under *Killebrew* and those occurring under *Cobbs*. According to the *Williams* (*Avana)* Court, *Cobbs* modified *Killebrew* "to allow somewhat greater participation by the judge." *Williams (Avana)*, 464 Mich at 177. However, the *Williams* (*Avana)* Court ruled that the requirement of *Killebrew*—that a court must indicate the sentence it considers appropriate if the court decides against accepting the prosecutorial recommendation—does not apply to a *Cobbs* agreement later rejected by the court that made the preliminary evaluation. *Williams (Avana)*, 464 Mich at 178-179. The Court explained the distinction between *Cobbs* and *Killebrew* as preserving the trial court's impartiality in sentence negotiations by minimizing the potential coercive effect of a court's participation in the process:

> "In cases involving sentence recommendations under *Killebrew*, the neutrality of the judge is maintained because the recommendation is entirely the product of an agreement between the prosecutor and the defendant. The judge's announcement that the recommendation will not be followed, and of the specific sentence that will be imposed if the defendant chooses to let the plea stand,[90] is the first involvement of the court, and does not constitute bargaining with the defendant, since the judge makes that announcement and determination of the sentence on the judge's own initiative after reviewing the presentence report.
>
> By contrast, the degree of the judge's participation in a *Cobbs* plea is considerably greater, with the judge having made the initial assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the

[90] However, see ADM File No. 2011-19, effective January 1, 2014, amending MCR 6.302(C)(3) and MCR 6.310(B)(2) to eliminate a defendant's ability to withdraw a plea if the court rejects a plea agreement involving a prosecutorial sentence recommendation (effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation). See 495 Mich lxxix (2013).

> bargaining process. Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.
>
> Thus, we hold that in informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand." *Williams (Avana)*, 464 Mich at 179-180.

B. Violations of a Sentence Agreement or Recommendation

1. By Prosecutor

As a general rule, fundamental fairness requires that promises made during plea bargaining be respected, where (1) the government agent was authorized to enter into the agreement; and (2) the defendant relied on the promise to his or her detriment. *People v Ryan (Thomas)*, 451 Mich 30, 41 (1996).

Where a defendant is aggrieved by the breach of an unauthorized non-plea agreement with the police (that the defendant not be prosecuted) he or she is not entitled to specific performance of that agreement. *People v Gallego (Luis)*, 430 Mich 443, 445, 452 (1988). Instead, suppression or exclusion of the written agreement is an appropriate remedy. *Id.* at 446, 456-457.

Where a sentencing agreement negotiated between the defendant and the prosecution is subsequently breached by the prosecution, a reviewing court has discretion to choose between vacating the plea or ordering specific performance, with considerable weight given to the defendant's choice of remedy. *People v Nixten*, 183 Mich App 95, 97, 99 (1990) (where the defendant did not assert his innocence and only complained that the prosecution did not fulfill its part of the bargain, the Court of Appeals found that specific performance was the appropriate remedy and remanded for resentencing before a different judge).

2. By Defendant

"On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement." MCR 6.310(E). However, where a "prosecutor's

motion [to vacate a plea is] not based on [the] defendant's failing to comply with the terms of the plea agreement[and t]he record shows that [the] defendant fully complied with his [or her] part of the plea bargain[,]" MCR 6.310(E) "[does not] permit[] the trial court to vacate [the] plea on its own motion or that of the prosecutor[.]" *People v Martinez (Gilbert)*, 307 Mich App 641, 648-650 (2014).

A defendant's breach of a plea agreement constitutes grounds for setting aside the agreement. *People v Abrams*, 204 Mich App 667, 672-673 (1994) (where the defendant breached his plea agreement by engaging in criminal activity, the prosecution was allowed to pursue its case against the defendant).

An evidentiary hearing is required for the court to determine if a substantial breach of a plea agreement has occurred. *United States v Frazier (Eric)*, 213 F3d 409, 419 (CA 7, 2000). The burden is on the prosecution to show by a preponderance of the evidence that a defendant breached the plea agreement. *Id.* at 419. A defendant who breaches a plea agreement forfeits any right to its enforcement. *United States v Wells*, 211 F3d 988, 995 (CA 6, 2000).

It is appropriate to grant a prosecutor's motion to void a plea bargain where the defendant has not lived up to his or her part of the bargain. *Abrams*, 204 Mich App at 672-673. See also *People v Acosta*, 143 Mich App 95, 99 (1985) (it was not error for the trial court to grant the prosecution's motion to void a plea agreement where the defendant absconded, failed to appear to enter his guilty plea, and was arrested eight months later).

It is appropriate to grant a prosecutor's motion to set aside a guilty plea made pursuant to a plea bargain where defense counsel concealed material information during the bargaining process. *People v Cummings*, 84 Mich App 509, 513-514 (1978).

Additionally, "[e]xcept as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct[91] after the plea is accepted but before sentencing." MCR 6.310(B)(3).[92] See also *People v Garvin (Larry)*, 159 Mich App 38, 44 (1987)[93] (the defendant's failure to live up to his part of a plea bargain did not void his guilty plea,

[91] "For purposes of [MCR 6.310], misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing." MCR 6.310(B)(3).

[92] See Section 6.23 for discussion of a defendant's right to withdraw a plea.

but rather, waived his right to withdraw the plea); *People v Kean*, 204 Mich App 533, 535-536 (1994)[94] (where, pursuant to a plea agreement, the defendant entered a qualifying drug and alcohol treatment program before sentencing, but left the program after one week, failed to appear at sentencing, and was arrested more than two and a half years later, the trial court's denial of the defendant's motion to withdraw his plea was upheld).

3. By the Court

If the court receives information that in its judgment dictates a lower sentence than that included in a sentence agreement, it must notify the prosecutor of the sentence it intends to impose and allow the prosecutor to withdraw from the plea. *People v Seibert*, 450 Mich 500, 511 (1995).

"[I]f the court chooses not to follow an agreement to a sentence for a specified term or within a specified range, [the court must explain to the defendant that] the defendant will be allowed to withdraw from the plea agreement." MCR 6.302(C)(3). However, "[a] judge's decision not to follow [a prosecutorial] sentence recommendation does not entitle the defendant to withdraw the defendant's plea." *Id*.[95]

A defendant is entitled to withdraw his or her plea, after acceptance but before sentencing, when the court is unable to comply with an agreement for a sentence for a specified term or within a specified range, or when the court is unable to sentence a defendant in accord with the court's initial statement regarding the sentence it would impose.[96] MCR 6.310(B)(2)(a)–MCR 6.310(B)(2)(b).[97]

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[93] *Garvin (Larry)*, 159 Mich App 38, was decided before the adoption of MCR 6.310(B)(3). See ADM File No. 2011-19, effective January 1, 2014.

[94] *Kean*, 204 Mich App 533, was decided before the adoption of MCR 6.310(B)(3). See ADM File No. 2011-19, effective January 1, 2014.

[95] See ADM File No. 2011-19, effective January 1, 2014, effectively superseding *Killebrew*, 416 Mich at 210, to the extent that it held that a trial court must afford the defendant the opportunity to affirm or withdraw a guilty plea if the court decides not to adhere to a prosecutorial sentence recommendation. See 495 Mich lxxix (2013).

[96] However, "[e]xcept as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under [MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b)] if the defendant commits misconduct after the plea is accepted but before sentencing." MCR 6.310(B)(3). See Section 6.23 for discussion of a defendant's right to withdraw a plea.

4. Standard of Review

The trial court's finding that a plea agreement was breached is reviewed for clear error, and even when the court finds a breach, the trial court has discretion to affirm the plea. MCR 2.613(C); MCR 6.310(C), and 1989 Staff Comment; *People v Hannold*, 217 Mich App 382, 388-389 (1996), overruled in part on other grounds by *People v Smart*, 497 Mich 950, 950 (2015).

C. Ineffective Assistance of Counsel Causing Lapse or Rejection of Plea Offer[98]

"[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v Kentucky*, 559 US 356, 373 (2010),[99] citing *Hill v Lockhart*, 474 US 52, 57 (1985). See also *Missouri v Frye*, 566 US ___, ___ (2012) ("plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages[]").[100]

1. Establishing Ineffective Assistance Under *Strickland*

"[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland* [*v Washington*, 466 US 668, 687 (1984)]." *Frye*, 566 US at ___, citing *Hill*, 474 US at 57.

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[97] Failure to "'provide the defendant the opportunity to affirm or withdraw [a] plea[]'" as required by MCR 6.310(B)(2) constitutes plain error that may require reversal. *People v Franklin (Joseph)*, 491 Mich 916, 916 (2012). In *Franklin (Joseph)*, 491 Mich at 916, 916 n 1, the Michigan Supreme Court concluded that the trial court's failure to comply with MCR 6.310(B)(2)(b) could not be considered plain error, "given [the] holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection[;]" however, the *Franklin (Joseph)* Court clarified that "*Grove* has been superseded by MCR 6.310(B)[,]" and cautioned that "in the future, such an error will be 'plain[.]'" The Court further noted that, even assuming that plain and prejudicial error had occurred in *Franklin (Joseph)*, 491 Mich 916, "[u]nder [the] circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial," the Court "[was] exercising its discretion in favor of not reversing the defendant's convictions." *Franklin (Joseph)*, 491 Mich at 916, citing *People v Carines*, 460 Mich 750, 763 (1999).

[98] See Section 5.19(C) for discussion of plea withdrawal based on ineffective assistance of counsel.

[99] *Padilla*, 559 US 356, has prospective application only under both federal and state rules of retroactivity. See *Chaidez v United States*, 568 US ___, ___ (2013); *People v Gomez*, 295 Mich App 411, 413 (2012).

[100] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US ___, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d 737, 738-739 (CA 6, 2013), quoting 28 USC 2255(h)(2).

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused[,] . . . [and w]hen defense counsel allow[s such an] offer to expire without advising the defendant or allowing him [or her] to consider it, defense counsel [does] not render the effective assistance the Constitution requires." *Frye*, 566 US at ___.[101]

In *Frye*, 566 US at ___, the respondent was charged with driving without a license, a felony that carried a maximum term of four years' imprisonment. The prosecutor offered to defense counsel a choice of two plea bargains, including an offer to reduce the charge to a misdemeanor that carried a maximum term of imprisonment of one year and to recommend a 90-day sentence if the respondent pleaded guilty. *Id.* at ___. Counsel failed to communicate the offers to the respondent, who entered an open plea of guilty to the original felony charge and was sentenced to three years in prison. *Id.* at ___. After determining that counsel's performance was deficient under the first part of the *Strickland*[102] test, *Frye*, 566 US at ___, the Court turned to *Strickland*'s prejudice requirement:

> "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice . . . , it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 US at ___.

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[101] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, . . . *Frye*[, 566 US ___, did not] . . . create[] a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d at 738-739, quoting 28 USC 2255(h)(2).

[102] 466 US at 687.

Noting that, in light of the respondent's intervening arrest on an additional charge of driving without a license shortly before the plea hearing was held, there was reason to doubt that the prosecution would have adhered to the misdemeanor plea offer or that the trial court would have accepted it unless they were required to do so under state law, the *Frye* Court remanded the case to the state appeals court to consider whether the "plea offer, if accepted by [the respondent], would have been adhered to by the prosecution and accepted by the trial court." *Frye*, 566 US at ___.

Similarly, where defense counsel's ineffective assistance results in a defendant's *rejection* of a favorable plea offer, followed by his or her conviction at an ensuing trial and the imposition of a sentence harsher than that offered, "[the] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v Cooper*, 566 US ___, ___ (2012).[103]

In *Cooper*, 566 US at ___, it was conceded that defense counsel rendered ineffective assistance by advising the respondent that the prosecution would not be able to obtain a conviction at trial and convincing him, on that basis, to reject the prosecution's offer to dismiss two charges and to recommend a sentence of 51 to 85 months' imprisonment if the respondent pleaded guilty to two remaining charges. Following trial, the respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment. *Id.* at ___. The *Cooper* Court rejected the petitioner's contention that "there can be no finding of *Strickland*[104] prejudice arising from plea bargaining if the defendant is later convicted at a fair trial[,]" holding that "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it[, and i]f that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on

[103] "[A]s held by every . . . [federal circuit court of appeals] to consider the issue, neither *Frye*[, 566 US ___,] nor *Cooper*[, 566 US ___,] created a 'new rule of constitutional law' made retroactive to cases on collateral review by the [United States] Supreme Court." *In re Liddell*, 722 F3d at 738-739, quoting 28 USC 2255(h)(2).

[104] 466 US at 687.

more serious charges or the imposition of a more severe sentence." *Cooper*, 566 US at ___, ___. Because the respondent established "that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea [offer,]" and because he received a sentence after trial that was "3½ times greater than he would have received under the plea[,]" the *Strickland* test was satisfied. *Cooper*, 566 US at ___.

Although defense counsel's erroneous advice and failure to inform the defendant of the 25–year mandatory minimum sentence for a conviction of the charged offense "fell below an objective standard of reasonableness[,]" the defendant was not entitled to reinstatement of a rejected plea offer where the record demonstrated that "it was not reasonably probable that he would have accepted the . . . offer[]" had he been properly advised. *People v Douglas (Douglas II)*, 496 Mich 557, 593-594, 598 (2014), aff'g in part and rev'g in part *People v Douglas (Douglas I)*, 296 Mich App 186 (2012), citing *Cooper*, 566 US at ___ (additional citations omitted). In *Douglas II*, 496 Mich at 591, defense counsel "never informed the defendant that he faced a 25-year mandatory minimum prison sentence if convicted [as charged] of [first-degree criminal sexual conduct (CSC-I) (victim under 13)] at trial[, but instead] . . . mistakenly advised [him] that a conviction at trial would result in a potential maximum sentence of 20 years in prison, and that he would likely have to serve approximately five to eight years before being eligible for parole." After rejecting two pretrial plea offers, one for the defendant to plead guilty to attempted criminal sexual conduct and one for him to plead guilty to fourth-degree criminal sexual conduct, the defendant was convicted of CSC-I and sentenced to the mandatory 25-year prison term. *Id*. at 561, 591. The Court of Appeals, in addition to concluding that the defendant was entitled to a new trial on the basis of several evidentiary errors and ineffective assistance of counsel at trial, held that he had "established that counsel's failure to inform him of the actual consequences of accepting or rejecting [a] plea offer prejudiced him[,]" and that he was therefore entitled to reinstatement of the prosecution's second plea offer. *Douglas I*, 296 Mich App at 204-208 (because the defendant "show[ed] that the offer was valid, that he would have accepted the offer, and that his convictions and sentences would have been much less severe than those that were imposed after trial[,] . . . [he] satisfied both prongs of the *Strickland*[105] test[]").

[105] 466 US at 687.

On appeal, the Michigan Supreme Court affirmed *Douglas I*, 296 Mich App 186, to the extent that it granted the defendant a new trial on the basis of evidentiary errors and ineffective assistance of counsel at trial. *Douglas II*, 496 Mich at 561-583. However, the *Douglas II* Court further held that "the Court of Appeals erred in concluding that the prosecution's prior plea offer must be reinstated," because "the trial court did not reversibly err in determining that the defendant [had] not shown prejudice as a result of counsel's deficient performance." *Id*. at 561, 591. Rather, "the record amply support[ed the trial court's] conclusion that, even had the defendant been properly advised of the consequences he faced if convicted at trial," it "would not have affected this particular defendant's decision to reject the pleas . . in light of his protestations of innocence." *Id*. at 595, 598.

"Although a defendant's proclamation of innocence does not relieve counsel of his [or her] normal responsibilities under *Strickland*[, 466 US 668], it may affect the advice counsel gives." *Burt v Titlow*, 571 US ___, ___, ___ (2013) (holding that the Sixth Circuit Court of Appeals erred in overturning the Michigan Court of Appeals' decision that defense counsel's advice to the respondent to withdraw his guilty plea satisfied *Strickland*, "given that [the] respondent was claiming innocence and only days away from offering self-incriminating testimony in open court pursuant to a plea agreement involving an above-guidelines sentence[]").

2. Remedy

When "a defendant shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence," the remedy, like other Sixth Amendment remedies, "should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" *Cooper*, 566 US at ___, quoting *United States v Morrison*, 449 US 361, 364 (1981). Noting that "[t]he specific injury" suffered in such a case may not always be redressed simply by imposition of a lesser sentence, the *Cooper* Court explained that in some cases—for example, if the offer was for a guilty plea to a less serious count or if a mandatory sentence applied to the charged offense—"the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Cooper*, 566 US at ___. If the trial court does so, "the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id*. at ___.

"In implementing a remedy . . . , the trial court must weigh various factors[,]" including "a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions[]" and "any information concerning the crime that was discovered after the plea offer was made." *Cooper*, 566 US at ___. In *Cooper*, 566 US at ___, where defense counsel's ineffective assistance resulted in the respondent's rejection of a plea offer to dismiss two charges and to recommend a much lower sentence than the sentence imposed following trial, "[t]he correct remedy . . . [was] to order the State to reoffer the plea agreement." If the respondent accepted the offer, the Michigan trial court would then have discretion, under MCR 6.302(C)(3), to determine "whether to vacate the convictions and resentence [the] respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence [the] respondent accordingly, or to leave the convictions and sentence from trial undisturbed." *Cooper*, 566 US at ___.

A defendant is not entitled to reinstatement of a rejected plea offer if he or she is unable to establish that "it was . . . reasonably probable that[, but for counsel's deficient advice,] he [or she] would have accepted the . . . offer." *Douglas II*, 496 Mich at 593-595, 598 (citing *Cooper*, 566 US at ___, and holding that "the record amply support[ed the trial court's] conclusion that, even had the defendant been properly advised of the consequences he faced if convicted at trial," it "would not have affected this particular defendant's decision to reject the [prosecution's plea offers] . . . in light of his protestations of innocence[]").

Where the trial court determined that the defendant's decision to reject a plea offer, under which she would have pleaded guilty of first-degree criminal sexual conduct in exchange for a ten-year minimum sentence, "was the result of ineffective assistance on the part of her trial counsel and ordered the prosecutor to re-offer the plea[,]" the trial court was "without authority to impose[]" the proposed sentence because "MCL 750.520b(2)(b) provides that the statutorily authorized punishment for the offense to which [the] defendant [was] to plead guilty under the proposed plea agreement is 'imprisonment for . . . not less than 25 years.'" *People v Kreiner*, 497 Mich 1024, 1024-1025 (2015) (citing *Cooper*, 566 US ___, and remanding to "the Court of Appeals to address the appropriate remedy, if any, for [the] defendant").

6.25 Plea—Collateral Attack of Earlier Plea or Conviction Used for Purposes of Sentence Enhancement

Prior convictions, where the record indicates that there was no counsel or formal waiver of counsel (when a right to counsel existed), may not be used to enhance punishment in a subsequent proceeding. *People v Garvie*, 148 Mich App 444, 453 (1986); *People v Schneider*, 132 Mich App 214, 216 (1984).

MCR 6.610(F)(3) incorporates the standard espoused by *Garvie* and *Schneider*:

> "Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to any attorney, a subsequent charge or sentence may not be enhanced because of this [prior] conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this [prior] conviction."

"[A]s a matter of federal law, a criminal defendant possesses the constitutional right to collaterally challenge a prior conviction that is used to enhance a sentence when that defendant alleges that the prior conviction was procured in violation of the Sixth Amendment right to counsel." *People v Carpentier*, 446 Mich 19, 28 (1994), citing *Custis v United States*, 511 US 485 (1994). However, the United States Supreme Court "expressly limited the availability of collateral challenges to these particular Sixth Amendment violations and refused to extend the opportunity for relief to other alleged constitutional infirmities." *Carpentier*, 446 Mich at 29, citing *Custis*, 511 US at 487. The United States Supreme Court "further emphasized that such a limitation was compelled by the ease of administration that accompanied such exceptional claims, and by the federal court's interest in promoting the finality of judgments for other non-*Gideon* [*v Wainwright*, 372 US 335 (1963)] challenges." *Carpentier*, 446 Mich at 29, citing *Custis*, 511 US at 497.

A violation of the right to counsel with respect to prior plea-based convictions is also subject to collateral attack under Michigan law. *People v Ingram*, 439 Mich 288, 296-297 (1992). While the state has "a compelling interest in championing the finality of criminal judgments . . . Michigan has recognized the unique import of a defendant's constitutional right to counsel." *Carpentier*, 446 Mich at 29. "[A]n alleged *Gideon*[, 372 US 335] violation constitutes a jurisdictional defect that may be collaterally challenged by a convicted criminal defendant." *Carpentier*, 446 Mich at 29-30. However, this type of collateral attack is time-limited: "[a] collateral attack on a prior conviction underlying a present charge may not be made after a defendant's plea of guilty to the present charge is accepted." *People v Roseberry*, 465 Mich 713, 723 (2002).

A prior plea-based misdemeanor conviction, obtained without benefit of counsel but for which no incarceration was imposed, may be used in a subsequent criminal prosecution for purposes of sentence augmentation. *People v Reichenbach*, 459 Mich 109, 120 (1998). See also *Nichols v United States*, 511 US 738, 747 (1994) (the use of counselless misdemeanor convictions, where no prison term was imposed, to enhance the prison term for a subsequent offense was consistent with the Sixth and Fourteenth Amendments, because reliance on those types of convictions is consistent with the traditional understanding of the sentencing process, which is less exacting than the process of establishing guilt).

Part C: Circuit Court Arraignments

6.26 Introduction

The *arraignment* discussed in this part refers to the arraignment that occurs *after* a defendant's preliminary examination, rather than the initial district court arraignment discussed in Part A.[106]

"A defendant has a constitutional right to adequate notice of the charges against him [or her]." *People v Darden*, 230 Mich App 597, 600 (1998). A defendant has a right to be arraigned on the information, at which time the information is read to the defendant or the court informs him or her of the substance of the charges contained in the information. MCR 6.113(A); MCR 6.113(B). "'The purpose of an arraignment is to provide formal notice of the charge against the accused.'" *People v Henry (After Remand)*, 305 Mich App 127, 158 (2014), quoting *People v Waclawski*, 286 Mich App 634, 704 (2009).

MCL 766.13 provides, in relevant part:

> "If the [district court judge] determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charing the defendant with committing a felony, the [judge] shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the

[106] The *arraignment* discussed in Part A is the initial arraignment that is conducted in district court for all misdemeanors and felonies. See MCL 600.8311(c); MCR 6.610(D); MCR 6.610(H). The *circuit court arraignment* discussed in this part occurs either after evidence presented at the preliminary examination establishes probable cause that the defendant committed the offense charged, or after the defendant validly waives his or her right to a preliminary examination. See MCL 766.13; MCL 600.8311(f); MCR 6.110; MCR 6.111.

> [district court judge] may conduct the circuit court arraignment as provided by court rule."

MCL 600.8311(f) also specifically grants the district court jurisdiction over "[c]ircuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under . . . MCL 766.13[,]" and provides further that "[s]entencing for felony cases and misdemeanor cases not cognizable by the district court shall be conducted by a circuit judge."

> **Note:** MCR 6.113(A) provides that, unless waived or delayed, "or as otherwise permitted by [court rule], the court with trial jurisdiction must arraign the defendant on the scheduled date."MCR 6.111 provides an exception to the general rule of MCR 6.113(A) that post-bindover arraignments must occur in the court with trial jurisdiction over the offense charged. MCR 6.111(A) provides:
>
> > "The circuit court arraignment may be conducted by a district judge in criminal cases cognizable in the circuit court immediately after the bindover of the defendant. A district court judge shall take a felony plea as provided by court rule if a plea agreement is reached between the parties. Following a plea, the case shall be transferred to the circuit court where the circuit judge shall preside over further proceedings, including sentencing. The circuit court judge's name shall be available to the litigants before the plea is taken."
>
> Although MCL 766.4, MCL 766.13, and MCL 600.8311[107] were amended, effective May 20, 2014, to specifically authorize district court judges to accept felony pleas and to conduct circuit court arraignments, and although MCR 6.111 was amended, effective January 1, 2015, to reflect these changes, MCR 6.113 has not been amended to reflect the statutory changes.

6.27 Circuit Court Arraignment Procedures

The court must arraign the defendant on the scheduled date, unless the defendant waives arraignment or the court for good cause, or as otherwise permitted by the court rules, orders a delay. MCR 6.113(A). However, failure to hold the arraignment on the scheduled date constitutes harmless error, unless the defendant demonstrates actual prejudice. *Id.*; see also *People v Nix*, 301 Mich App 195, 208 (2013) ("[a]

[107] See 2014 PA 123 and 2014 PA 124, both effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015.

showing of prejudice is required to merit relief for the failure to hold a circuit court arraignment[]"). The court may hold the arraignment before the preliminary examination transcript has been prepared and filed. MCR 6.113(A).

MCR 6.113 addresses the procedures for conducting the post-bindover arraignment.

- The prosecutor must provide the defendant with a copy of the information[108] before he or she is asked to plead. MCR 6.113(B).

- Unless the defendant waives it at arraignment, the court must either tell the defendant the substance of the offense charged in the information or require that the information be read to the defendant. *Id.*

- The court is required to advise the defendant of his or her plea options if the defendant has waived legal representation. *Id.*

- Pleas taken in district court under MCR 6.111 after arraignment for an offense not cognizable in district court must conform to the applicable provisions of MCR 6.301, MCR 6.302, MCR 6.303, and MCR 6.304.[109] MCR 6.111(C). See also MCR 6.113(B). A district court judge *must* take a felony plea as provided by court rule if a plea agreement is reached between the parties. MCR 6.111(A).

- Once a plea is taken under MCR 6.111, it is governed by MCR 6.310. MCR 6.111(C).

- A verbatim record of the arraignment must be made. MCR 6.113(B).

A circuit court may submit a local administrative order to the State Court Administrator that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information and any notice of intent to seek an enhanced sentence under MCL 769.13.[110] MCR 6.113(E). See SCAO Model Local Administrative Order 26—Elimination of Circuit Court Arraignments.[111]

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[108] The content of the information is described in MCR 6.112(D).

[109] See Part B of this chapter for a full discussion of these court rules.

[110] See also MCR 6.112(F), which provides that "[a] notice of intent to seek an enhanced sentence pursuant to MCL 769.13 . . . must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense."

Committee Tip:

Before taking a defendant's plea or proceeding to trial, it is imperative to confirm, on the record, that the defendant has been given a copy of the information.

6.28 Waiver of Circuit Court Arraignment

A defendant who is represented by an attorney has the right to enter a plea of not guilty or to stand mute without formal arraignment. MCR 6.113(C). "A defendant may waive a trial court arraignment by filing a written statement 'acknowledging that the defendant has received a copy of the information, has read or had it read or explained, understands the substance of the charge, waives arraignment in open court, and pleads not guilty to the charge or stands mute.'" *People v Manning*, 243 Mich App 615, 624 n 27 (2000), quoting MCR 6.113(C). See also *People v Payne*, 285 Mich App 181, 191-192 (2009) (trial court properly accepted waiver of arraignment by mail); SCAO Form CC 261, *Waiver of Arraignment and Election to Stand Mute or Enter Not Guilty Plea*.[112]

The written waiver statement must be signed by the defendant and the defendant's attorney and must acknowledge

- that the defendant received a copy of the information;
- that the defendant read the information or has had it read or explained to him or her;
- that the defendant understands the substance of the charge against him or her;
- that the defendant waives an arraignment in open court; and
- that the defendant stands mute or pleads not guilty to the offense charged in the information. MCR 6.113(C).

Note: This subrule may lack practical application to arraignments conducted under MCR 6.111. MCR 6.111(A) specifically permits the district court judge to accept a plea to an offense not cognizable by the district court *immediately*

[111] Available at http://courts.mi.gov/Administration/SCAO/Resources/LAOs/LAO26-model.rtf.

[112] Available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/felonycriminal/cc261.pdf.

> following bindover. Bindover after a defendant's preliminary examination or waiver presumes that the defendant *is present* in court. Neither MCR 6.610(H) nor MCR 6.113(C) indicates a method by which a defendant may provide a written waiver of his or her preliminary examination.

A waiver of the circuit court arraignment is not invalid "[m]erely because the prosecutor had not filed the information . . . before [the defendant] waived the arraignment[]" if "[the] defendant had an opportunity to review the information before it was filed[] . . . and understood the charges against him[or her]." *People v Henry (After Remand)*, 305 Mich App 127, 158-159 (2014) (citing *People v Nix*, 301 Mich App 195, 208 (2013), and noting that under these circumstances, "[the] defendant [could not] show prejudice[]" from the court's failure to conduct the circuit court arraignment).

Chapter 7: Pretrial Release

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7.1 Right to Pretrial Release

Every person charged with a noncapital offense has the right to bail. *Stack v Boyle*, 342 US 1, 4 (1951). "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v Salerno*, 481 US 739, 755 (1987). "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." *Stack*, 342 US at 4. "[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused." *Id*. at 5.

Everyone is entitled to bail, except in the following instances:

> (1) if the defendant is charged with murder or treason;
>
> (2) if the defendant is charged with first-degree criminal sexual conduct, armed robbery, or kidnapping with the intent to extort money or something valuable ("unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person[]");
>
> (3) if the defendant is charged with committing a violent felony[1] *and* at the time the violent felony was committed, he or she was on probation, parole, or released pending trial for another violent felony; or
>
> (4) if the defendant is charged with committing a violent felony *and* during the 15 years preceding the commission of the violent felony, the defendant was convicted of two or more violent felonies. [MCR 6.106(B)(1); Const 1963, art 1, § 15.]

Before denying bail, the court must also find evident proof that the defendant committed the crime or the presumption of guilt is great. MCR 6.106(B)(1); Const 1963, art 1, § 15.

In general, at a defendant's arraignment on the complaint and/or warrant (unless an order was previously entered), the court must order that, pending trial, the defendant: (1) be held in custody; (2) be released on personal recognizance or an unsecured appearance bond; or (3) be released conditionally, with or without money bail (ten percent, cash or surety). MCR 6.106(A).

[1] A violent felony is defined in MCR 6.106(B)(2) as "a felony, an element of which involves a violent act or threat of a violent act against any other person."

If the court determines that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense. MCR 6.106(B)(3). Within those 90 days, the trial must begin or the court must immediately schedule a hearing and set the amount of bail. *Id*.

"The court must state the reasons for an order of custody on the record and on a form approved by the State Court Administrator's Office entitled 'Custody Order.'" MCR 6.106(B)(4). See SCAO Form MC 240, *Order for Pretrial Release/Custody/Amended*.[2] "The completed form must be placed in the court file." MCR 6.106(B)(4).

The custody order may contain conditions that are "reasonably necessary to maintain the integrity of the judicial proceedings or are reasonably necessary for the protection of one or more named persons." MCR 6.106(B)(5); see also MCR 6.106(D)(2)(m).

7.2 Types of Pretrial Release

A. Personal Recognizance

1. Generally

"If the defendant is not ordered held in custody pursuant to MCR 6.106(B), the court must order the pretrial release of the defendant on personal recognizance, or on an unsecured appearance bond . . . ." MCR 6.106(C). Bond is subject to the conditions that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released. *Id*. However, if the court determines that such release will not reasonably ensure the appearance of the defendant, or that such release will present a danger to the public, the court may deny the defendant a personal recognizance bond. *Id*.

2. Speedy Trial–Misdemeanor and Felony Cases

A defendant must be released on personal recognizance if he or she has been incarcerated for a period of 28 days or more (misdemeanor cases) or 180 days or more (felony cases) "to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode . . . unless the court finds by clear and convincing evidence that the

[2] Available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/generalcriminal/mc240.pdf.

defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community." MCR 6.004(C). The 28-day and 180-day periods do not include:

> "(1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,
>
> (2) the period of delay during which the defendant is not competent to stand trial,
>
> (3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,
>
> (4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either
>
> > (a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or
> >
> > (b) exceptional circumstances justifying the need for more time to prepare the state's case,
>
> (5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and
>
> (6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion." MCR 6.004(C)(1)-(6).

B. Conditional Release

The court may order the pretrial release of the defendant subject to any condition (in addition to the conditions attending a personal recognizance bond) the court determines is reasonably necessary to ensure the appearance of the defendant, and to ensure public safety. MCR 6.106(D)(1)-(2).

The court may require the defendant to do any of the following, as set out in MCR 6.106(D)(2):

> "(a) make reports to a court agency as are specified by the court or the agency;
>
> (b) not use alcohol or illicitly use any controlled substance;
>
> (c) participate in a substance abuse testing or monitoring program;
>
> (d) participate in a specified treatment program for any physical or mental condition, including substance abuse;
>
> (e) comply with restrictions on personal associations, place of residence, place of employment, or travel;
>
> (f) surrender driver's license or passport;
>
> (g) comply with a specified curfew;
>
> (h) continue to seek employment;
>
> (i) continue or begin an educational program;
>
> (j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;
>
> (k) not possess a firearm or other dangerous weapon;
>
> (l) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;
>
> (m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order,[3] the most restrictive provision of the orders shall take precedence until the conflict is resolved. The court may make this condition effective immediately on entry of a pretrial release order and while [the] defendant remains in custody if the

[3] Examples include Personal Protection Orders (PPOs), MCR 3.706(A)(1) ("An order granting a personal protection order must include . . . [a] statement that the [PPO] has been entered, listing the type or types of conduct enjoined"), and protective orders against domestic violence as provided in MCR 3.700 *et seq*. MCR 3.207(A).

> court determines it is reasonably necessary to maintain the integrity of the judicial proceedings or it is reasonably necessary for the protection of one or more named persons[;]
>
> (n) satisfy any injunctive order made a condition of release; or
>
> (o) comply with any other condition, including the requirement of money bail as described in [MCR 6.106](E), reasonably necessary to ensure the defendant's appearance as required and the safety of the public."

The court may order certain defendants charged with a crime involving domestic violence,[4] or any other assaultive crime,[5] to wear an electronic monitoring device[6] as a condition of pretrial release. MCL 765.6b(6). Before ordering a defendant to wear an electronic monitoring device, "the court shall consider the likelihood that the defendant's participation in electronic monitoring will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the victim prior to trial." *Id.* A defendant must agree to pay the cost of the device and monitoring, or perform community service in lieu of payment, in order to be released under the provisions of MCL 765.6b(6). If the court orders a defendant to be monitored by a GPS device as a condition of release pursuant to MCL 765.6b(6), the court must require as a condition of release that the defendant not purchase or possess a firearm. MCL 765.6b(3).

Violation of a bond condition is punishable by criminal contempt because "a court's decision in setting bond is a court order." *People v Mysliwiec*, ___ Mich App ___, ___ (2016) (noting that "[s]pecifically, a bail decision is an interlocutory order[,]" and rejecting the defendant's contention "that a defendant may not be held in contempt of court for the violation of bond conditions because they are not court orders[]") (citation omitted). A "defendant's bond condition prohibiting the use of alcohol was a court order punishable by contempt[]" under MCL 600.1701(g) where the trial court orally ordered that a condition of the defendant's bond was to abstain from possession or consumption of any alcohol and "then

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[4] "'Domestic violence' means that term as defined in . . . MCL 400.1501." MCL 765.6b(6)(b).

[5] "'Assaultive crime' means that term as defined in [MCL 770.9a]." MCL 765.6b(6)(a).

[6] "'Electronic monitoring device' includes any electronic device or instrument that is used to track the location of an individual, but does not include any technology that is implanted or violates the corporeal body of the individual." MCL 765.6b(6)(c).

issued written mittimuses requiring that [the] defendant have no alcohol." *Mysliwiec*, ___ Mich App at ___.[7]

C. Money Bail

"If the court determines for reasons it states on the record that the defendant's appearance or the protection of the public cannot be otherwise assured, money bail, with or without conditions described in [MCR 6.106(D)], may be required." MCR 6.106(E).

MCR 6.106(E)(1)(a) provides that the court may require the defendant to post, at the defendant's option[8]:

> "(*i*) a surety bond that is executed by a surety approved by the court in an amount equal to 1/4 of the full bail amount, or
>
> (*ii*) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by
>
> > [A] a cash deposit, or its equivalent, for the full bail amount, or
> >
> > [B] a cash deposit of 10 percent of the full bail amount, or, with the court's consent,
> >
> > [C] designated real property[.]"

MCR 6.106(E)(1)(b) provides that the court may require the defendant to post, at the defendant's option[9]:

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[7] For discussion of contempt of court, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

[8] However, in certain instances, a defendant may not exercise the options set out in MCR 6.106(E)(1)(a). For example, a person arrested pursuant to a bench warrant issued under MCL 552.631 for failure to pay child support, or pursuant to a felony warrant for failure to pay spousal or child support under MCL 750.165, must deposit a cash performance bond in an amount not less than $500.00 or 25 percent of the arrearage, whichever is greater; in its discretion, the trial court may set the cash bond in an amount up to 100 percent of the arrearage, plus costs. MCL 552.631(3); MCL 750.165(3); see also MCL 552.632. Additionally, MCL 765.6a requires the posting of "a cash bond or a surety other than the [bail] applicant if the applicant (1) [i]s charged with a crime alleged to have occurred while on bail pursuant to a bond personally executed by him; or (2) [h]as been twice convicted of a felony within the preceding [five] years."

[9] However, in certain instances, a defendant may not exercise the options set out in MCR 6.106(E)(1)(a). For example, a person arrested pursuant to a bench warrant issued under MCL 552.631 for failure to pay child support, or pursuant to a felony warrant for failure to pay spousal or child support under MCL 750.165, must deposit a cash performance bond in an amount not less than $500.00 or 25 percent of the arrearage, whichever is greater; in its discretion, the trial court may set the cash bond in an amount up to 100 percent of the arrearage, plus costs. MCL 552.631(3); MCL 750.165(3); see also MCL 552.632. Additionally, MCL 765.6a requires the posting of "a cash bond or a surety other than the [bail] applicant if the applicant (1) [i]s charged with a crime alleged to have occurred while on bail pursuant to a bond personally executed by him; or (2) [h]as been twice convicted of a felony within the preceding [five] years."

> "(*i*) a surety bond that is executed by a surety approved by the court in an amount equal to the full bail amount, or
>
> (*ii*) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by
>
> > [A] a cash deposit, or its equivalent, for the full bail amount, or, with the court's consent,
> >
> > [B] designated real property."

When setting money bond, the court should recognize the constitutional mandate that "excessive bail shall not be required . . . ." Const 1963, art 1, § 16.

"Money bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the defendant will appear when his [or her] presence is required." *People v Edmond*, 81 Mich App 743, 747-748 (1978).

MCL 765.6(1) provides:

> "Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:
>
> > (a) The seriousness of the offense charged.
> >
> > (b) The protection of the public.
> >
> > (c) The previous criminal record and the dangerousness of the person accused.
> >
> > (d) The probability or improbability of the person accused appearing at the trial of the cause."

MCL 765.6(2) provides:

> "If the court fixes a bail amount under subsection (1) and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under subsection (1) and executed by a surety approved by the court."

For example, "if the full bail amount were set at $10,000 with a 10% deposit or a $2,500 surety bond, a defendant could post bail either

by paying $1,000 to the court . . . or by paying only $250 to a bond provider, who then would post a $2,500 bond with the court." SB 151 (S-1) Bill Analysis, 5/21/04.

D. Interim Bail

In general, a person accused of a criminal offense is entitled to post interim bail to obtain release before arraignment. MCL 765.4; MCL 765.6. However, "[n]o person charged with treason or murder shall be admitted to bail if the proof of his [or her] guilt is evident or the presumption great." MCL 765.5. See also Const 1963, art 1, § 15 (identifying additional offenses precluding bail "when the proof is evident or the presumption great"). The applicable procedures for bail depend on the nature of the offense and whether a magistrate is available to set the amount of bail.[10]

1. Warrant Specification of Interim Bail

Under MCL 765.1 and MCL 765.3, district court magistrates and judges of circuit courts, district courts, and municipal courts have statutory authority to set a specific bail amount on a warrant for an accused person.

> "Where permitted by law, the court may specify on the warrant the bail that an accused may post to obtain release before arraignment on the warrant and, if the court deems it appropriate, include as a bail condition that the arrest of the accused occur on or before a specified date or within a specified period of time after issuance of the warrant." MCR 6.102(D) (applicable to both misdemeanor and felony cases, MCR 6.001(A)-(B)).

MCR 6.102(D) "authorizes in felony cases the specification on the warrant of interim bail similar to the procedure currently authorized by statute in misdemeanor cases. See MCL 780.582 and MCL 780.585." 1989 Staff Comment to MCR 6.102.[11]

MCL 780.582 states "[e]xcept as otherwise provided in [MCL 780.582a],[12] if a person is arrested with a warrant for a misdemeanor or a violation of a city, village, or township

[10] Effective June 1, 2016, the Michigan Supreme Court conditionally approved proposed standards submitted pursuant to the Michigan Indigent Defense Commission Act (MIDCA) by the Michigan Indigent Defense Commission, including that "[w]here there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment." Administrative Order No. 2016-2, ___ Mich ___, ___ (2016). See Section 3.4(B) for discussion of the MIDCA.

ordinance, and the misdemeanor or violation is punishable by imprisonment for not more than 1 year or by a fine, or both, the provisions of [MCL 780.581][13] shall apply, except that the interim bond[14] shall be directed to the magistrate who has signed the warrant, or to any judge authorized to act in his or her stead."

MCL 780.585 states that "[i]n cases arising under [MCL 780.582], the magistrate issuing the warrant may endorse on the back thereof a greater or lesser amount for an interim bond."[15]

"The amount of bail shall not be excessive." MCL 765.6(1). When fixing the amount of bail, the court "shall consider and make findings on the record as to each of the following:

> (a) The seriousness of the offense charged.
>
> (b) The protection of the public.
>
> (c) The previous criminal record and the dangerousness of the person accused.
>
> (d) The probability or improbability of the person accused appearing at the trial of the cause." MCL 765.6.

For traffic offenses or misdemeanors, "[t]he amount of bail shall be:

> (a) Sufficient to assure compliance with the conditions set forth in the bail bond.
>
> (b) Not oppressive.

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[11] MCR 6.102(D) "further authorizes the court, in its discretion, to include an expiration date for the interim bail provision. This option permits the court to set a cut-off date, beyond which release may not be obtained, to prevent the release of a person who may be avoiding arrest. However, setting of an expiration date may also defeat the purpose of the interim bail provision if it is too short or is used in a case where the arrest of the defendant is sought solely in a passive fashion such as awaiting the defendant's stop for a traffic offense." 1989 Staff Comment to MCR 6.102.

[12] MCL 780.582a concerns the holding period and protective or release conditions for release of misdemeanor prisoners.

[13] MCL 780.581 concerns taking a person arrested without a warrant for a misdemeanor or violation of an ordinance before a magistrate, interim bond, and holding certain arrested persons in a holding cell, holding center, lockup, or county jail.

[14] MCL 780.582 refers to interim *bond*; MCR 6.102 refers to interim *bail*. For purposes of this chapter, we will defer to the term used in the authority being cited; otherwise, the term *interim bail* will be used.

[15] MCL 780.585 refers to interim *bond*; MCR 6.102 refers to interim *bail*. For purposes of this chapter, we will defer to the term used in the authority being cited; otherwise, the term *interim bail* will be used.

> (c) Commensurate with the nature of the offense charged.
>
> (d) Considerate of the past criminal acts and conduct of the defendant.
>
> (e) Considerate of the financial ability of the accused.
>
> (f) Uniform whether the bail bond be executed by the person for whom bail has been set or by a surety." MCL 780.64(1).

When a person is charged with a traffic offense or a misdemeanor, and the offense is punishable by a fine only, the amount of the bail must not exceed double the amount of the maximum penalty. MCL 780.64(2).

When a person is charged with a traffic offense or a misdemeanor and is punished solely by the imposition of a fine, "the amount of bail shall not exceed double the amount of the fine." MCL 780.64(3).

> "If a person is arrested for an ordinance violation or a misdemeanor punishable by imprisonment for not more than 1 year or a fine, or both, and if the defendant's operator's or chauffeur's license is not expired, suspended, revoked, or canceled, then the court may require the defendant, in place of other security for the defendant's appearance in court for trial or sentencing or, in addition, to release of the defendant on personal recognizance, to surrender to the court his or her operator's or chauffeur's license." MCL 780.64(4).

2. Release on Interim Bail

"If an accused has been arrested pursuant to a warrant that includes an interim bail provision, the accused must either be arraigned promptly or released pursuant to the interim bail provision." MCR 6.102(F). This provision applies to both misdemeanor and felony cases. MCR 6.001(A)-6.001(B).

"The accused may obtain release by posting the bail on the warrant and by submitting a recognizance to appear before a specified court at a specified date and time, provided that

> (1) the accused is arrested prior to the expiration date, if any, of the bail provision;

> (2) the accused is arrested in the county in which the warrant was issued, or in which the accused resides or is employed, and the accused is not wanted on another charge;[16]
>
> (3) the accused is not under the influence of liquor or controlled substance;[17] and
>
> (4) the condition of the accused or the circumstances at the time of arrest do not otherwise suggest a need for judicial review of the original specification of bail."[18] MCR 6.102(F).

"Implicit in [MCR 6.102(F)] is the condition that the accused be satisfactorily identified as the person named in the warrant. Additionally, the rule does not preclude the police agency from requiring the accused to submit to photographing and fingerprinting[19] before being released." 1989 Staff Comment to MCR 6.102.

3. Conditional Release[20]

"If a judge or district court magistrate sets interim bond under [MCL 780.582a], the judge or magistrate shall consider and may impose the condition that the person released shall not have or attempt to have contact of any kind with the victim." MCL 780.582a(2). A magistrate's or judge's authority to impose other conditions of release or other protective measures is not limited by MCL 780.582a. MCL 780.582a(7).

A judge or district court magistrate imposing protective conditions under MCL 780.582a must "inform the person on the record, either orally or by a writing that is personally

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[16] "The purpose of this limitation is to preclude the availability of interim bail to a person who may be avoiding arrest." 1989 Staff Comment to MCR 6.102.

[17] MCR 6.102(F)(3) "does not preclude interim bail release of an accused who was under the influence of liquor at the time of arrest but who is no longer in that condition." 1989 Staff Comment to MCR 6.102.

[18] MCR 6.102(F)(4) "is a catch-all provision and should be applied in good faith." 1989 Staff Comment to MCR 6.102.

[19] See MCL 28.243 for information on the collection of biometric data, which includes fingerprints.

[20] Certain individuals are not eligible to be released on interim bond under MCL 780.581, and instead, must "be held until he or she can be arraigned or have interim bond set by a judge or district court magistrate if either of the following applies: "(a) The person is arrested without a warrant under . . . MCL 764.15a, or a local ordinance substantially corresponding to that section[,]" or "(b) The person is arrested with a warrant for a violation of . . . MCL 750.81 [or] [MCL] 750.81a, or a local ordinance substantially corresponding to [MCL 750.81] and the person is a spouse or former spouse of the victim of the violation, has or has had a dating relationship with the victim of the violation, or is a person who resides or has resided in the same household as the victim of the violation. As used in this subdivision, 'dating relationship' means that term as defined in . . . MCL 600.2950." MCL 780.582a(1).

delivered to the person, of the specific conditions imposed and that if the person violates a condition of release, he or she will be subject to arrest without a warrant and may have his or her bond forfeited or revoked and new conditions of release imposed, in addition to any other penalties that may be imposed if he or she is found in contempt of court." MCL 780.582a(3).

An order or amended order issued under MCL 780.582a(3) that imposes protective conditions must contain all the following:

> "(a) A statement of the person's full name.
>
> (b) A statement of the person's height, weight, race, sex, date of birth, hair color, eye color, and any other identifying information the judge or district court magistrate considers appropriate.
>
> (c) A statement of the date the conditions become effective.
>
> (d) A statement of the date on which the order will expire.
>
> (e) A statement of the conditions imposed, including, but not limited to, the condition prescribed in [MCL 780.582a(3)]." MCL 780.582a(4).

The judge or district court magistrate must "immediately direct a law enforcement agency within the jurisdiction of the court, in writing, to enter an order or amended order issued under [MCL 780.582a(3)] into the law enforcement information network [(LEIN)] as provided by . . . MCL 28.211 to [MCL 28.215]." MCL 780.582a(5). If the order or amended order is rescinded, the judge or district court magistrate must immediately order the law enforcement agency to remove the order from the LEIN. *Id*.

If a person granted conditional release on bail under MCL 765.6b or MCL 780.582a is subsequently arrested without a warrant for violating the conditions imposed, the arresting police agency or the officer in charge of the jail may release the person on interim bond if, in the opinion of the agency or officer, it is safe to do so. MCL 764.15e(3). The bond may not be more than $500 and must request the person to appear at the opening of court the next business day. *Id*. If the person is held more than 24 hours before being brought before the court, "the officer in charge of the jail shall note in the jail records why it was not safe to release the defendant on interim bond[.]" *Id*.

> "[I]f an arrestee is released on bail, development of DNA identification revealing the defendant's unknown violent past can and should lead to the revocation of his [or her] conditional release. . . . It is reasonable in all respects for the State to use an accepted [DNA] database to determine if an arrestee is the object of suspicion in other serious crimes, suspicion that may provide a strong incentive for the arrestee to escape and flee." *Maryland v King*, 569 US ___, ___, ___ (2013) (holding that the collection and analysis of an arrestee's DNA according to Combined DNA Index System (CODIS) procedures "[a]s part of a routine booking procedure for serious offenses[]" did not violate the Fourth Amendment where the DNA sample was used to identify the arrestee as the perpetrator of an earlier unsolved rape).

7.3 Denial of Pretrial Release

A. Generally

Bail may be denied to a defendant charged with murder or treason when the proof of the defendant's guilt is evident or the presumption of guilt is great. Const 1963, art 1, § 15; MCL 765.5; MCR 6.106(B)(1)(a)(*i*); *People v Milosavleski*, 450 Mich 954 (1996). The court may also deny pretrial release to a defendant charged with committing a violent felony when one of the following circumstances applies:

> (1) at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony. MCR 6.106(B)(1)(a)(*ii*)(A).
>
> (2) during the 15 years preceding the commission of the violent felony, the defendant had been convicted of two or more violent felonies under the laws of Michigan or substantially similar laws of the United States or another state arising out of separate incidents. MCR 6.106(B)(1)(a)(*ii*)(B).

MCR 6.106(B)(2) defines a "violent felony" as "a felony, an element of which involves a violent act or threat of a violent act against any other person."

The court may also deny pretrial release to a defendant charged with first-degree criminal sexual conduct, armed robbery, or kidnapping with the intent to extort money or other valuable item, if it finds that proof of the defendant's guilt is evident or the presumption of guilt is great. MCR 6.106(B)(1)(b). The court still

may grant pretrial release to the defendant if it finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person. *Id*.

"DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness[,]" and will thus "inform a court's determination whether the individual should be released on bail." *Maryland v King*, 569 US ___, ___, ___ (2013) (holding that the collection and analysis of an arrestee's DNA according to Combined DNA Index System (CODIS) procedures "[a]s part of a routine booking procedure for serious offenses[]" did not violate the Fourth Amendment where the DNA sample was used to identify the arrestee as the perpetrator of an earlier unsolved rape).

The rules of evidence do not apply to proceedings with respect to release on bail or otherwise. MRE 1101(b)(3).

B. Custody Hearing

If a defendant has been denied pretrial release pursuant to MCR 6.106(B), the defendant may be held in custody for 90 days, excluding delays attributable to the defense. MCR 6.106(B)(3). After 90 days, the defendant's trial must begin or the court must immediately schedule a hearing and set bail for the defendant. *Id*. The court may conduct a custody hearing if the defendant is being held in custody pursuant to MCR 6.106(B) and either the defendant or the prosecutor requests a custody hearing. MCR 6.106(G)(1). The party seeking modification of a release decision has the burden of going forward. MCR 6.106(H)(2)(c). The purpose of the hearing is to permit the parties to litigate all of the issues relevant to challenging or supporting a custody decision under MCR 6.106(B). MCR 6.106(G)(1). The rules of evidence, except those pertaining to privilege, are not applicable to the custody hearing. MCR 6.106(G)(2)(b).

C. Custody Order and Conditions

"The court must state the reasons for an order of custody on the record and on a form approved by the State Court Administrator's Office entitled 'Custody Order.'" MCR 6.106(B)(4). See SCAO Form MC 240, *Order for Pretrial Release/Custody/Amended*.[21] "The completed form must be placed in the court file." MCR 6.106(B)(4).

[21] Available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/generalcriminal/mc240.pdf.

The custody order may include "reasonably necessary" conditions, including restrictions on contact with any named person. MCR 6.106(B)(5)-(6) provide:

> "(5) The court may, in its custody order, place conditions on the defendant, including but not limited to restricting or prohibiting [the] defendant's contact with any other named person or persons, if the court determines the conditions are reasonably necessary to maintain the integrity of the judicial proceedings or are reasonably necessary for the protection of one or more named persons. If an order under this paragraph is in conflict with another court order, the most restrictive provisions of the orders shall take precedence until the conflict is resolved.
>
> (6) Nothing in [MCR 6.106] limits the ability of a jail to impose restrictions on detainee contact as an appropriate means of furthering penological goals."

See also MCR 6.106(D)(2)(m), which provides, in relevant part:

> "If [a conditional pretrial release] order . . . limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of the orders shall take precedence until the conflict is resolved. The court may make [a condition limiting or prohibiting contact] effective immediately on entry of a pretrial release order and while [the] defendant remains in custody if the court determines it is reasonably necessary to maintain the integrity of the judicial proceedings or it is reasonably necessary for the protection of one or more named persons."

7.4 Rationale for Decision

In deciding which release to use and what terms and conditions to impose, the court, according to MCR 6.106(F)(1), should consider the following information:

> "(a) defendant's prior criminal record, including juvenile offenses;
>
> (b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
>
> (c) defendant's history of substance abuse or addiction;

> (d) defendant's mental condition, including character and reputation for dangerousness;
>
> (e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;
>
> (f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
>
> (g) the availability of responsible members of the community who would vouch for or monitor the defendant;
>
> (h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence; and,
>
> (i) any other facts bearing on the risk of nonappearance or danger to the public."[22]

"If the court orders the defendant held in custody pursuant to [MCR 6.106(B)] or released on conditions in [MCR 6.106(D)] that include money bail, the court must state the reasons for its decision on the record. The court need not make a finding on each of the enumerated factors." MCR 6.106(F)(2).

The rules of evidence do not apply to proceedings with respect to release on bail or otherwise. MRE 1101(b)(3).

7.5 Motion to Modify Release Decision

The court, on its own or on the request of either party, may modify a prior release decision after "finding that there is a substantial reason for doing so[.]" MCR 6.106(H)(2). "The party seeking modification of a release decision has the burden of going forward." MCR 6.106(H)(2)(c). The rules of evidence do not apply to proceedings with respect to release on bail or otherwise. MRE 1101(b)(3).

MCR 6.106(H)(2) provides, in part:

> "(a) Prior to Arraignment on the Information. Prior to the defendant's arraignment on the information, any court before which proceedings against the defendant are pending may,

[22] See *Maryland v King*, 569 US ___, ___, ___ (2013), noting that "DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness[,]" and will thus "inform a court's determination whether the individual should be released on bail."

> on the motion of a party or its own initiative and on finding that there is a substantial reason for doing so, modify a prior release decision or reopen a prior custody hearing.
>
> (b) Arraignment on Information and Afterwards. At the defendant's arraignment on the information and afterwards, the court having jurisdiction of the defendant may, on the motion of a party or its own initiative, make a de novo determination and modify a prior release decision or reopen a prior custody hearing."

Motion Regarding Amount of Bail. Without a transcript of the lower court proceedings, there cannot be review of the amount of bail set. See *People* v *Szymanski*, 406 Mich 944 (1979). Upon a finding of an abuse of discretion by the lower court in fixing bail, the trial court may only modify the bail provisions (including the amount of the money bail) after having considered the factors mandated by the court rule governing bail (MCR 6.106(F)(1)(a)-(i)). *People* v *Weatherford*, 132 Mich App 165, 170 (1984). See also *Atkins v Michigan*, 644 F2d 543, 550 (CA 6, 1981) (the Michigan Court of Appeals erred by twice cancelling the defendant's bond without stating its reasons for doing so).

"In reviewing a bail decision, more than perfunctory compliance [with the applicable court rule] is required . . . . Defendants must also be allowed to present any additional material evidence, which could have originally been considered in the setting of bail, if the evidence was not available when bail was originally set. A record must be made of this proceeding. . . ." *People* v *Spicer*, 402 Mich 406, 410-411 (1978).

> "Money bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his presence is required." *People* v *Edmond*, 81 Mich App 743, 747-748 (1978), citing *Stack v Boyle*, 342 US 1 (1951).

7.6 Bond Forfeiture

A. Default, Arrest of Accused, and Release of Surety

Upon a finding that a defendant has failed to comply with conditions of release, the court may issue a warrant.[23] See SCAO Form MC 229, *Petition and Bench Warrant*.[24] See also State Court Administrative Memorandum, 2007-05, Amendment to Surety

[23] Additionally, violation of a bond condition is punishable by criminal contempt. *People v Mysliwiec*, ___ Mich App ___, ___ (2016). See Section 7.2(B).

[24] Available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/general/mc229.pdf.

Bond Process, August 9, 2007.[25] "Upon issuing the bench warrant, the court should set a show cause date, prepare SCAO Form MC 218, *Order Revoking Release and Forfeiting Bond*, *Notice of Intent to Enter Judgment*, and sign and mail the form to the defendant, the surety agent, anyone who posted bond, and the prosecutor." State Court Administrative Memorandum, 2007-05(C)(1)(b).

MCR 6.106(I)(2)(a)-(b) provide:

> "(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.
>
> > (a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bail or bond has been ordered, to anyone who posted bail or bond.
> >
> > (b) If the defendant does not appear and surrender to the court within 28 days after the revocation date, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant and anyone who posted bail or bond for an amount not to exceed the full amount of the bail, and costs of the court proceedings, or if a surety bond was posted, an amount not to exceed the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. If the defendant does not within that period satisfy the court that there was compliance with the conditions of release other than appearance or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant alone for an amount not to exceed the full amount of the bond, and costs of the court proceedings."

"[A] bond revocation hearing [is] not a 'critical stage' in [a criminal] proceeding because it [does] not have any effect on the

[25] Available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2007-05.pdf.

determination of [the] defendant's guilt or innocence[;]" accordingly, "the presence of counsel [is] not constitutionally required[]" at such a hearing. *People v Collins (Jesse)*, 298 Mich App 458, 470 (2012).

MCL 765.26 provides:

> "(1) In all criminal cases where a person has entered into any recognizance for the personal appearance of another and such bail and surety afterwards desires to be relieved from responsibility, he or she may, with or without assistance, arrest or detain the accused and deliver him or her to any jail or to the sheriff of any county. In making the arrest or detainment, he or she is entitled to the assistance of any peace officer.
>
> (2) The sheriff or keeper of any jail is authorized to receive the principal and detain him or her in jail until he or she is discharged. Upon delivery of his or her principal at the jail by the surety or his or her agent or any officer, the surety shall be released from the conditions of his or her recognizance.
>
> (3) Whenever the prosecuting attorney of a county is satisfied that a person who has been recognized to appear for trial has absconded, or is about to abscond, and that his or her sureties or either of them have become worthless, or are about to dispose or have disposed of their property for the purpose of evading the payment or the obligation of such bond or recognizance or with intent to defraud their creditors, and that prosecuting attorney makes a satisfactory showing to this effect to the court having jurisdiction of that person, the court or judge shall promptly grant a mittimus to the sheriff or any peace officer of that county, commanding him or her forthwith to arrest the person so recognized and bring him or her before the officer issuing the mittimus and on the return of that mittimus may, after a hearing on the merits, order him or her to be recommitted to the county jail until such time as he or she gives additional and satisfactory sureties, or is otherwise discharged."

"MCL 765.26 . . . intend[s] to reward a surety who, through its own diligence, apprehends and surrenders the principal to the appropriate authorities." *In re Forfeiture of Surety Bond (People v Meadows)*, 208 Mich App 369, 372-373 (1995) (surety "was not released from liability inasmuch as it failed to pursue its statutory remedies despite the fact that it was plainly aware of [the]

defendant's whereabouts during the period between his default and subsequent arrest[]").

Additionally, MCL 765.28(1) provides:

> "(1) If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. After the default is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear. The notice shall be served upon each surety in person or left at the surety's last known business address. Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. Execution shall be awarded and executed upon the judgment in the manner provided for in personal actions."

"MCL 765.28(1) and MCR 3.604(I)(2) do not conflict[]" because they govern "two separate and distinct events[;]" MCL 765.28(1) governs "the procedure for providing a surety notice of a default[,]" while MCR 3.604(I)(2) governs "the procedure to provide notice of a hearing on a motion for judgment." *In re Forfeiture of Bail Bond (People v Stanford)*, ___ Mich App ___, ___ (2016) (additionally noting that if a conflict existed, the statute would control, as provided by MCR 3.604(A)).

Under MCL 765.28(1), "[o]nce a default occurs, the surety must be given an opportunity to appear before the court and show cause why the judgment should not be entered against it for the full amount of the bond. If good cause is not shown, the court must enter a judgment against the surety on the bond for any amount it deems appropriate up to the full amount of the bond." *In re Forfeiture of Surety Bond*, 208 Mich App at 374 (citations omitted). "The judgment is as 'enforceable, reviewable and appealable' as any other judgment rendered in a personal action." *Id.*, quoting *People v Evans*, 434 Mich 314, 331 (1990) (additional citations omitted).

However, "a court's failure to comply with the seven-day notice provision of MCL 765.28(1) bars forfeiture of a bail bond posted by a surety." *In re Bail Bond Forfeiture (People v Gaston)*, 496 Mich 320, 339-340 (2014), overruling *In re Forfeiture of Bail Bond (On Remand) (People v Moore)*, 276 Mich App 482 (2007). "When a statute provides that a public officer 'shall' do something within a specified period of time and that time period is provided to safeguard someone's rights or the public interest, . . . it is mandatory, and the public officer who fails to act timely is prohibited from proceeding as if he or she had acted within the statutory notice period." *Gaston*, 496 Mich at 339-340 ("vacat[ing] the trial court's orders to the extent that the orders forfeited the bail bond posted by the [appellant-]surety and ordered the surety to pay [the full amount of the bond]").

Where "the trial court did not even mail the notice [of the defendant's default] until the eighth day[]" following the defendant's failure to appear, "the notice was not timely[]" under MCL 765.28(1). *Stanford*, ___ Mich App at ___, additionally citing MCR 6.106(I)(2). Furthermore, although "notice of the hearing on the motion to enter judgment against the surety was timely pursuant to MCR 3.604(I)(2)[]" where it was mailed by the court 29 days before the scheduled hearing, "that [did] not obviate the fact [that] the surety did not receive proper notice of the default itself[;]" rather, because "the court failed to give the surety immediate notice within seven days[]" of the default, "the court [could not] require the surety to pay the surety bond." *Stanford*, ___ Mich App at ___.

B. Setting Aside Bond Forfeiture

The trial court must consider a motion to set aside a bond forfeiture judgment under the standards set out in MCL 600.4835 and MCL 765.28(2). *People v Bray*, 481 Mich 888, 889 (2008).

MCL 600.4835 provides:

> "The circuit court for the county in which such court was held, or in which such recognizance was taken, may, upon good cause shown, remit any penalty, or any part thereof, upon such terms as appear just and equitable to the court. But this section does not authorize such court to remit any fine imposed by any court upon a conviction for any criminal offense, nor any fine imposed by any court for an actual contempt of such court, or for disobedience of its orders or process."

MCL 765.28(2)-(3) provide:

> "(2) Except as provided in [MCL 765.28](3), the court shall set aside the forfeiture and discharge the bail or

> surety bond within 1 year from the date of forfeiture judgment if the defendant has been apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person. If the bond or bail is discharged, the court shall enter an order to that effect with a statement of the amount to be returned to the surety.
>
> (3) [MCL 765.28](2) does not apply if the defendant was apprehended more than 56 days after the bail or bond was ordered forfeited and judgment entered and the surety did not fully pay the forfeiture judgment within that 56-day period."

Similarly, MCL 765.15(1) provides, in relevant part:

> "The court shall set aside the forfeiture and discharge the bail or bond, within 1 year from the time of the forfeiture judgment, in accordance with [MCL 765.15](2) if the person who forfeited bond or bail is apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person."

MCL 765.28, as amended in 2002 "to allow for a [bond] forfeiture judgment to be set aside," is not "the sole remedy for commercial sureties[;]" rather, "the remedy under MCL 600.4835 [(generally permitting the court to remit any penalty)] remains viable[.]" *Calvert Bail Bond Agency, LLC v St Clair Co*, ___ Mich App ___, ___ (2016) (holding that the trial court erred in dismissing the plaintiff bail bond agency's claim for remittance under MCL 600.4835 on the ground that MCL 765.28 was the exclusive remedy for the return of sums paid to the defendant county on bond forfeiture judgments). "MCL 765.28 provides a 'safe harbor,' where, if certain conditions are satisfied, a surety is *entitled* to a remittance of the forfeiture it paid[, and the] court lacks any discretion[;] . . . MCL 600.4835, on the other hand, gives the court discretion to remit forfeited recognizances[]" as it deems just and equitable. *Calvert Bail Bond Agency*, ___ Mich App at ___. Therefore, the two statutes "do not conflict[,] . . . because each statute can be given its full effect without affecting the other." Id. at ___.

"[A] person is 'apprehended' within the meaning of [MCL 765.15(1)][26] when that person is held in custody in another state." *In re Forfeiture of Bail Bond*, 209 Mich App 540, 543 (1995) (trial court erred in denying a bond depositor's motion to set aside a forfeiture

[26] Effective May 1, 1994, 1993 PA 343 amended MCL 765.15 and redesignated former MCL 765.15(a) as MCL 765.15(1). The amendment did not substantively change this provision.

on the ground that the defendant, who had been taken into custody in New Jersey on unrelated charges seven months after the forfeiture was entered and remained in custody there at the time of the depositor's motion, "had not been returned to the county where the bond was posted[]" and had therefore not been "apprehended" within the meaning of former MCL 765.15[a]); see also *In re Forfeiture of Bail Bond*, 229 Mich App 724, 728 (1998) ("the first criterion [of former MCL 765.15(a) (that the defendant be 'apprehended')] was met by [the] defendant's apprehension in New Jersey within one year of the forfeiture judgment[]").

"[T]he following considerations are among those relevant to determining whether 'the ends of justice have not been thwarted': (1) the depositor's role, if any, in hiding the defendant, failing to assist in the apprehension of the defendant, or affirmatively assisting in the apprehension of the defendant; (2) the length of time elapsing between the defendant's failure to appear and his ultimate apprehension; (3) the extent to which evidence has been lost (e.g., death or unavailability of witnesses, fading of witnesses' memories) or whether the prosecution's case has otherwise been affected by the delay; (4) the extent to which the defendant has committed additional crimes before apprehension, and the seriousness of such crimes; (5) the extent to which there has been a psychological or emotional effect upon the initial victim as a result of the defendant being at large; (6) the extent to which the defendant's apprehension was involuntary; and (7) the extent to which extradition or other legal procedures have been required, thereby causing additional delays in carrying out justice." *In re Forfeiture of Bail Bond*, 229 Mich App at 729-731 (noting that "[w]hile a depositor obviously risks losing the funds deposited if the defendant fails to appear, a depositor does not, by virtue alone of providing funds for a bond, undertake an affirmative duty to produce the defendant[; r]ather, . . . the depositor's involvement, if any, in either hiding or apprehending the defendant is simply a relevant consideration in determining whether 'the ends of justice have not been thwarted[]'").

"[T]he costs of 'apprehending the person' under [MCL 765.15(1)] include a jurisdiction's costs in locating the defendant, as well as any extradition costs." *In re Forfeiture of Bail Bond*, 229 Mich App at 731-732 (noting that "[t]he county's costs to locate the defendant (e.g., man-hours of investigative time, professional and support personnel costs, telephone calls) are all part of the costs of apprehension[]").

7.7 Termination of Release Order

MCR 6.106(I) provides, in part:

> "(I) Termination of Release Order.
>
> > (1) If the conditions of the release order are met and the defendant is discharged from all obligations in the case, the court must vacate the release order, discharge anyone who has posted bail or bond, and return the cash (or its equivalent) posted in the full amount of the bail, or, if there has been a deposit of 10 percent of the full bail amount, return 90 percent of the deposited money and retain 10 percent.
> >
> > * * *
> >
> > (3) If money was deposited on a bail or bond executed by the defendant, the money must be first applied to the amount of any fine, costs, or statutory assessments imposed and any balance returned, subject to [MCR 6.106](I)(1)."
>
> "If the bond or bail is discharged, the court shall enter an order to that effect with a statement of the amount to be returned to the surety." MCL 765.28(2).

See also MCL 765.15(2)-(3), which provide:

> "(2) If bond or bail is discharged, the court shall enter an order with a statement of the amount to be returned to the depositor. If the court ordered the defendant to pay a fine, costs, restitution, assessment, or other payment, the court shall order the fine, costs, restitution, assessment, or other payment collected out of cash bond or bail personally deposited by the defendant under [MCL 765.1 *et seq*.], and the cash bond or bail used for that purpose shall be allocated as provided in [MCL 775.22]. Upon presentation of a certified copy of the order, the treasurer or clerk having the cash, check, or security shall pay or deliver it as provided in the order to the person named in the order or to that person's order.
>
> (3) If the cash, check, or security is in the hands of the sheriff or any officer other than the treasurer or clerk, the officer holding it shall dispose of the cash, check, or security as the court orders upon presentation of a certified copy of the court's order."

7.8 Revocation of Release on Conviction

MCL 770.9a(1) requires that a defendant convicted of an assaultive crim[27]e and awaiting sentence be detained and not be admitted to bail unless the court finds by clear and convincing evidence that the defendant is not likely to pose a danger to other persons.

MCL 770.9b requires that a defendant awaiting sentence who was convicted of sexually assaulting a minor be detained and not be admitted to bail.

7.9 Release Pending Appeal

"During the time between the trial court judgment and the decision of the court to which an appeal is taken, the trial judge may admit the defendant to bail, if the offense charged is bailable[28] and if the offense is not an assaultive crime as defined in [MCL 770.]9a[.]" MCL 770.8.

"During the pendency of an appeal or application for leave to appeal, a justice or judge of the court in which the appeal or application is filed may admit the defendant to bail, if the offense charged is bailable and if the offense is not an assaultive crime as defined in [MCL 770.]9a . . . or sexual assault of a minor as described in [MCL 770.]9b. . . ." MCL 770.9.

The right of a defendant to bail upon appeal by the prosecutor is governed by MCL 770.9a and MCL 765.7. MCL 770.12(3). MCL 765.7 provides that "[i]f an appeal is taken by or on behalf of the people of the state of Michigan from a court of record, the defendant shall be permitted to post bail on his or her own recognizance, pending the prosecution and determination of the appeal, unless the trial court determines and certifies that the character of the offense, the respondent, and the questions involved in the appeal, render it advisable that bail be required."

7.10 Standard of Review

A district court magistrate's decision is reviewed de novo as an appeal of right in district court. *People v Wershe*, 166 Mich App 602, 607 (1988); MCL 600.8515. A bail decision by a district court judge at the close of a

---

[27] MCL 770.9a(3) defines "assaultive crime" as an offense against a person described in MCL 750.81c(3), 750.82, 750.83, 750.84, 750.86, 750.87, 750.88, 750.89, 750.90a, 750.90b(a), 750.90b(b), 750.91, 750.200 to 750.212a, 750.316, 750.317, 750.321, 750.349, 750.349a, 750.350, 750.397, 750.411h(2)(b), 750.411h(3), 750.411i, 750.520b, 750.520c, 750.520d, 750.520e, 750.520g, 750.529, 750.529a, 750.530, and 750.543a to 750.543z.

[28] See MCR 6.106(B)(1)-(4) and Const 1963, art 1, § 15, for offenses for which a defendant is not entitled to bail.

preliminary examination does not constitute a review of the initial bail decision made by a magistrate at the arraignment; the bail decision following preliminary examination is a new bail decision and, once entered, it is the decision subject to review and deference as set out in the court rules. *Wershe*, 166 Mich App at 606.

A trial court's decision regarding forfeiture of a bail bond is reviewed for an abuse of discretion. See *In re Forfeiture of Surety Bond*, 208 Mich App 369, 375 (1995); *People v Munley*, 175 Mich App 399, 403 (1989).

If a party files a motion seeking review of a release decision, the lower court's order may not be stayed, vacated, modified, or reversed unless the reviewing court finds an abuse of discretion. MCR 6.106(H)(1). The circuit court must have a transcript of the district court proceedings concerning the release decision; without a transcript, the issue cannot be reviewed. *People v Szymanski*, 406 Mich 944 (1979). If the reviewing court finds an abuse of discretion, it may only modify the release decision after considering the factors set out in MCR 6.106(F)(1)(a)–MCR 6.106(F)(1)(i).[29] *People v Weatherford*, 132 Mich App 165, 170 (1984) (trial court should not have increased the amount of the defendant's bail because there was no finding of an abuse of discretion, and because the trial court did not consider any of the court rule factors in raising the amount of bail).

Decisions on a motion to set aside a bond forfeiture are reviewed for an abuse of discretion. *In re Forfeiture of Bail Bond*, 229 Mich App at 727.

[29] See Section 7.5(C).

Chapter 8: Pretrial Motions and Proceedings

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8.1 Using This Chapter

This chapter contains procedural and substantive information regarding pretrial motions. It includes discussion on several very common types of pretrial motions. However, if a topic is covered elsewhere in this publication, it may refer the reader to that location for discussion of any relevant pretrial motions. In addition, due to the volume of material addressing motions to suppress evidence based on various search and seizure issues, that topic appears on its own in Chapter 9.

Part A: Pretrial Procedures

8.2 Pretrial Motions—Generally

The Michigan Court Rules do not provide for motion practice in criminal proceedings; therefore, the rules for civil motion practice apply. MCR 6.001(D).

A. Form

An application to the court for an order in a pending action must be by motion. MCR 2.119(A)(1). A motion must be in writing (unless made during a hearing or trial); state with particularity the grounds and authority on which it is based; state the relief or order sought; and be signed by the party or attorney. *Id*.

"A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based, and must comply with the provisions of MCR 7.215(C)[1] regarding citation of unpublished Court of Appeals opinions." MCR 2.119(A)(2). Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 double spaced pages, exclusive of attachments and exhibits. *Id*. See *People v Leonard*, 224 Mich App 569, 578-579 (1997) (defendant granted permission to file a brief in excess of the 20-page limit where the matter was "very complicated").

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[1] MCR 7.215(C)(1) provides:

> "An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears."

B. Timing

Unless a different period is set by the court rules or by the court for good cause, a written motion, notice of the hearing on the motion, and any supporting brief or affidavits must be served at least nine days (if served by mail), or at least seven days (if served by delivery), before the time set for the hearing. MCR 2.119(C)(1).

Unless a different period is set by the court rules or by the court for good cause, any response to a motion (including a brief or affidavits), required or permitted by the court rules, must be served at least five days (if served by mail), or at least three days (if served by delivery), before the hearing. MCR 2.119(C)(2).

If the court sets a different time for serving a motion or response, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order. MCR 2.119(C)(3).

Unless the court sets a different time, a motion must be filed at least seven days before the hearing, and any response to a motion required or permitted by the court rules must be filed at least three days before the hearing. MCR 2.119(C)(4).

C. Pretrial Conference/Scheduling

Because the court rules do not specifically provide for pretrial conferences in felony criminal cases, MCR 2.401 applies. MCR 6.001(D). MCR 2.401 gives the court broad case management authority, including the authority to require the parties to attend scheduled pretrial conferences. MCR 2.401(E); MCR 2.401(F).

At an early scheduling conference under MCR 2.401(B)(1), a pretrial conference under MCR 2.401(C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events as the court deems appropriate, including filing motions, completing discovery, and scheduling a pretrial conference or trial. MCR 2.401(B)(2)(a).

The scheduling of events in a scheduling order must take into consideration the nature and complexity of the case, including the issues involved; the number and location of parties and potential witnesses, including experts; the extent of expected and necessary discovery; and the availability of reasonably certain trial dates. MCR 2.401(B)(2)(b).

The scheduling of events in a scheduling order requires meaningful consultation with all counsel of record, whenever reasonably practicable. MCR 2.401(B)(2)(c).

D. Evidentiary Hearing

An evidentiary hearing must be conducted whenever a defendant challenges the admissibility of evidence on constitutional grounds. *People v Reynolds (Anthony)*, 93 Mich App 516, 519 (1979). Where a defendant fails to substantiate the claim that the evidence is inadmissible on constitutional grounds or it is apparent that the defendant's allegations do not rise to the level of a constitutional violation, no evidentiary hearing must be held. *People v Johnson (James)*, 202 Mich App 281, 285 (1993).

Under MCR 6.110(D)(2), the court need not conduct an evidentiary hearing during a preliminary examination if there is a preliminary showing that the evidence in question is admissible.

At an evidentiary hearing, burdens of proof and presumptions come into play. The phrase "burden of proof" encompasses both the burden of production and the burden of persuasion. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 178-179 (1987).

The party with the burden of production must introduce sufficient evidence to have the relevant issue considered by the court. *McKinstry*, 428 Mich at 179. The burden of production may shift from one party to the other. *Id.* at 179. For example, legal presumptions may help a party meet its burden of production and shift the burden of production to the opposing party. "In criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by [MRE 302]." MRE 302(a). In a criminal case, a presumption creates an inference which does not bind the fact-finder. It also places the burden of producing evidence regarding the presumed fact on the defendant, while the ultimate burden of proof remains with the prosecution.

The burden of persuasion—to prove beyond a reasonable doubt that the defendant committed each element of the charged offense—always remains with the prosecution, and the defendant is not required to prove anything. M Crim JI 1.9.

If the attorneys for the parties agree, a motion to exclude evidence may be decided on the information contained in the preliminary examination transcript. *People v Kaufman*, 457 Mich 266, 275-276 (1998); MCR 6.110(D)(2). Presumably, the parties can also stipulate to use the transcript of another hearing or stipulate to facts necessary to resolve the motion.

The rules of evidence, except those with respect to privilege, do not apply to the determination of questions of fact preliminary to

admissibility of evidence under MRE 104(a). MRE 1101(b)(1). Preliminary questions arise regarding the admissibility of a great deal of evidence: competency of witnesses, especially expert witnesses; the existence of privileges (e.g., did the privileged relationship exist? was the statement confidential or made in the presence of a third party?); whether foundational requirements for the admission of hearsay under an exception have been met (e.g., unavailability of the declarant, where required); whether a confession was voluntary; whether evidence was seized in accordance with Fourth Amendment requirements, etc. Accordingly, MRE 104(a) is concerned with meeting the technical or constitutional requirements for admissibility.

The question whether the technical requirements of the rules of evidence have been met for the admissibility of evidence must be resolved by the trial court. If there is conflicting proof on the question and credibility is an issue, these disputes must be resolved by the trial court in making its decision.

In determining whether the proffered evidence is admissible under the technical requirements of the rules of evidence, the trial court applies a preponderance of the evidence test. *Bourjaily v United States*, 483 US 171, 175 (1987).

While the court rules do not require the trial court to make findings of fact with respect to pretrial motions, "it is always preferable for purposes of appellate review that a trial court explain its reasoning and state its findings of fact with respect to pretrial motions . . . ." *People v Shields*, 200 Mich App 554, 558 (1993); MCR 2.517(A)(4).

A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Mischley*, 164 Mich App 478, 481-482 (1987).

E. Disposition

Although a trial court's findings of fact and conclusions of law may facilitate appellate review, they are unnecessary in motion decisions unless required by court rule. MCR 2.517(A)(4). If the court makes findings and conclusions, they may be stated on the record or in a written opinion. MCR 2.517(A)(3).

A trial court sitting without a jury for a criminal case must make a record of the reasons for its verdict; in other words, the court must articulate its findings of fact for the record. *People v Jackson (Robert)*, 390 Mich 621, 627 (1973). No similar mandate exists for a trial court's disposition of pretrial evidentiary matters. *People v Oliver (Kenneth)*, 63 Mich App 509, 522-523 (1975).

Judges and judicial officers should promptly determine matters submitted to them. Specifically, MCR 8.107(A) provides:

> "Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and for production of transcripts. Decisions, when possible, should be made from the bench or within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission. For the purpose of this rule, the time of submission is the time the last argument or presentation in the matter was made, or the expiration of the time allowed for filing the last brief or production of transcripts, as the case may be."

Matters not decided within 56 days of submission must be identified on the quarterly "Report as to Matters Undecided." MCR 8.107(B).

F. When Findings of Fact and Conclusions of Law Are Required

MCR 2.517(A)(1) requires that, in actions tried without a jury or with an advisory jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." A court's decision should include "[b]rief, definite, and pertinent findings and conclusions on the contested matters . . . without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). The requirement that a trial judge articulate the reasons for a decision in its findings of fact applies to criminal cases as well as civil cases. *Jackson (Robert)*, 390 Mich at 627. A trial court's articulation of the law it applied to the facts of the case is designed to aid appellate review. *People v Johnson (Gary) (On Rehearing)*, 208 Mich App 137, 141 (1994). Findings are sufficient if it appears that the court was aware of the issues and correctly applied the law. *People v Smith (Kerry)*, 211 Mich App 233, 235 (1995).

Findings of fact and conclusions of law are required in certain situations, including, but not limited to:

- bench trials, MCR 6.403;
- when there is joint representation of defendants, MCR 6.005(F)(3);
- directed verdicts (reasons required), MCR 6.419(E);
- when evidence of a criminal conviction is used for impeachment purposes, MRE 609;

- when sentencing a juvenile, MCR 6.931(E)(5);
- probation revocation, MCR 6.445(E)(2); and
- post-appeal evidentiary hearings, MCR 6.508(E).

G. Standard of Review

A trial court's decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. See *People v Collins (Richard)*, 239 Mich App 125, 138-139 (1999) ("the trial court should decide whether a hearing is necessary").

A trial court's findings of fact are reviewed for clear error. MCR 2.613(C).

8.3 Discovery

A. Generally

MCR 6.201[2] governs and defines the scope of criminal discovery in Michigan. *People v Phillips (Paul)*, 468 Mich 583, 588-589 (2003). Either the subject of discovery must be set out in MCR 6.201, or the party seeking discovery must show good cause why the trial court should order the requested discovery. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 448 (2006).

The parties must comply with the requirements of MCR 6.201 within 21 days of a request under the rule, unless otherwise ordered by the court. MCR 6.201(F).

If a party discovers additional information or material subject to disclosure under MCR 6.201 at any time, the party, without further request, must promptly notify the other party. MCR 6.201(H).

B. Mandatory Disclosure

MCR 6.201(A) governs mandatory disclosure and provides that in addition to disclosures required by provisions of law other than MCL 767.94a[3], a party upon request must provide all other parties:

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[2] MCR 6.201 only applies to felony cases. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 450 n 6 (2006).

[3] Discovery in criminal cases is governed by MCR 6.201, not by MCL 767.94a. Administrative Order 1994-10.

> "(1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;
>
> (2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;
>
> (3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;
>
> (4) any criminal record that the party may use at trial to impeach a witness;
>
> (5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and
>
> (6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction, including the cost of providing copies of electronically recorded statements. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence."

MCR 6.201(B) governs discovery of information known to the prosecuting attorney, and provides that upon request, the prosecuting attorney must provide each defendant:

> "(1) any exculpatory information or evidence known to the prosecuting attorney;[4]
>
> (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

[4] Due process also requires that the prosecution turn over known exculpatory evidence. *Brady v Maryland*, 373 US 83 (1963).

> (3) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;
>
> (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
>
> (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case."

MCR 6.201(K) states "[e]xcept as otherwise provided in MCR 2.302(B)(6), electronic materials are to be treated in the same manner as nonelectronic materials under [MCR 6.201]. Nothing in [MCR 6.201] shall be construed to conflict with MCL 600.2163a."

A tacit agreement between the prosecution and a witness concerning potential or actual leniency related to the witness's criminal conduct is favorable evidence subject to disclosure under *Brady v Maryland*, 373 US 83 (1963). *Bell v Bell*, 512 F3d 223, 233 (CA 6, 2008). A witness's informal and mutual agreement with law enforcement officials and the prosecution (that charges against the witness would be reduced in exchange for his testimony against the defendant) constituted evidence favorable to the defendant because of its impeachment value and should have been disclosed under *Brady*, 373 US 83. *Akrawi v Booker*, 572 F3d 252, 263-264 (CA 6, 2009). However, "'[t]he focus of required disclosure [under MCR 6.201(B)(5) and *Brady*, 373 US 83,] is not on factors which may motivate a prosecutor in dealing subsequently with a witness, but rather on facts which may motivate the witness in giving certain testimony.'" *People v Bosca*, 310 Mich App 1, 32-33 (2015) (holding that where the details of a witness's plea agreement were read into the trial court record and defense counsel was given the opportunity to cross-examine the witness, "the prosecution made the requisite disclosure sufficient to permit the jury to evaluate [the witness's] credibility[;]" although "[the] defendant contend[ed] that the trial court ultimately was more lenient (than the prosecution had recommended) in its sentencing of [the witness], there [was] no demonstration that the more lenient sentencing was the result of any undisclosed sentencing agreement[]") (citations omitted and alteration added).

"When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder." MCR 6.201(D).

C. Discretionary Disclosure

MCR 6.201(I) governs discretionary disclosure, and provides that "[o]n good cause shown, the court may order a modification of the requirements and prohibitions of [MCR 6.201]."

For example, because a videotape of a defendant's post-arrest Datamaster breath test is not a subject of mandatory discovery expressly listed in MCR 6.201(A), and is not contemplated by the categories of discoverable evidence described in MCR 6.201(B), a trial court may not compel its discovery absent good cause. *Greenfield*, 271 Mich App at 450-452. A prosecutor's failure to produce evidence not addressed by MCR 6.201's description of discoverable evidence does not constitute "good cause" for entry of an order under MCR 6.201(I) to produce such evidence. *Greenfield*, 271 Mich App at 451-454.

D. Prohibited Disclosure/Privilege[5]

MCR 6.201(C)(1) governs prohibited discovery, and provides that "[n]otwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in [MCR 6.201(C)](2)."

MCR 6.201(C)(2) states:

> "If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.
>
> > (a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the trial court shall suppress or strike the privilege holder's testimony.
> >
> > (b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege

[5] For additional discussion of discovery and privilege, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 1.

> is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
>
> (c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
>
> (d) The court shall seal and preserve the records for review in the event of an appeal
>
> > (*i*) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or
> >
> > (*ii*) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.
>
> (e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide."

If a defendant can demonstrate a possible need for an informant's testimony, the court should conduct an in camera hearing to interview the informant to determine whether the informant can offer helpful testimony. *People v Underwood (Lanford)*, 447 Mich 695, 706 (1994).

Work product of the prosecution is not discoverable, *People v Gilmore*, 222 Mich App 442, 453 (1997), including attorneys' notes of interviews with witnesses whom the attorney intends to call at trial. *People v Holtzman*, 234 Mich App 166, 168-169 (1999).

E. Discovery Violation

Under MCR 6.201(J), if a party fails to comply with MCR 6.201, the court, in its discretion, may:

> (1) order the party to provide the discovery or permit the inspection of materials not previously disclosed;
>
> (2) grant a continuance;

(3) prohibit the party from introducing in evidence the material not disclosed; or

(4) enter such other order as it deems just under the circumstances.

Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. MCR 6.201(J).

Willful violation by counsel of an applicable discovery rule or an order issued pursuant to an applicable discovery rule may subject counsel to appropriate sanctions by the court. MCR 6.201(J).

Additionally, "'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution[,]'" and irrespective of whether defense counsel exercised "reasonable diligence" to discover the evidence. *People v Chenault*, 495 Mich 142, 149, 152, 155 (2014), quoting *Brady*, 373 US at 87, and overruling *People v Lester*, 232 Mich App 262 (1998).[6] The *Brady* duty extends to impeachment evidence and exculpatory evidence. *Youngblood v West Virginia*, 547 US 867, 869 (2006). A *Brady* violation even occurs when the government fails to turn over evidence that is known only to the police, and not to the prosecutor. *Youngblood*, 547 US at 869-870.

"[D]ue process does not generally require the prosecution to seek and find exculpatory evidence, or search for evidence that will support a defendant's case[.]" *People v Dimambro*, ___ Mich App ___, ___ (2016), citing *People v Coy*, 258 Mich App 1, 21 (2003). However, "'the individual prosecutor [does have] a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including police[.]" *Dimambro*, ___ Mich App at ___, quoting *Kyles v Whitley*, 514 US 419, 437 (1995) (first alteration in original. In *Dimambro*, the Michigan Court of Appeals held that, where autopsy photographs that were under the control of the medical examiner were not turned over to either the prosecution or the defense until after the defendant's trial, "the prosecution's failure to disclose the . . . photographs constituted a *Brady* violation[;]" "whether inadvertent or not, . . . the prosecution suppressed the photographs for *Brady* purposes, despite the fact that the medical examiner had sole possession of them[.]"

[6] "In contrast to the three-factor *Brady* test articulated by the United States Supreme Court[in *Strickler v Greene*, 527 US 263, 281-282 (1999)]," the Michigan Court of Appeals "adopted a four-factor *Brady* test in 1998[]" that included the requirement that the defendant "'could [not] . . . have obtained [the evidence] himself [or herself] with any reasonable diligence[.]'" *Chenault*, 495 Mich at 151, quoting *Lester*, 232 Mich App at 281 (internal citation omitted). The *Chenault* Court "reject[ed] the addition of a diligence requirement to the *Brady* test and . . . overrule[d] *Lester*[, 232 Mich App 262]." *Chenault*, 495 Mich at 152.

Dimambro, ___ Mich App at ___. "[G]iven a county's medical examiner's duty [under the county medical examiners act, MCL 52.201 *et seq.*,] to act on the government's behalf in cases involving violent or unexpected deaths in Michigan, . . . (1) the medical examiner may be understood as 'acting on the government's behalf' in a particular case, and (2) evidence within the medical examiner's control may be imputed to the government, even if 'unknown to the prosecution.'" *Dimambro*, ___ Mich App at ___, quoting *Kyles*, 514 US at 437.

In order to establish a *Brady* violation, a defendant must establish that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material." *Chenault*, 495 Mich at 155, citing *Strickler v Greene*, 527 US 263, 281-282 (1999).

"To establish materiality[of alleged *Brady* evidence], a defendant must show that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" *Chenault*, 495 Mich at 150, quoting *United States v Bagley*, 473 US 667, 682 (1985). However, in evaluating the materiality of suppressed evidence, "'[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he [or she] received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Chenault*, 495 Mich at 157, quoting *Kyles*, 514 US at 434. See *Smith v Cain*, 565 US ___, ___ (2012) (the petitioner established a *Brady* violation where a police investigator's undisclosed notes contained statements directly contradicting an eyewitness's trial testimony; because the eyewitness's testimony constituted the sole evidence linking the petitioner to the crime, the evidence was "material" within the meaning of *Brady*, 373 US at 87); *Dimambro*, ___ Mich App at ___ (expert testimony regarding undisclosed medical examiner photographs "demonstrate[d] that there [was] a reasonable probability that the outcome of the trial [might] have been different had the photographs been disclosed to the defense[]" where the photographs may have revealed that the child-victim's injuries were not intentionally inflicted).

"Where the trial court has discretion as to how to handle claims of noncompliance with discovery orders, a hearing is required, not only to determine whether there has been a noncompliance but to inquire into the causes thereof, its impact, and any circumstances that might bear on the choice of an appropriate remedy." *People v Taylor (Robert)*, 159 Mich App 468, 475 n 9 (1987).

"When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252 (2002) (trial court did not abuse its discretion in denying the defendant's motion for a mistrial based on prosecution's inadvertent failure to disclose a police report).

If an inadvertent discovery violation is established, a trial court may grant a continuance, if requested, to alleviate any harm by allowing both parties to prepare for the new evidence without requiring the exclusion of relevant evidence. *People v Elston*, 462 Mich 751, 764 (2000).

Where the prosecution's failure to disclose a transcript of a witness's prior statements, given pursuant to an investigative subpoena, violated MCR 6.201(A)(2) but did not implicate the defendant's right to due process because the transcript contained no exculpatory evidence, the remedy fashioned by the trial court—precluding the prosecution from questioning the witness regarding the statements and allowing defense counsel to review the transcript before cross-examining the witness—did not constitute an abuse of discretion. *People v Jackson (Andre)*, 292 Mich App 583, 590-592 (2011).

F. Bill of Particulars

MCR 6.112(E) states that the court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense.

The provisions of MCL 767.44 are commonly known as "statutory short form." *People v Strutenski*, 39 Mich App 72, 73 (1972). For example, the statutory short form for murder is "A.B. murdered C.D."; the statutory short form for manslaughter is "A.B. killed C.D." MCL 767.44.

"When a statutory short-form information is used, the defendant has a statutory right to a bill of particulars, while when the common law long-form of information is used, the trial court may in its discretion order a bill of particulars." *People v Johnson (Henry)*, 427 Mich 98, 109-110 (1986). "Once a bill of particulars is supplied, a defendant has a right 'to have the trial confined to the particulars set up therein.'" *Id.* at 110, quoting *People v Ept*, 299 Mich 324, 326 (1941). Accordingly, "the procedural implementation of MCL 767.44 assures that the defendant will have notice in advance of trial of the factual basis underlying the alleged offense." *Johnson (Henry)*, 427 Mich at 110.

Where a preliminary examination adequately informs a defendant of the charge against him or her, the need for a bill of particulars is obviated. *People v Harbour*, 76 Mich App 552, 557 (1977).

G. Standard of Review

A trial court's decision regarding discovery is reviewed for an abuse of discretion. *Phillips (Paul)*, 468 Mich at 587.

A trial court's decision on a motion for mistrial based on a discovery violation is reviewed for an abuse of discretion. *Banks*, 249 Mich App at 252.

A trial court's decision regarding the appropriate remedy for noncompliance with a discovery order is reviewed for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597-598 (1997).

8.4 Witnesses—Disclosure, Production, and Appointment

A. Witness Disclosure

MCR 6.201(A)(1) requires a party to provide all other parties with the names and addresses of all witnesses the party may call at trial. Alternatively, a party may provide the name of the witness and make the witness available to the other party for interview. *Id*. The witness list may be amended without leave of the court no later than 28 days before trial. *Id*. **Note:** While MCL 767.94a concerns disclosure of certain material or information by the defendant to the prosecuting attorney, MCR 6.201 controls discovery in criminal cases. *People v Phillips (Paul)*, 468 Mich 583, 587-589 (2003); Administrative Order 1994-10[7].

MCL 767.40a(1) requires the prosecuting attorney to attach to the filed information a list of all witnesses known to the prosecuting attorney that may be called at trial, and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers. The prosecuting attorney is under a continuing duty to disclose the names of any further res gestae witnesses as they become known. MCL 767.40a(2). However, "the prosecution [does not have] an affirmative duty to present the 'entire res gestae,' or call at trial all of the witnesses who were present when a crime occurred." *People v Steanhouse*, 313 Mich App 1, 15 (2015) (citation omitted).

[7] Available at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/AOs/AOs-Responsive%20HTML5/index.html#t=AOs%2FAdministrative_Orders%2FAO_No_1994-10_%E2%80%94_Discovery_in_Criminal_Cases.htm.

"Although the prosecutor did not include [a potential witness] as a known res gestae witness on his witness list, the . . . omission did not prejudice [the] defendant[] . . . or violate his right to present a defense[;] . . . [b]ecause [the] defendant implicated [the potential witness] in the [crime], it [was] apparent that [the] defendant was aware that [the potential witness] could be a res gestae witness." *Steanhouse*, 313 Mich App at 15 (citations omitted). "Because [the potential witness] invoked his Fifth Amendment privilege against self-incrimination and refused to testify, neither the prosecution nor the defense could call [him] as a witness[;]" therefore, the prosecution did not "commit[] a plain error affecting [the] defendant's substantial rights by failing to include [the potential witness] on the witness list as a res gestae witness, notifying the trial court of the need to inform [the potential witness] of his Fifth Amendment right against self-incrimination, and failing to call [him] as a witness." *Id*. at 16 (citation omitted).

Ordinarily, late endorsement of witnesses should be permitted and a continuance granted to obviate any potential prejudice that might result. *People v Yost (Donna Alice)*, 278 Mich App 341, 379, 386 (2008). The decision to permit the late endorsement of a witness is reviewed for an abuse of discretion. *People v Callon*, 256 Mich App 312, 325-326 (2003).

B. Witness Location and Production

A fundamental element of due process is a defendant's right to present witnesses in his or her favor. *Washington (Jackie) v Texas*, 388 US 14, 19 (1967); US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1.

A prosecutor is obligated to provide reasonable assistance to locate witnesses on a defendant's request. *People v Cook*, 266 Mich App 290, 295 (2005). A prosecutor is not statutorily obligated to locate, endorse, and produce unknown persons who might be res gestae witnesses. *Id.* at 295.

1. Material Witness

If there is a material witness without whose testimony an indigent defendant cannot safely proceed to trial, the trial court may, in its discretion, order that a subpoena be issued and served on the defendant's behalf at the state's expense. MCL 775.15; *People v Thomas (William)*, 1 Mich App 118, 125 (1965). To implement a defendant's constitutional and statutory rights to compulsory process when a material witness resides outside of the state, Michigan has adopted the uniform act to "secure the attendance of witnesses from without a state in

criminal proceedings." *People v McFall*, 224 Mich App 403, 407-408 (1997); MCL 767.91 *et seq*. To properly invoke the procedures under the act, a defendant must "(1) designate the proposed witness'[s] location with a reasonable degree of certainty; (2) file a timely petition; and (3) make out a prima facie case that the witness'[s] testimony is material." *McFall*, 224 Mich App at 409.

If there is a danger of losing the testimony of a material witness, the trial court may require the witness to post bond, following a hearing on the matter. MCL 767.35; MCL 765.29.

The missing witness instruction, M Crim JI 5.12, provides: "_____ is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case." It may be appropriate for the trial court to instruct the jury with the missing witness instruction if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused, or if a prosecutor fails to provide reasonable assistance to locate a witness. *People v Perez*, 469 Mich 415, 420 (2003). The propriety of the instruction depends on the individual facts of the case. *Id.* at 420-421.

2. Appointment of Expert Witness for Indigent Defendant

In order for a trial court to appoint an expert witness for an indigent defendant, the defendant must show that he or she cannot safely proceed to trial without the witness. MCL 775.15; *People v Lueth*, 253 Mich App 670, 688 (2002) (defendant failed to show that he was unable to safely proceed without an expert accountant, where his motion for appointment of the expert was made two months after he had notice of restitution hearing). Also, a defendant must establish a nexus between the facts of his or her case and the need for an expert. *People v Tanner (Hattie)*, 469 Mich 437, 443 (2003). It is insufficient for a defendant to show a mere possibility that the requested expert will be of assistance. *Id.* at 443. "Without an indication that expert testimony would likely benefit the defense, it [is] not [an abuse of discretion] to deny without prejudice [a] motion for appointment of an expert witness." *Id.* (trial court did not abuse its discretion in denying the defendant's motion for an expert witness where the defendant could not show that she could not safely proceed to trial without a DNA expert because the DNA evidence presented by the prosecutor's DNA experts was exculpatory). See also *People v Jacobsen*, 448 Mich 639, 641

(1995) (not error to deny without prejudice the defendant's motion for appointment of an expert witness because the defendant was unable to show a nexus between the facts of her case and the need for an expert); *People v McDade*, 301 Mich App 343, 355-356 (2013) ("[the d]efendant [could not] show the necessary nexus between the facts of [the] case and the need for an [appointed handwriting] expert[,]" because "even if expert testimony . . . [had] established that [the] defendant did not [personally write an incriminating jailhouse note], the trial court could still have reasonably found . . . that [the] defendant had a role in encouraging [another inmate] to write the note").

In the defendant's trial for distributing child sexually abusive material and related offenses, the trial court abused its discretion by denying the defendant's request for public funds to retain his own computer forensics expert to rebut the testimony of the prosecution's expert witness that the defendant used Shareaza software to possess and share child pornography; the defendant met his burden under MCL 775.15 of demonstrating a nexus between the facts of the case and the need for an expert where he argued that appointment of an expert was necessary "to show that in the process of copying the hard drives of others, [he] inadvertently copied child sexually abusive material to his own computer." *People v Agar (Agar I)*, 314 Mich App 636, 638-641, 645 (2016), vacated in part and reversed in part on other grounds ___ Mich ___ (2016). "The contested issues . . . were how the material came to be on [the] defendant's computer and whether [the] defendant intentionally used the Shareaza program to obtain and distribute the same[;]" "the defense was that the files were loaded at a time when [the] defendant did not have control of the computer[,]" and the prosecution's expert, whose "testimony was the centerpiece" of the prosecution's case, "was unable to identify when the files were loaded." *Agar I*, 314 Mich App at 641-642, 645. Accordingly, "the logical nexus [was] clear[,]" and "[i]t was an abuse of discretion to deny the defendant access to an expert witness[]" to rebut the testimony of the prosecution's expert. *Id*. at 642, 646.[8]

[8] See, however, *People v Agar (Agar II)*, ___ Mich ___, ___ (2016), reversing that portion of *Agar I*, 314 Mich App at 646-648, concluding that the defendant was entitled to a new trial on the basis of the error in failing to appoint an expert under MCL 775.15. "[T]he error in denying funds may not have prejudiced the defendant, and, at this point in the proceedings, it would be premature to vacate the defendant's convictions before the results of independent forensic analysis are known." *Agar II*, ___ Mich at ___ (remanding to the trial court with directions to provide funds to obtain a defense expert on computer forensic analysis and directing the defendant, in the event that he sought further relief on the basis of the expert's evaluation, to provide "an offer of proof indicating how the expert's testimony would be material and favorable to the defense[]").

On a showing of good cause, a court may order the county to pay for an indigent defendant's independent psychiatric evaluation. MCL 768.20a(3). In prosecutions for being a sexually delinquent person, the court must provide an indigent defendant with expert testimony if the defendant requests it. MCL 767.61a.

"The plain language of MCR 6.201(A) does not permit a trial court to compel creation of a report from either party's expert witnesses where no report exists . . . . Only existing reports that have been 'produced,' or created, by an expert witness are required to be disclosed pursuant to MCR 6.201(A)." *Phillips (Paul)*, 468 Mich at 591.

There is no inherent right to conduct an independent scientific examination with an expert of one's own choice, and a trial court's denial of criminal discovery is generally not reversible if the defendant is afforded a full opportunity for cross-examination. *People v Anderson (Woodrow)*, 88 Mich App 513, 516-517 (1979) (defendant not entitled to conduct an independent analysis of alleged cocaine where defense counsel had unrestricted cross-examination of the analyst who identified the cocaine).

A trial court's decision on an indigent defendant's motion for the appointment of an expert witness is reviewed for an abuse of discretion. *Tanner (Hattie)*, 469 Mich at 442.

8.5 Special Notice Requirement—Rape Shield Law

A. Generally

Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct are generally not admissible unless the trial court finds that (1) evidence of the victim's past sexual conduct with the actor, and/or (2) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease, is/are material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. MCL 750.520j(1).

1. Notice and Timing

If the defendant proposes to offer evidence described in MCL 750.520j(1)(a) or MCL 750.520j(1)(b), the defendant must file a

written motion and offer of proof within 10 days after the arraignment on the information. MCL 750.520j(2).

Regarding the initial offer of proof under MCL 750.520j, the defendant is obligated to demonstrate the relevance of the proposed evidence to the purpose for which its admission is sought. *People v Hackett (Charles)*, 421 Mich 338, 350 (1984). "Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an in camera evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated." *Id.* at 350.

"At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy or humiliate sexual assault victims and to guard against mere fishing expeditions. Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues or misleading the jury. . . . [I]n ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation." *Hackett (Charles)*, 421 Mich at 350-351 (internal citations omitted).

The accused has a right to be present at the in camera hearing. See, e.g., *People v Brownrigg,* unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 270303).[9]

2. Failure to Provide Notice

"Failure to comply with the notice requirement of MCL 750.520j does not necessarily preclude the admission of evidence of past sexual relations between a victim and a defendant. *People v Dixon (Darrell)*, 263 Mich App 393, 399 (2004). "Where no notice is filed, the trial court must determine whether the evidence is admissible on a case-by-case basis considering whether the defendant's timing of the offer to

[9] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C).

produce such evidence suggests an improper tactical purpose, and whether the probative value of the evidence outweighs its prejudicial effect." *Id.* at 399-400.

3. In Camera Hearing to Determine Admissibility of New Information Discovered During the Course of Trial

If new information is discovered during the course of the trial that may make the evidence described in MCL 750.520j(1)(a) or MCL 750.520j(1)(b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under MCL 750.520j(1).

B. Evidence of Victim's Past Sexual Conduct

The admissibility of evidence under the rape-shield statute is a matter left to the court's discretion. *Hackett (Charles)*, 421 Mich at 349. The trial court should err on the side of excluding evidence of a victim's sexual conduct where its exclusion would not unconstitutionally infringe on the defendant's right to confrontation. *Id.* at 349.

"Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: [i]n a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease[.]"MRE 404(a)(3).

"The rape-shield law does not prohibit defense counsel from introducing 'specific instances of sexual activity . . . to show the origin of a physical condition when evidence of that condition is offered by the prosecution to prove one of the elements of the crime charged provided the inflammatory or prejudicial nature of the rebuttal evidence does not outweigh its probative value.'" *People v Shaw (Barry)*, ___ Mich App ___, ___ (2016) (citation omitted; alteration in original). In *Shaw (Barry)*, ___ Mich App at ___, the Court of Appeals held that defense counsel was ineffective for failing to present evidence that "the complainant had engaged in consensual vaginal and anal sex[]" with her live-in boyfriend. "The fact that the complainant was sexually active and living with her boyfriend at age 19, well before" she was examined by a pediatrician who testified that he found extensive hymenal changes and a chronic anal fissure and that these findings were consistent with those of either a sexually active adult woman or an abused child, was "highly relevant." *Id.* at ___. "[E]vidence of an alternative

explanation for the hymenal changes and source for the chronic anal fissure would have been admissible under the exception to the rape shield statute[, MCL 750.520j(1)(b),] and defense counsel's failure to ask the boyfriend about these issues fell below an objective standard of reasonableness." *Shaw (Barry)*, ___ Mich App at ___ (citations omitted).

Evidence of a victim's sexual reputation and past sexual conduct *with others* is not admissible when offered to prove that the conduct at issue was consensual; this is simply a variation of character evidence as circumstantial evidence of conduct. *Hackett (Charles)*, 421 Mich at 347-348. However, evidence regarding a victim's past sexual conduct *with the defendant* is relevant to a determination of whether the acts between the defendant and the victim that formed the basis of the charge were consensual. *People v Perkins*, 424 Mich 302, 309 (1986). "Past" sexual conduct refers to conduct that occurs before the evidence is offered at trial, and is not limited to conduct that occurred before the alleged crime. *People v Adair*, 452 Mich 473, 482-483 (1996).

Evidence of a victim's past sexual reputation and sexual conduct with others is not admissible for general impeachment; this is a collateral matter bearing only on general credibility. *Hackett (Charles)*, 421 Mich at 347-348.

Evidence of a victim's past sexual conduct to show the witness's bias is almost always material and should be admitted. *Hackett (Charles)*, 421 Mich at 348, citing *Commonwealth v Joyce*, 415 NE2d 181, 183-184, 187 (1981) (in rape prosecution, evidence that the victim had previously been charged with prostitution should have been admitted because it was relevant to show bias, i.e., "that, having been found in a similar situation on two prior occasions, the [victim] was herself arrested and charged with a crime . . . [t]hus, the allegation of rape against the defendant may have been motivated by [the victim's] desire to avoid further prosecution").

Evidence of a victim's sexual conduct may be probative of a victim's ulterior motive for making a false charge. *Hackett (Charles)*, 421 Mich at 348.

Evidence that a victim made false allegations of rape or sexual abuse in the past is admissible, *Hackett (Charles)*, 421 Mich at 348, and does not implicate MCL 750.520j. *People v Jackson (Nicholas)*, 477 Mich 1019 (2007).

Evidence of a victim's virginity admitted to show that because the victim had no prior sexual experience, she was less likely to have consented to sexual relations with the defendant on the night of the incident was a violation of MRE 404(a)(3), which prohibits the

admission of such evidence for the purpose of refuting a defense of consent. *People v Bone*, 230 Mich App 699, 701-703 (1998).

Evidence that a victim stated she was "ready to have sex" was relevant, because it had a tendency to make the existence of consent more probable than it would be without the evidence. *People v Ivers*, 459 Mich 320, 324, 330 (1998).

Evidence that a victim is a prostitute is not admissible to impeach her credibility because there is no logical nexus between the victim's reputation as a prostitute and her character for being truthful. *People v Slovinski*, 166 Mich App 158, 173-175 (1988). However, evidence that the victim is a prostitute is admissible on the issues of consent and right of confrontation. *Id.* at 177.

Evidence of prior sexual conduct involving a child victim to show that age-inappropriate sexual knowledge was not learned from the defendant, and to show motive to make false accusations, may be admissible if the trial court determines that the evidence is relevant; that another person was convicted of criminal sexual conduct involving the victim; and that facts underlying the previous conviction were significantly similar to the charged offenses. *People v Morse*, 231 Mich App 424, 434, 437 (1998).

At the defendant's trial for first-degree criminal sexual conduct (CSC-I), her constitutional right of confrontation was not violated by the exclusion of evidence of the 12-year-old victim's prior sexual experiences, which the defendant sought to introduce "because [the victim's] trial testimony falsely portrayed him as a sexually innocent, inexperienced virgin, thereby appealing to the jury's sympathy for a sexually uninitiated victim." *People v Benton*, 294 Mich App 191, 194, 198-199 (2011) (holding that the evidence was not necessary to impeach the victim's trial testimony, which did not directly or indirectly indicate that he was a virgin at the time of his sexual contact with the defendant, and that "the victim's sexual experience or history was not legally relevant to any issue in the case . . . [because s]exual penetration with a person under 13 years of age constitutes CSC-I irrespective of the victim's consent or experience[]").

Where charges against a defendant involving multiple victims are joined for trial, evidence of specific instances of the victims' sexual conduct to show that they had "similar sexual contact with other [individuals]" is inadmissible under MCL 750.520j, "regardless whether [the victims] . . . testify[] to support their own case or to provide other-acts evidence under MCL 768.27a for the other cases[.]" *People v Gaines*, 306 Mich App 289, 317 (2014).

8.6 Alibi Defense

A. Notice and Timing

MCL 768.20 requires the defendant to give written notice to the prosecuting attorney of his or her intent to offer an alibi defense. MCL 768.20(1). Notice must be given at arraignment or within 15 days after arraignment, but not less than ten days before the trial, or at such other time as the court directs. *Id*. The notice must contain the names of witnesses and specific information about the place where the accused claims to have been at the time the charged offense was committed. *Id*.

Within ten days after receipt of the notice, but not later than five days before trial, or at such other time as the court directs, the prosecuting attorney must file and serve on the defendant a notice of rebuttal containing the names of the witnesses the prosecuting attorney proposes to call to controvert the defendant's alibi defense. MCL 768.20(2). Each party has a continuing duty to promptly disclose the names of additional witnesses that come to the respective party's attention who may be called to establish or rebut an alibi defense. MCL 768.20(3). Additional witnesses not identified in the first notices may be permitted to testify if the moving party gives notice to the opposing party and shows that the additional witness's name was not known when the notice required under MCL 768.20(1) and MCL 768.20(2) was due, and could not have been discovered with due diligence. MCL 768.20(3).

Despite the explicit language of MCL 768.20, an alibi notice must be permitted if it is filed not less than ten days before trial, even if it is filed more than 15 days after arraignment. *People v Bennett*, 116 Mich App 700, 704-707 (1982).

Filing a notice of an alibi defense does not require the defendant to proceed with that defense at trial, and no comment should be made upon the failure to do so. *People v Dean*, 103 Mich App 1, 6-7 (1982). However, if a defendant proffers an alibi defense, the prosecutor may comment on the defendant's failure to produce corroborating witnesses. *People v Fields (Carl)*, 450 Mich 94, 112 (1995).

B. Failure to Provide Notice

MCL 768.21(1) provides that if the defendant fails to give timely notice of his or her intent to raise an alibi defense, the court must exclude evidence offered for the purpose of establishing the alibi. Similarly, MCL 768.21(2) provides that if the prosecuting attorney has failed to give timely notice of rebuttal, the court must exclude that rebuttal evidence. And MCL 768.21(1) and MCL 768.21(2)

provide that even if timely notice is given by both parties, the court must exclude testimony from witnesses not particularly identified in the required notices. Despite the statutory language in MCL 768.21 indicating that the sanction of exclusion is mandatory, the Supreme Court has held that the statutory language in MCL 768.20(2) ("or at such other time as the court may direct") "preserves the trial court's discretion to fix the timeliness of notice in view of the circumstances." *People v Travis*, 443 Mich 668, 678-679 (1993).

To determine whether an undisclosed alibi witness's testimony should be admitted, the court should consider:

- the amount of prejudice that resulted from the failure to disclose;
- the reason for nondisclosure;
- the extent to which the harm caused by nondisclosure was mitigated by subsequent events;
- the weight of the properly admitted evidence supporting the defendant's guilt; and
- other relevant factors arising out of the circumstances of the case. *Travis*, 443 Mich at 682.

This test "takes into account not only the diligence of the prosecution, but also the conduct of the defendant and the degree of harm done to the defense. It tends to protect the prosecution in cases where the defendant is at fault or where the defendant suffers little or no prejudice. At the same time, it tends to protect the defendant when the conduct of the prosecution unfairly limits the defendant's choice of trial strategy[.]" *Travis*, 443 Mich at 683.

Even if timely notice of an alibi defense is not given, a defendant may still testify to an alibi without corroborative evidence, and is still entitled to an alibi instruction. *People v McGinnis*, 402 Mich 343, 346 n 4 (1978).

When there is a failure to give timely notice of alibi, a trial court may be required to grant a requested continuance. *Bennett*, 116 Mich App at 707 (trial court reversibly erred in denying the defendant's requested continuance where the defendant asserted his constitutional right to compulsory process and to present a defense; the defendant had a legitimate reason for asserting the right, i.e., if the jury found that his alibi raised a reasonable doubt, he would have been acquitted; the defendant was not negligent in failing to tell defense counsel for several months that he had an alibi; there

were no prior adjournments; and the defendant demonstrated prejudice, because he was left without a defense).

C. Impeachment with Alibi Notice

A notice of alibi constitutes an admission by a party opponent under MRE 801(d)(2)(c), and may be used to impeach a defendant's credibility at trial when his or her testimony is inconsistent with the contents of the alibi notice. *People v McCray (Lorenzo)*, 245 Mich App 631, 636-637 (2001). Note that this is distinguishable from a situation in which "a prosecutor attempts to comment on a defendant's failure to put forth an alibi defense after he [or she] has filed a notice of alibi defense, or comment on the defendant's failure to produce a witness listed on a notice of alibi, when the defendant has not presented an alibi defense." *Id.* at 637 n 1. This is because a defendant is not required to proceed with an alibi defense after filing a notice of an alibi defense. *Dean*, 103 Mich App at 6-7. Therefore, informing the jury of a defendant's failure to produce an alibi witness where the defendant had given notice of an alibi defense "unduly denigrates defendant's case when he [or she] later chooses to present no evidence." *People v Shannon*, 88 Mich App 138, 143 (1979). However, a prosecutor may challenge an alibi defense by commenting on the defendant's failure to produce corroborating witnesses after the defendant has actually put forth an alibi defense. *Id.* at 145.

D. Cross-Examination of Alibi Witness

No special foundation is required before cross-examining an alibi witness about the witness's failure to come forward with the alibi information at an earlier time. *People v Gray (Norman)*, 466 Mich 44, 49 (2002).

E. Jury Instruction

M Crim JI 7.4 is the jury instruction for alibi:

> "(1) You have heard evidence that the defendant could not have committed the alleged crime because [he/she] was somewhere else when the crime was committed.
>
> "(2) The prosecutor must prove beyond a reasonable doubt that the defendant was actually there when the alleged crime was committed. The defendant does not have to prove [he/she] was somewhere else.
>
> "(3) If, after carefully considering all the evidence, you have a reasonable doubt about whether the defendant

> was actually present when the alleged crime was committed, you must find [him/her] not guilty."

Where the defendant raises an alibi defense and requests the instruction, failure to give it is error requiring reversal. *McGinnis*, 402 Mich at 345-347.

F. Standard of Review

The decision of a trial court to permit or preclude alibi witnesses is reviewed for an abuse of discretion. *People v Merritt*, 396 Mich 67, 83-84 (1976).

8.7 Defenses Involving a Defendant's Mental Status[10]

A. Competency Determination

The conviction of a defendant while he or she is incompetent to stand trial violates due process. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17; *People v Newton*, 179 Mich App 484, 487 (1989). "The protection afforded by the Due Process Clause requires that a court sua sponte hold a hearing regarding competency when any evidence raises a bona fide doubt about the competency of the defendant." *In re Carey*, 241 Mich App 222, 227-228 (2000). See *Cooper v Oklahoma*, 517 US 348, 355-356 (1996) (a state may not proceed with a criminal trial after the defendant has demonstrated that he or she is more likely than not incompetent); *Riggins v Nevada*, 504 US 127, 139-140 (1992) ("[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so); *Pate v Robinson*, 383 US 375, 385-386 (1966) (evidence introduced at trial on behalf of the accused entitled him to a hearing on the issue of whether he was competent to stand trial); and *Dusky v United States*, 362 US 402 (1960) (the test of a defendant's competency to stand trial is whether he or she has sufficient present ability to consult with his or her attorney with a reasonable degree of rational understanding, and whether he or she has a rational as well as a factual understanding of the proceedings against him or her; it is not enough that he or she is oriented to time and place and has some recollection of events).

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[10] This section addresses the competency provisions of the Mental Health Code, MCL 330.2020 *et seq.*, as they apply in criminal proceedings. For discussion of competency determinations in juvenile delinquency proceedings, governed by MCL 330.2060—MCL 330.2074 and MCL 712A.18n—MCL 712A.18s, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 7.

1. General Test

"[A] criminal defendant's mental condition at the time of trial must be such as to assure that he [or she] understands the charges against him [or her] and can knowingly assist in his [or her] defense." *People v McSwain*, 259 Mich App 654, 692 (2003).

MCL 330.2020(1) states that a criminal defendant is presumed competent to stand trial unless

> "he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during trial."

The defendant has the burden of proving incompetence. MCL 330.2020(1). A defendant's competence may be based on the defendant's medicated state. MCL 330.2020(2). The defendant must prove incompetence by a preponderance of the evidence. *Medina v California*, 505 US 437, 440 (1992).

A defendant is not incompetent when medication makes the defendant competent, even if the defendant would be incompetent without the medication. MCL 330.2020(2); *People v Mette*, 243 Mich App 318, 331 (2000). See *Sell v United States*, 539 US 166, 180 (2003) (involuntary administration of drugs solely for trial competence purposes is permitted in certain rare instances).

The standard for competency to plead guilty is the same as that for competency to stand trial. *Godinez v Morin*, 509 US 389, 396-397 (1992); *People v Matheson*, 70 Mich App 172, 179 (1976).

2. Raising the Issue of Competence

The issue of competency may be raised at any time during the proceedings against a defendant. MCR 6.125(B). "[C]ompetency is an ongoing matter appropriately raised" any time evidence of incompetence arises, *People v Whyte*, 165 Mich App 409, 414 (1988), "including proceedings in the district court, or subsequent to trial, such as sentencing." 1989 Staff Comment to MCR 6.125.

The question of competency to stand trial may be raised by either party or the court. MCL 330.2024. "Whether [a]

defendant is competent to stand trial is an ongoing concern of the court, and the issue of competence may be raised at any time during or after trial." *People v Garfield*, 166 Mich App 66, 74 (1988). A defendant is entitled to a competency hearing when evidence demonstrates a bona fide doubt as to his or her competency. *People v Harris (Karen)*, 185 Mich App 100, 102 (1990). In fact, the trial court is obligated to raise the issue of the defendant's competence when "facts are brought to its attention which raise a 'bona fide doubt' as to the defendant's competence." *Id.* at 102 (trial court erred when it failed to have the defendant's competence reevaluated before trial where the defendant had a long history of severe mental illness and, at the outset of trial, stated that she was incoherent and felt incompetent to stand trial and requested a court order for hospitalization).

The trial court is not required to accept without question an attorney's representations concerning the competence of his or her client, although counsel's expression of doubt in that regard is a factor that should be considered. *Drope v Missouri*, 420 US 162, 177 n 13 (1975). "[E]vidence of a defendant's irrational behavior, his [or her] demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but [] even one of th[o]se factors standing alone may, in some circumstances, be sufficient." *Id.* at 180. The trial court's ruling "as to the existence of a 'bona fide doubt'" is reviewed for an abuse of discretion. *Harris (Karen)*, 185 Mich App at 102.

The trial court did not "abuse its discretion in failing to order a competency examination[]" where it was "able to personally observe [the] defendant's behavior and conduct, hear live [the] defendant's remarks and the tone of and inflections in his voice, and directly assess [the] defendant's demeanor, attitude, and comments[.]" *People v Kammeraad*, 307 Mich App 98, 140-141 (2014) (upholding as "reasonable and principled" the trial court's "finding that [the] defendant intentionally and purposefully, and not because of a mental condition or illness, acted in a defiant and dilatory manner in an attempt to disrupt the proceedings and to show contempt and disrespect for the court and the criminal justice process[]").

3. Order for Examination

A trial court must order a competency examination "[u]pon a showing that the defendant may be incompetent to stand trial[.]" MCL 330.2026(1). The decision whether to refer a

defendant for psychiatric testing is within the discretion of the trial court. *Whyte*, 165 Mich App at 411-412.

The examination must be conducted "by a certified or licensed examiner of the center for forensic psychiatry or other facility officially certified by the department of mental health to perform examinations relating to the issue of competence to stand trial." MCR 6.125(C)(1). On a showing of good cause, the court may order an independent examination. MCR 6.125(D).[11]

"Because of a presumption that the Center for Forensic Psychiatry or other facility officially certified by the Department of Mental Health will properly perform their functions, 'good cause' justifying an independent competency examination should arise only in exceptional cases." 1989 Staff Comment to MCR 6.125.

The record did not establish good cause to order an independent competency examination where the defendant was unable to get along with three different court-appointed defense attorneys, and the defendant testified that he had a head injury, but did not corroborate his assertion beyond the fact that he had an actual bump on his head. *People v Cage*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 273645).[12] See also *People v Buie*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2007 (Docket No. 270414) (trial court properly acted within its discretion in rejecting the defendant's request for an independent competency examination where the request was made solely on the basis of the defendant's unsupported claim of bias by the Center for Forensic Psychiatry).

4. Hearing

A competency hearing must be held within five days of the court's receipt of the examiner's report, or on conclusion of the proceedings then before the court—whichever is sooner—unless an adjournment is granted upon a showing of good cause. MCR 6.125(E); MCL 330.2030(1).

The defendant must prove incompetence by a preponderance of the evidence. *Medina*, 505 US at 440. The Michigan Rules of

[11] See SCAO Form MC 204, *Order for Competency Examination*, available at http://courts.michigan.gov/Administration/SCAO/Forms/courtforms/generalcriminal/mc204.pdf.

[12] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C).

Evidence apply during the hearing. MRE 1101(a). The court must determine the issue of competency based on evidence admitted at the hearing. MCL 330.2030(2). Absent objection, the written forensic examination report is admissible at the hearing but is not admissible for any other purpose. MCL 330.2030(3). The defense, prosecution, and court may present additional evidence at the hearing. *Id*.

Competency Hearing Checklist

- Competency issue raised
- Court finds a bona fide and legitimate doubt about defendant's competence to stand trial
- Court orders defendant to undergo a competency examination[13]
- After receiving the report, or on conclusion of the proceedings then before the court—whichever is earlier—the court orders a competency hearing and makes a competency finding

SCAO Form MC 205, *Finding and Order on Competency*,[14] provides that the following findings/orders are appropriate:

> "(1) The defendant is competent to stand trial and the case shall continue to the next stage of the criminal process.
>
> (2) The defendant, in order to maintain competency to stand trial, shall be administered appropriate medication pending and during trial.
>
> (3) The defendant is determined incompetent to stand trial and there is a substantial probability that competence to stand trial will not be attained within the time limit established by law.
>
> (4) The prosecuting official shall file a petition with the probate court for commencement of civil proceedings pertaining to the defendant.
>
> (5) The defendant is incompetent to stand trial and there is substantial probability that the defendant,

[13] See SCAO Form MC 204, *Order for Competency Examination*, available at http://courts.michigan.gov/Administration/SCAO/Forms/courtforms/generalcriminal/mc204.pdf.

[14] Available at http://courts.michigan.gov/Administration/SCAO/Forms/courtforms/generalcriminal/mc205.pdf.

> if provided a course of treatment, will attain competence to stand trial within the time limit established.
>
> (6) The State Department of Mental Health is appointed medical supervisor of the defendant's course of treatment and shall fulfill all requirements established by law.
>
> (7) The defendant shall undergo treatment to render the defendant competent to stand trial.
>
> (8) Commitment is necessary for the effective administration of the course of treatment and therefore the defendant is committed to the custody of the State Department of Mental Health and placed at the facility recommended by the Center for Forensic Psychiatry.
>
> (9) Since the defendant is incarcerated pending trial, the liberty of the defendant shall be restricted to the building and grounds of the facility providing treatment.
>
> (10) If the defendant is under detention, the sheriff shall transport the defendant to and from the facility recommended by the Center for Forensic Psychiatry upon notification by the center."

If the defendant is found incompetent to stand trial, the court must determine whether there is a substantial probability that, if provided treatment, the defendant will attain competence to stand trial within 15 months or within a period of one-third of the maximum possible sentence the defendant could receive if convicted of the offense, whichever is less. MCL 330.2031(2); MCL 330.2034(1).

"Absent a hearing at which the prosecutor [can] present evidence regarding [a] defendant's ability to attain competence," a court may not "render[] any decision regarding [the] defendant's continued incompetence." *People v Davis (Demond)*, 310 Mich App 276, 294 (2015), citing MCL 330.2030(2).

5. Commitment for Treatment

The court may direct the prosecutor to file a petition asserting that the defendant requires treatment if the court concludes there is not a substantial probability that the defendant will attain competence with treatment during the required time

period. MCL 330.2031; MCL 330.2034(1). If the court determines there is a substantial probability that treatment will enable the defendant to attain competency, the court may order treatment and commit the defendant to the custody of the Department of Mental Health for that purpose. MCL 330.2032(3). The court must receive treatment reports as required by MCL 330.2038. The court is required to redetermine the issue of the defendant's competency to stand trial after the receipt of each report, unless the defendant waives a hearing and redetermination. MCL 330.2040(1).

The defendant may not be detained in excess of 15 months or a term longer than one-third of the sentence possible for conviction of the offense, whichever is less, or after charges against the defendant have been dismissed. MCL 330.2034(1). The 15-month period begins on the date at which the hearing determining the defendant's incompetence was held. *People v Bowman*, 141 Mich App 390, 398-399 (1985).

6. Motions During Defendant's Incompetence

If the defendant's presence is not essential to a fair hearing and decision, pretrial motions may be heard and decided while a defendant is incompetent. MCR 6.125(F); MCL 330.2022(2).

7. Dismissal

If a defendant is determined to be incompetent to stand trial, the charges must be dismissed when the prosecutor notifies the court of his or her intention not to prosecute the case, or after 15 months have passed since the date on which the defendant was originally determined incompetent to stand trial. MCL 330.2044(1). The 15 months of incompetence need not be continuous. *Miller (Willie)*, 440 Mich at 641-642.

A court "lack[s] statutory authority to dismiss [a] case [under MCL 330.2044(1)] over the prosecutor's objections[]" where "15 months [have] not elapsed since the [court's] original incompetency determination." *People v Davis (Demond)*, 310 Mich App 276, 295 (2015). Additionally, a "delay in beginning [a] defendant's treatment [is] an insufficient basis to support that [the] defendant [is] unlikely to attain competence[;]" rather, under MCL 330.2032, the "court's focus must be 'whether, *if provided a course of treatment*, a substantial probability exists that a defendant found to be incompetent will attain competence within the time limit established.'" *Davis (Demond)*, 310 Mich App at 304 (holding that the court erred in dismissing the charges against the defendant, without

a hearing, based on a "four-month delay between being adjudged incompetent to stand trial and beginning treatment[]") (citation omitted).

Charges may be reinstated against a defendant as follows:

- If the charges were dismissed 15 months after the date on which the defendant was originally determined incompetent to stand trial, and if the crime charged was punishable by a life sentence, the prosecutor may at any time petition the court for permission to refile the charges. MCL 330.2044(3).

- If the charges were dismissed 15 months after the date on which the defendant was originally determined incompetent to stand trial, and if the crime charged was not punishable by a life sentence, the prosecutor may, within the period of time after the charges were dismissed equal to 1/3 of the maximum sentence that the defendant could receive on the charges, petition the court for permission to refile the charges. MCL 330.2044(3).

"[A] trial court's failure to dismiss the charges against a defendant does not deprive the trial court of jurisdiction, nor does a violation of [MCL 330.2044(1)(b)],[15] standing alone, furnish a basis on which to reverse an otherwise valid conviction. Absent a claim of prejudice to the defendant's substantive rights, failure to dismiss is a procedural violation on which reversal may not be predicated." *People v Miller (Willie)*, 440 Mich 631, 633 (1992).

8. Statements to Examiner

MCL 768.20a(5) provides:

> "Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense."

See also *People v Toma*, 462 Mich 281, 292-293 (2000) (the statutory prohibition against using a defendant's statement to a

[15] MCL 330.2044(1)(b) requires the dismissal of charges 15 months after a defendant is found incompetent to stand trial.

mental health professional "is a clear expression by the Legislature that these statements cannot be admitted at trial except on the issue of insanity[.]").

9. Standard of Review

"[T]he determination of a defendant's competence is within the trial court's discretion." *Harris (Karen)*, 185 Mich App at 102. See also *Newton*, 179 Mich App at 488. "[T]he decision as to the existence of a 'bona fide doubt' will only be reversed where there is an abuse of discretion." *Harris (Karen)*, 185 Mich App at 102.

B. Not Guilty By Reason of Insanity

1. Affirmative Defense

Insanity is an affirmative defense for which the defendant has the burden of proof by a preponderance of the evidence. MCL 768.21a(1) and MCL 768.21a(3).

"[I]nsanity is a defense to all crimes, including general intent and strict liability offenses." *People v Moore (Eric)*, 497 Mich 1043, 1043 (2015) (citing MCL 768.21a and noting that "the Court of Appeals [in *People v Moore (Eric)*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2014 (Docket No. 315193),] misinterpreted" *People v Carpenter (James)*, 464 Mich 223 (2001), "in stating that insanity is not a defense to general intent crimes[]").

2. Timely Notice Required

The defendant must file and serve on the court and the prosecuting attorney a notice of his or her intention to assert the defense of insanity not less than 30 days before trial, or at another time as directed by the court. MCL 768.20a(1). If the defendant fails to file and serve the written notice prescribed in MCL 768.20a, the court must exclude evidence offered by the defendant for the purpose of establishing the defendant's insanity. MCL 768.21(1).

3. Experts and Reports

The defendant must be referred to the center for forensic psychiatry for an examination. MCL 768.20a(2). See SCAO Form MC 206, *Order for Evaluation Relative to Criminal Responsibility*[16].

The defendant must cooperate with the examination. MCL 768.20a(4). The failure to cooperate, if established at a hearing, bars any testimony of insanity, and this bar is constitutional. *Id.*; *People v Hayes (Larry)*, 421 Mich 271, 274-275 (1984).

Both the prosecution and defense may obtain examinations from independent examiners. MCL 768.20a(3). On a showing of good cause, a court may order the county to pay for an indigent defendant's independent psychiatric evaluation. MCL 768.20a(3). The defendant may have an independent psychiatric evaluation by a clinician of his or her choice. MCL 768.20a(3). The defendant must notify the prosecuting attorney at least five days before the independent evaluation that he or she intends to have an evaluation done. *Id.*

Reports are required and must be provided to both parties. MCL 768.20a(6).

Statements made by the defendant during examination are not admissible on any issues other than his or her mental illness or insanity at the time of the alleged offense. MCL 768.20a(5).

"Where expert testimony is presented in support of an insanity defense, the probative value of the expert's opinion depends on the facts on which it is based." *People v Lacalamita*, 286 Mich App 467, 470 (2009). "Further, a trial court must generally defer to a jury's determination, unless '"it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe [the testimony],' or [the testimony] contradicted indisputable physical facts or defied physical realities . . . ." "' *Id.*, quoting *People v Musser*, 259 Mich App 215, 219 (2003), quoting *People v Lemmon*, 456 Mich 625, 645-646 (1998).

The Fifth Amendment is not violated "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, [and] the prosecution . . . offer[s] evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence." *Kansas v Cheever*, 571 US ___, ___ (2013), relying on *Buchanan v Kentucky*, 483 US 402, 422-424 (1987). "The admission of this rebuttal testimony harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him [or her] to refuse to answer related questions on cross-examination." *Cheever* at ___, ___ (holding that the prosecution

[16] Available at http://courts.michigan.gov/Administration/SCAO/Forms/courtforms/generalcriminal/mc206.pdf.

was properly permitted to "introduc[e] evidence from a court-ordered mental evaluation of [the] criminal defendant to rebut [the] defendant's presentation of expert testimony in support of a defense of voluntary intoxication[]").

4. Jury Instruction

If a defendant asserts a defense of insanity in a criminal action tried before a jury, the court must instruct the jury on the definitions of mental illness, intellectual disability, and legal insanity[17] immediately before the commencement of testimony, especially expert testimony. MCL 768.29a(1). However, failure to give a preliminary instruction before an offer of testimony on insanity does not require automatic reversal. *People v Grant (Andre)*, 445 Mich 535, 537 (1994).

5. Definitions

MCL 768.21a(1) states that a person is legally insane if, "as a result of mental illness . . . or as a result of having an intellectual disability[,]" he or she "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law."

Mental illness is defined as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g); see also MCL 768.21a(1); M Crim JI 7.9(2).

Intellectual disability "means a condition manifesting before the age of 18 years that is characterized by significantly subaverage intellectual functioning and related limitations in 2 or more adaptive skills and that is diagnosed based on the following assumptions:

> "(a) Valid assessment considers cultural and linguistic diversity, as well as differences in communication and behavioral factors.
>
> (b) The existence of limitation in adaptive skills occurs within the context of community environments typical of the individual's age peers and is indexed to the individual's particular needs for support.

[17] See Section 8.7(B)(5).

> (c) Specific adaptive skill limitations often coexist with strengths in other adaptive skills or other personal capabilities.
>
> (d) With appropriate supports over a sustained period, the life functioning of the individual with an intellectual disability will generally improve." MCL 330.1100b(12); see also MCL 768.21a(1); M Crim JI 7.9(3).

"Mental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity." MCL 768.21a(1).

A determination of insanity is not mandated because a person is mentally ill, *People v Bailey*, 142 Mich App 571, 573 (1985), because insanity is an extreme of mental illness. *People v Fultz*, 111 Mich App 587, 590 (1981). Additionally, although all insane persons are mentally ill, not all mentally ill persons are insane. *Id.* at 590. Therefore, once a person is determined to have a mental illness, it must also be determined that he or she lacked the "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1).

A person under the influence of drugs or alcohol that have been voluntarily consumed or injected at the time of the alleged offense should not be considered to have been legally insane solely because of being under the influence of alcohol or controlled substances. MCL 768.21a(2).

6. Test

"An individual is legally insane if, as a result of mental illness . . . or as a result of having an intellectual disability . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1).[18]

The "policeman at the elbow" standard alone does not accurately reflect whether the defendant lacked substantial capacity to conform his or her conduct to the requirements of the law. *People v Jackson (Damon)*, 245 Mich App 17, 22 (2001). However, it is proper for the prosecution to ask the defendant

[18] See Section 8.7(B)(5) for definitions of *mental illness* and *intellectual disability*.

and/or the defendant's expert witness whether the defendant would have committed the act if a police officer was at his or her elbow (in order to explore the extent of the defendant's control), and whether there was sufficient evidence to support the court's conclusion about the defendant's sanity. *Id.* at 22.

7. Psychiatrists and Privileged Communications

Unless the patient has waived the privilege, privileged communications shall not be disclosed in criminal cases or proceedings, or in proceedings preliminary to such cases or proceedings, except in the circumstances set out in MCL 330.1750. MCL 330.1750(1). For example, MCL 330.1750(2)(f) provides that privileged communications shall be disclosed upon request "[i]f the privileged communication was made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge, but only with respect to issues to be determined in proceedings concerned with the competence of the patient to stand trial."

8. Waiver of Privilege

"After claiming the defense of insanity and authorizing the release of medical information, [a] defendant can no longer claim an intent to preserve the sanctity of the physician-patient privilege." *People v Sullivan (John)*, 231 Mich App 510, 517 (1998). See also MCR 2.314(B).

"When a defendant presents evidence through a psychological expert who has examined him[or her], the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined [the defendant]." *Kansas v Cheever*, 571 US ___, ___ (2013) (citation omitted). The Court explained:

> "[W]hen a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him [or her] to refuse to answer related questions on cross-examination. A defendant 'has no right to set forth to the jury all the facts which tend in his [or her] favor without laying himself [or herself] open to a cross-examination upon those facts.' . . . [W]here a party provides testimony and then refuses to answer potentially incriminating questions, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in

> the balance of considerations determining the scope and limits of the privilege against self-incrimination.'" *Id*. at ___ (citations omitted).

9. Acquittal by Reason of Insanity

The court must immediately commit any person who is acquitted of a criminal charge by reason of insanity to the custody of the center for forensic psychiatry for a period not to exceed 60 days. MCL 330.2050(1). The court must forward to the center a full report, in the form of a settled record, of the facts concerning the crime the person committed but of which he or she was acquitted by reason of insanity. *Id*. See SCAO Form MC 207, *Commitment Order Not Guilty by Reason of Insanity*.[19]

Within the 60-day period, the center for forensic psychiatry must file a report with the court, prosecuting attorney, and defense counsel. MCL 330.2050(2). The report must contain a summary of the crime the person committed but of which he or she was acquitted by reason of insanity, an opinion as to whether the person meets the criteria of a person requiring treatment or for judicial admission as defined by MCL 330.1404 or MCL 330.1515, and the facts upon which the opinion is based. MCL 330.2050(2).

After receipt of the report, the court may direct the prosecuting attorney to file, with the probate court of the person's county of residence, or of the county in which the criminal trial was held, a petition pursuant to MCL 330.1434 or MCL 330.1516 for an order of hospitalization or an order of admission to a facility. MCL 330.2050(3).

C. Guilty but Mentally Ill

1. By Trier of Fact

If a defendant asserts a defense of insanity in compliance with MCL 768.20a, the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following: (1) the defendant is guilty beyond a reasonable doubt of an offense; (2) the defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time the offense was committed; and (3) the defendant

[19] Available at http://courts.michigan.gov/Administration/SCAO/Forms/courtforms/criminaldisposition/mc207.pdf.

has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law. MCL 768.36(1).

M Crim JI 7.12 provides, in part:

> "(2) To find the defendant guilty but mentally ill, you must find each of the following:
>
> (3) First, the prosecutor has proven beyond a reasonable doubt that the defendant is guilty of a crime.
>
> (4) Second, that the defendant has proven by a preponderance of the evidence that [he/she] was mentally ill, as I have defined that term for you, at the time of the crime.
>
> (5) Third, that the defendant has not proven by a preponderance of the evidence that [he/she] lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of [his/her] conduct or to conform [his/her] conduct to the requirements of the law."

The purpose behind the creation of the guilty but mentally ill verdict was to limit the number of persons who were improperly being relieved of all criminal responsibility by way of the insanity verdict. *People v Stephan*, 241 Mich App 482, 491-492 (2000).

2. By Plea

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302 (accepting guilty or nolo contendere pleas). MCR 6.303.

D. Diminished Capacity

Diminished capacity is not a cognizable defense in Michigan. *People v Carpenter (James)*, 464 Mich 223, 237 (2001)[20]; see also *People v Abraham (Nathaniel)*, 256 Mich App 265, 271 n 2 (2003). "[The] Legislature, by enacting the comprehensive statutory framework [set out in MCL 768.20a; MCL 768.21a; MCL 768.36], has . . . conclusively determined when mental incapacity can serve as a basis for relieving one from criminal responsibility[,]" and MCL 768.36(3) "demonstrate[s] [the Legislature's] policy choice that

evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Carpenter (James)*, 464 Mich at 237.[21]

E. Voluntary Intoxication

"'[T]he enactment of MCL 768.37[][22] . . . [has] abolished the defense of voluntary intoxication except in one narrow circumstance[.]'" *People v Nickens*, 470 Mich 622, 631 n 7 (2004) (citation omitted). MCL 768.37 provides:

> "(1) Except as provided in [MCL 768.37(2)], it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.
>
> (2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.
>
> (3) As used in [MCL 768.37]:
>
> > (a) 'Alcoholic liquor' means that term as defined in . . . . MCL 436.1105.
> >
> > (b) 'Consumed' means to have eaten, drunk, ingested, inhaled, injected, or topically applied, or

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[20] See also *Metrish v Lancaster*, 569 US ___, ___ (2013), reversing *Lancaster v Metrish*, 683 F3d 740, 742, 744-754 (CA 6, 2012), in which the Sixth Circuit Court of Appeals granted the petitioner habeas relief on the ground that the retroactive application of *Carpenter (James)*, 464 Mich 223, was objectively unreasonable because the defense of diminished capacity was well-established and its abolition was unforeseeable when the petitioner committed his crime. "[T]he Michigan Supreme Court [in *Carpenter (James)*] rejected a diminished-capacity defense that the court reasonably found to have no home in a comprehensive, on-point statute enacted by the Michigan Legislature[;]" accordingly, "[f]airminded jurists could conclude that [*Carpenter (James)* was] not 'unexpected and indefensible by reference to [existing] law.'" *Lancaster*, 569 US at ___ (citation omitted).

[21] See also *People v Moore (Eric)*, 497 Mich 1043, 1043 (2015) (noting that under MCL 768.21a "*insanity* is a defense to all crimes, including general intent and strict liability offenses[,]" and that "the Court of Appeals [in *People v Moore (Eric)*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2014 (Docket No. 315193),] misinterpreted" *Carpenter (James)*, 464 Mich 223, "in stating that insanity is not a defense to general intent crimes[]") (emphasis supplied).

[22] 2002 PA 366, effective September 1, 2002.

> to have performed any combination of those actions, or otherwise introduced into the body.
>
> (c) 'Controlled substance' means that term as defined in . . . MCL 333.7104."

See also MCL 8.9(6), which provides:

> "It is not a defense to a crime[23] that the defendant was, at the time the crime occurred, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound. However, it is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily ingested a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired."

The Fifth Amendment was not violated when the trial court permitted the prosecution to "introduc[e] evidence from a court-ordered mental evaluation of [the] criminal defendant to rebut [the] defendant's presentation of expert testimony in support of a defense of voluntary intoxication." *Kansas v Cheever*, 571 US ___, ___ (2013) (holding that "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence[]").

Part B: Procedural Pretrial Motions

[23] MCL 8.9 is inapplicable to crimes under the Michigan Vehicle Code, MCL 257.1 *et seq.*; the Public Health Code, MCL 333.1101 *et seq.*; the Identity Theft Protection Act, MCL 445.61 *et seq.*; the Michigan Penal Code, MCL 750.1 *et seq.*; or Chapter 752 of the Michigan Compiled Laws. MCL 8.9(7). See Section 1.8 for additional discussion of MCL 8.9.

8.8 Adjournment or Continuance

A. Generally

MCL 768.2 provides that the trial court, in a criminal case, has discretion to adjourn or continue a criminal case for good cause shown in the manner provided for civil cases. The statute states that where the prosecution and the defendant consent to an adjournment, there shall be a showing to the court that the consent is "founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done." MCL 768.2.

"The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel." MCR 6.005(E).

Denial of a continuance may violate a defendant's right to due process in certain circumstances. *Ungar v Sarafite*, 376 US 575, 589 (1964). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.* at 589.

The moving party has the burden of establishing good cause for the adjournment. MCL 768.2; MCR 2.503(B)(1).

B. Factors

If the defendant requests an adjournment, the following factors should be considered:

- whether the defendant is asserting a constitutional right (e.g., the right to counsel);
- whether the defendant has a legitimate reason for asserting the right (e.g., a bona fide irreconcilable dispute with counsel over whether to call alibi witnesses);
- whether the defendant was negligent with regard to any delay in his or her request;
- whether the defendant requested previous adjournments; and

- whether the defendant can demonstrate that prejudice would result from a denial of the request. *People v Williams (Charles)*, 386 Mich 565, 575-578 (1972); *People v Lawton*, 196 Mich App 341, 348 (1992).

Adjournments were properly granted in the following situations:

- When defense counsel was permitted to withdraw. *Williams (Charles)*, 386 Mich at 575-576.

- Preparation of defense expert witness endorsed on the day of trial. *People v Wilson (Roy)*, 397 Mich 76, 81-82 (1976).

- New witness listed by prosecutor or codefendant turns state's evidence shortly before trial. *People v Suchy*, 143 Mich App 136, 139-143 (1985).

- New statements made by witnesses shortly before trial. *Suchy*, 143 Mich App at 142-146.

- Defendant requested properly fitted clothes to replace ill-fitting clothes brought for trial. *People v Turner (Clarence Duane)*, 144 Mich App 107, 110-111 (1985).

A trial court's desire to expedite the court's docket is not a sufficient reason to deny an otherwise proper request for a continuance. *Williams (Charles)*, 386 Mich at 577.

C. Adjournment to Secure Witness Testimony

"A criminal defendant has a state and federal constitutional right to present a defense, which includes the right to call witnesses, but this right is not absolute[;]" the defendant must comply with MCR 2.503 if he or she seeks an adjournment to secure the testimony of a witness. *People v Daniels (Daniel)*, 311 Mich App 257, 265 (2015) (citations omitted).

"[I]f a defendant seeks an adjournment based on the absence of an expert witness, he [or she] must show both 'good cause and diligence' in pursuit of that expert witness." *Daniels (Daniel)*, 311 Mich App at 266 (citation omitted). "'Good cause factors include whether [the] defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments[;] . . . [e]ven with good cause and due diligence, the trial court's denial of a request for an adjournment . . . is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion.'" *Id*. at 266 (holding that "[t]he trial court . . . did not violate [the

defendant's] right to present a defense when it denied his request for an adjournment[]" where the defendant "did not attempt to locate and secure two potential expert witnesses until soon before the trial began[,]" failed to "move for an adjournment until the *day before trial*[,]" "had already caused his trial to be delayed for several months[,]" and "fail[ed] to show that the absence of [the expert witness] prejudiced him in any significant way[]") (citations omitted).

D. Standard of Review

A trial court's grant or denial of a party's request for a continuance is reviewed for an abuse of discretion. *People v Jackson (Walter)*, 467 Mich 272, 276 (2002).

Even if the trial court abused its discretion in denying a defendant's request for a continuance, the defendant must still establish that he or she was prejudiced by the court's decision. *Williams (Charles)*, 386 Mich at 574; *Daniel (Daniels)*, 311 Mich App at 266 (citation omitted).

8.9 Motions for Rehearing or Reconsideration

"[A] circuit court, sitting as an appellate court, [may] reconsider a judgment or order." *People v Walters (Jayne)*, 266 Mich App 341, 349 (2005).

"Unless another rule provides a different procedure for reconsideration of a decision[], a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion." MCR 2.119(F)(1). "The purpose of MCR 2.119(F) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties. . . . The time requirement for filing a motion for reconsideration or rehearing insures that the motion will be brought expeditiously." *Bers v Bers*, 161 Mich App 457, 462 (1987) (internal citation omitted).

No response to the motion may be filed and no oral argument is allowed unless the court directs otherwise. MCR 2.119(F)(2).

The standard for granting or denying motions for rehearing or reconsideration is set out in MCR 2.119(F)(3):

> "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either

> expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

Generally, a motion for rehearing or reconsideration that presents the same issue ruled on by the court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3). However, "[MCR 2.119(F)(3)] does not categorically prevent a trial court from revisiting an issue even when [a] motion for reconsideration presents the same issue already ruled on; in fact, it allows considerable discretion to correct mistakes." *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754 (2014), citing *In re Moukalled Estate*, 269 Mich App 708, 714 (2006); see also *Walters (Jayne)*, 266 Mich App at 350 (adherence to the palpable error provision contained in MCR 2.119(F)(3) is not required; rather, the provision offers guidance to a court by suggesting when it may be appropriate to grant a party's motion for reconsideration).

Where a different judge is seated in the circuit court that issued the ruling or order for which a party seeks reconsideration, the judge reviews the prior court's factual findings for clear error. *Walters (Jayne)*, 266 Mich App at 352. The fact that the successor judge is reviewing the matter for the first time does not authorize the judge to conduct a de novo review. *Id.* at 352. Similarly, "'rehearing [or reconsideration] will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur.'" *People v White (Kadeem) (White (Kadeem) III)*, 493 Mich 962, 962 (2013) (quoting *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), and applying MCR 2.119(F)(3) to a motion for rehearing of the Michigan Supreme Court's decision[24] affirming the judgment of the Court of Appeals).[25]

A motion for reconsideration or rehearing may not be entertained by a court after entry of an order changing venue to another court, unless the order specifies an effective date. *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 656, 658-661 (2012) (holding that "once a transfer of venue is made, the transferee court has full jurisdiction over the action [under MCL 600.1651] and, therefore, the transferor court has none[; a]ny motion for rehearing or reconsideration would have to be heard by whichever court has jurisdiction over the action at the time the motion is

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[24] *People v White (Kadeem) (White (Kadeem) II)*, 493 Mich 187 (2013).

[25] On April 12, 2013, the Michigan Supreme Court issued similar orders applying MCR 2.119(F)(3) to motions for reconsideration in several civil cases. See, e.g., *Boertmann v Cincinnati Ins Co*, 493 Mich 963 (2013). Subsequently, MCR 7.313, governing motions in the Michigan Supreme Court, was amended to specifically provide that "the restrictions contained in MCR 2.119(F)(3)[]" apply to motions for rehearing, MCR 7.313(E)(1), and motions for reconsideration, MCR 7.313(F). See ADM File No. 2013-12, effective January 1, 2014.

brought, which, after entry of an order changing venue, would be the transferee court[]").[26]

8.10 Motion to Change Venue

A. Generally

Venue in a criminal case may be changed "upon good cause shown by either party." MCL 762.7. Generally, defendants must be tried in the county where the crime is committed. MCL 600.8312.[27] "[U]nfair and prejudicial news comment on pending trials has become increasingly prevalent," and "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influence." *Sheppard (Samuel) v Maxwell*, 384 US 333, 362 (1966).

The moving party has the burden of showing good cause for a change of venue. MCL 762.7. "The burden of establishing that prospective jurors have been influenced by pretrial publicity is on the party seeking the change of venue, and merely showing that jurors have been exposed to pretrial publicity is not in itself sufficient." *People v Florinchi*, 84 Mich App 128, 135 (1978). "'[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.'" *Skilling v United States*, 561 US 358, 384 (2010), quoting *Nebraska Press Ass'n v Stuart*, 427 US 539, 554 (1976) ("news stories about Enron did not present the kind of vivid, unforgettable information [the United States Supreme Court] ha[s] recognized as particularly likely to produce prejudice, and [the trial city's] size and diversity diluted the media's impact"). The focus is on whether the moving party can secure a fair and impartial trial in the jurisdiction where the action is brought. *In re Attorney General*, 129 Mich App 128, 133 (1983). Convenience of the parties and witnesses does not constitute good cause. *Id.* at 133, 135.

Where potential jurors swear that they will put aside preexisting knowledge and opinions about the case and that they will be able to decide the case impartially based on the evidence at trial, such preexisting knowledge and opinions do not constitute good cause

[26] The *Frankfurth* Court noted that "the better practice might be to make orders changing venue effective as of some reasonable time [after entry of the order]." *Frankfurth*, 297 Mich App at 662.

[27] However, certain exceptions apply as provided by statute. See, e.g., MCL 762.8 (providing that "[w]henever a felony consists or is the culmination of [two] or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect[;]" MCL 762.3(3)(a) (providing that "[i]f an offense is committed on the boundary of [two] or more counties, districts or political subdivisions or within [one] mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned[]"). See Section 5.2 and Section 6.2 for additional discussion of jurisdiction and venue.

justifying a change of venue. *People v DeLisle*, 202 Mich App 658, 662-663 (1993).

"Federal precedent has used two approaches to determine whether the failure to grant a change in venue is an abuse of discretion. Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *People v Jendrzejewski*, 455 Mich 495, 500-501 (1997).

In *People v Cline*, 276 Mich App 634, 638-642 (2007), the Court of Appeals reviewed the circumstances of the defendant's case in light of the standards set out in *DeLisle*, 202 Mich App 658, and *Jendrzejewski*, 455 Mich 495, to determine whether the defendant's counsel was ineffective for failing to bring a motion for change of venue. In *Cline*, 276 Mich App at 638-642, the totality of the circumstances surrounding the jury selection—including the fact that nine out of the selected jury panel of 14 heard about the case before trial, and 11 local newspaper articles about the case were published—did not overcome the jurors' assurances that they could decide the case impartially.

"[A]fter [a] change of venue becomes effective, the transferee court has full jurisdiction of the action [under MCL 600.1653]; consequently, the transferor court has none[]" and may not "entertain any further proceedings[.]" *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 656, 658 (2012) (holding that "because the trial court had entered an order changing . . . venue, it lost jurisdiction to entertain . . . [the plaintiff's] motion for reconsideration[]" of the trial court's order changing venue).

B. Timing

It is the preferred practice for the trial court to defer ruling on a motion for change of venue until after jury selection has been attempted in the original county. *People v Harvey (Wayne)*, 167 Mich App 734, 741 (1988).

A district court does not have authority to order a change of venue in a felony case. *In re Attorney General*, 129 Mich App at 131-132.

C. Standard of Review

A trial court's ruling on a motion for change of venue is reviewed for an abuse of discretion. *Jendrzejewski*, 455 Mich at 500. A trial

court's determination regarding the existence of venue in a criminal prosecution is reviewed de novo. *People v Webbs*, 263 Mich App 531, 533 (2004), superseded in part on other grounds by 2013 PA 128, effective October 9, 2013.

"[B]ecause improper venue is not a constitutional structural error, [it] is subject to a harmless error analysis under MCL 769.26." *People v Houthoofd*, 487 Mich 568, 593 (2010), superseded in part on other grounds by 2013 PA 128, effective October 9, 2013. "Moreover, MCL 600.1645 explicitly provides that no judgment shall be voided solely on the basis of improper venue." *Houthoofd*, 487 Mich at 593-594.

8.11 Motion to Close Courtroom During Preliminary Examination

Upon the motion of any party and satisfaction of certain conditions, a magistrate has the discretion to close to members of the general public the preliminary examination of a person charged with any of the following offenses:

- Criminal sexual conduct in any degree;
- Assault with intent to commit criminal sexual conduct;
- Sodomy;
- Gross indecency;
- Any other offense involving sexual misconduct. MCL 766.9(1).

See Section 4.19 for more information.

8.12 Motion to Close Courtroom During Trial

A. Limitations on Access to Court Proceedings

Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless

> "(a) a party has filed a written motion that identifies the specific interest to be protected, or the court sua sponte has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;

> "(b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
>
> "(c) the court states on the record the specific reasons for the decision to limit access to the proceeding." MCR 8.116(D)(1).

Any person may file a motion to set aside an order entered under MCR 8.116(D)(1) or object to its entry. MCR 2.119[28] governs the proceedings for motions or objections under MCR 8.116(D)(1). MCR 8.116(D)(2).

The court must forward a copy of the order to the State Court Administrative Office. MCR 8.116(D)(3).

B. Discussion

All trials must be open to the public. MCL 600.1420. See also US Const, Am VI; Const 1963, art 1, § 20 (entitling criminal defendant to public trial). A criminal trial must be open to the public, unless the court finds that no alternative short of closure will adequately assure a fair trial for the accused. *Richmond Newspapers, Inc v Virginia*, 448 US 555, 580-581 (1980).

See Administrative Order No. 1989-1,[29] 432 Mich cxii (1989), regarding film or electronic media coverage of court proceedings.

"Although the Sixth Amendment right [to a public trial] 'is the right of the accused,' a member of the public can invoke the right to a public trial under the First Amendment." *People v Vaughn (Joseph)*, 491 Mich 642, 652 (2012). "Thus, a defendant cannot affirmatively seek to exclude the public from his [or her] trial unless he [or she] can overcome the public's First Amendment right. That right exists separately from [the] defendant's Sixth Amendment right, and its mere existence does not prevent [an appellate court] from enforcing [the] traditional rules of forfeiture and waiver when reviewing a defendant's claim that his [or her] Sixth Amendment right has been violated." *Id.* at 659.

The requirements for *total* closure are: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be

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[28] See the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 3, for a discussion of MCR 2.119.

[29] Available at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/AOs/AOs-Responsive%20HTML5/index.html#t=AOs%2FAdministrative_Orders%2FAO_No_1989-1_%E2%80%94_Film_or_Electronic_Media_Coverage_of_Court.htm.

prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) it must make findings adequate to support the closure. *People v Kline*, 197 Mich App 165, 170 (1992).

A *partial* closure occurs where the public is only partially excluded, such as when family members or members of the press are allowed to remain, or when the closure order is narrowly tailored to specific needs. *Kline*, 197 Mich App at 170 n 2. Because the effect of a partial closure does not rise to the level of a total closure, only a substantial (rather than a compelling) reason for the closure is necessary. *People v Russell (Fred)*, 297 Mich App 707, 720 (2012) (holding that limited courtroom capacity constituted a substantial reason for the partial closure of voir dire proceedings and did not deny the defendant his right to a public trial); see also *People v Gibbs (Phillip)*, 299 Mich App 473, 481-482 (2013) (no error occurred where, before jury selection began, the trial court stated that spectators were welcome to enter, "but [the courtroom was] then closed once jury selection began[]" because the trial court found it "'too confusing' to allow individuals to come and go during jury selection[;]" furthermore, even if error occurred, the defendant was "not entitled to a new trial or evidentiary hearing[] . . . [where] both parties engaged in vigorous voir dire, there were no objections to either party's peremptory challenges, . . . each side expressed satisfaction with the jury[, and] . . . the venire itself was present[]"); *Kline*, 197 Mich App at 170.

A court has statutory authority to exclude certain persons from the courtroom or to limit the disclosure of information in the courtroom. See, e.g., MCL 600.1420 (court may exclude minors who are not parties or witnesses in cases of scandal or immorality), and MCL 750.520k (in a criminal sexual conduct case, a court may suppress the victim's and actor's names and details of the alleged offense until the defendant is arraigned on the information, the charge is dismissed, or the case is otherwise concluded, whichever is first).

"The parties may not, by their mere agreement, empower a judge to exclude the public and press." *Detroit Free Press v Macomb Circuit Judge*, 405 Mich 544, 549 (1979).

The right to a public trial extends to pretrial hearings, *Waller v Georgia*, 467 US 39, 43-47 (1984), and the jury selection process, *Presley v Georgia*, 558 US 209, 212-216 (2010).[30]

[30] "[T]he right to a public trial also encompasses the right to public voir dire proceedings[.]" *Vaughn (Joseph)*, 491 Mich at 650-652, citing *Presley*, 558 US 209.

"[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Waller*, 467 US at 48. See *Presley*, 558 US at 215 ("[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course[]"). "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials[,]" e.g., "reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members." *Id.* at 215-216 (trial court improperly excluded public from courtroom during jury selection process without considering alternatives to closure).

"While a criminal defendant has the constitutional right to a public trial, that right is forfeited when no objection is made at the time of the courtroom's closure to members of the public." *Vaughn (Joseph)*, 491 Mich at 674. However, because this forfeited right is of constitutional magnitude, "the defendant can obtain relief if he [or she] shows that the court's exclusion of members of the public during voir dire was 'a plain error that affected substantial rights' and that he [or she] either 'is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 674-675, quoting *People v Carines*, 460 Mich 750, 774 (1999). See also *People v Orlewicz*, 293 Mich App 96, 112-114 (2011) (the defendant's request to allow his family to remain in the courtroom, which the trial court had cleared for voir dire due to the large number of potential jurors, did not constitute a legal objection to the closure of the courtroom; therefore, the defendant waived his right to a public trial).

8.13 Motion to Modify Pretrial Release Decision

MCR 6.106(H) governs motions to modify a pretrial release decision, which includes a motion to increase or reduce bail. For more information on this topic, see Section 7.5 in the chapter on pretrial release.

8.14 Motion to Substitute Counsel

An indigent defendant may be entitled to have his or her assigned lawyer replaced on a showing of adequate cause. *People v Ginther*, 390 Mich 436, 441 (1973). An indigent defendant who seeks substitution of assigned counsel must show good cause for substitution. *Id.*; *People v Buie (On Remand) (Buie IV)*, 298 Mich App 50, 67 (2012). See Section 3.5 for more information on this topic.

8.15 Motion to Withdraw as Counsel

An attorney may only withdraw as counsel upon order of the court. MCR 2.117(C)(2). MRPC 1.16 outlines situations when an attorney *must* or *may* move to withdraw as counsel. However, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." MRPC 1.16(c).

8.16 Motion to Disqualify Judge

MCR 2.003(C)(1) sets forth a nonexhaustive list of circumstances in which a judge is disqualified, including instances when a judge is biased or prejudiced for or against a party or an attorney. For example, disqualification is warranted when "[t]he judge is biased or prejudiced for or against a party or attorney[,]" MCR 2.003(C)(1)(a), or when "[t]he judge, based on objective and reasonable perceptions, has either (*i*) a serious risk of actual bias impacting the due process rights of a party as enunciated in [*Caperton v AT Massey Coal Co*, 556 US 868 (2009)], or (*ii*) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct[,]" MCR 2.003(C)(1)(b).

The moving party has the burden of showing grounds for disqualification. A party challenging a judge on the basis of bias or prejudice bears the burden of overcoming the heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 (1996), and *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151 (1992). One who challenges a judge on the basis of the constitutional right to an unbiased and impartial tribunal also bears a heavy burden. *Cain*, 451 Mich at 498-499 n 33.

"[A] trial judge's ruling regarding the admission of evidence, no matter how erroneous, is not grounds for disqualification[under MCR 2.003(C)(1)(b),] . . . [and j]udicial disqualification based on due process grounds is reserved for extreme cases." *People v Roscoe*, 303 Mich App 633, 647-648 (2014) (citing *Caperton*, 556 US at 886-887, 890, and holding that "a ruling against [a] defendant, even if erroneous, does not create a

serious, objective risk of actual bias that rises to an unconstitutional level[]") (additional citation omitted).

See the Michigan Judicial Institute's *Judicial Disqualification in Michigan* for more information.

8.17 Separate or Joint Trial

A. One Defendant—Multiple Charges[31]

A defendant may be charged with two or more offenses in a single information or indictment filed by the prosecuting attorney. MCR 6.120(A). However, each offense with which a defendant is charged must be stated in a separate count. *Id*. When two or more informations or indictments are filed against a single defendant, they may be consolidated for a single trial. *Id*.

Except where a defendant is entitled to the severance of unrelated charges, the court—on its own initiative, a party's motion, or the stipulation of all parties—may join offenses charged in more than one information or indictment against a single defendant. MCR 6.120(B).

Similarly, except where a defendant is entitled to severance, the court—on its own initiative, a party's motion, or the stipulation of all parties—may sever offenses charged in a single information or indictment against a single defendant. MCR 6.120(B).

A court may join or sever charges under MCR 6.120(B) "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B). Joinder is appropriate if the offenses are related, i.e., if the offenses are based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. MCR 6.120(B)(1)(a)–MCR 6.120(B)(1)(c).

In *People v Williams (Carletus)*, 483 Mich 226, 228-229 (2009),[32] the defendant was convicted of two drug charges, stemming from two separate arrests. The Court determined that "the offenses charged were related because the evidence indicated that [the] defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution, and joinder was appropriate." *Id*. at 235. See also *People v Campbell (Michael)*, ___

[31] See also Section 1.10(C)(1) for more information.

[32] *Williams (Carletus)*, 483 Mich at 238, overruled *People v Tobey*, 401 Mich 141 (1977), because *Tobey* construed MCR 6.120 too narrowly.

Mich App ___, ___ (2016) (holding that the trial court did not abuse its discretion or deny the defendant his due process right to a fair trial when it refused to bifurcate the proceedings or hold separate trials as to whether he both committed indecent exposure and was a sexually delinquent person; "[g]iven the substantial overlap in the evidence and that the trial court could adequately protect [the defendant's] rights with a limiting instruction concerning the evidence that was admissible only to prove that [he] was a sexually delinquent person, . . . the trial court's decision to hold a single trial was within the range of reasonable and principled outcomes[]") (citation omitted); *People v Gaines*, 306 Mich App 289, 305 (2014) (cases involving three different victims were "related" for purposes of MCR 6.120(B)(1) and were properly joined for trial where "[the] defendant engaged in ongoing acts related to his scheme of preying upon young, teenage girls from his high school[;] . . . used text messages to communicate with [them] and encouraged them to keep their communications secret[;] . . . requested naked photographs from [at least two of them] and, if they refused, threatened to cut off ties with them[; and] . . . used his parents' basement to isolate two of the young girls and sexually penetrate them[]").

Other relevant factors to consider include: the timeliness of the motion; the drain on the parties' resources; the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence; the potential for harassment; the convenience of witnesses; and the parties' readiness for trial. MCR 6.120(B)(2).

On a defendant's motion, the court must sever unrelated offenses. MCR 6.120(C).

B. Multiple Defendants

"An information[33] or indictment may charge two or more defendants with the same offense." MCR 6.121(A). "An information or indictment may charge two or more defendants with two or more offenses when each defendant is charged with accountability for each offense, or the offenses are related as defined in MCR 6.120(B)." MCR 6.121(A)(1)–MCR 6.121(A)(2). "When more than one offense is alleged, each offense must be stated in a separate count. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment . . . ." MCR 6.121(A).

[33] See also Section 1.10(C)(2) for more information on separate trials involving multiple defendants.

On a defendant's motion, the court must sever unrelated offenses. MCR 6.121(B). The court has discretion whether to require separate or joint trials when two or more defendants are jointly indicted for any criminal offense. MCL 768.5; *People v Hana*, 447 Mich 325, 331 (1994), amended 447 Mich 1203 (1994). Michigan law strongly favors joint trials and a decision to join or consolidate two cases will not be reversed on appeal absent a showing of prejudice to an accused's substantial rights. *People v Carroll*, 396 Mich 408, 414 (1976).

Joinder of distinct criminal charges is allowed when (1) there is a significant overlap of issues or evidence, (2) the charges represent a series of events, and (3) there is a "substantial interconnection" between the defendants, the proofs, and the factual and legal bases of the crimes charged. *People v Stricklin*, 162 Mich App 623, 630 (1987).

In a multidefendant trial, if a codefendant's attorney seeks to "stand in" when defense counsel for another defendant is absent for a brief period, the judge must determine on the record that the defendant knowingly and intelligently accepts substitute counsel on those occasions. *Olden v United States*, 224 F3d 561, 568-569 (CA 6, 2000).

If defendants are tried jointly, M Crim JI 2.19 or M Crim JI 3.7 must be given. Both instructions caution the jury about considering the law and the evidence as it applies to each defendant. M Crim JI 2.19 is a procedural instruction that states:

> "(1) There is more than one defendant in this case. The fact that they are on trial together is not evidence that they were associated with each other or that either one is guilty.
>
> (2) You should consider each defendant separately. Each is entitled to have [his/her] case decided on the evidence and the law that applies to [him/her].
>
> [(3) If any evidence was limited to (one defendant/some defendants) you should not consider it as to any other defendants.]"

M Crim JI 3.7 is a composite instruction that states:

> "(1) _____ and _____ are both on trial in this case. The fact that they are on trial together is not evidence that they were associated with each other or that either one is guilty.
>
> (2) You should consider each defendant separately. Each is entitled to have [his/her] case decided on the evidence and the law that applies to [him/her].

> [(3) If any evidence was limited to (one defendant/some defendants) you should not consider it as to any other defendants.]"

Severance is only mandated under MCR 6.121(C) when a defendant moves for severance and demonstrates that severance is necessary to prevent prejudice to his or her substantial rights. *Hana*, 447 Mich at 331. A defendant is entitled to a separate trial where it appears that a codefendant may testify to exculpate himself or herself and incriminate the defendant. *People v Hurst*, 396 Mich 1, 4 (1976). This rule does not apply to bench trials. *People v Butler (Michael)*, 193 Mich App 63, 66 (1992). To warrant severance, defenses must not only be inconsistent, but also mutually exclusive or irreconcilable. *People v Cadle*, 209 Mich App 467, 469 (1995).

The use of dual juries as an alternative to severance. Dual juries may be used to avoid the problems arising from a joint trial of defendants with antagonistic defenses. *People v Hoffman*, 205 Mich App 1, 19 (1994). The use of separate juries is merely a partial form of severance and should be evaluated using the factors applicable to a motion for separate trials. *Hana*, 447 Mich at 331. The court should determine whether the dual-trial procedure provides defendants with the same protections they would have gotten through separate trials. *Id.* at 351-352.

C. Standard of Review

A trial court's ruling on a motion for joinder or severance is reviewed for an abuse of discretion. *Hana*, 447 Mich at 331; *People v Girard*, 269 Mich App 15, 17 (2005). However, whether the charges are related is a question of law that is reviewed de novo. *Girard*, 269 Mich App at 17.

Part C: Pretrial Motions to Dismiss/Quash

8.18 Motion to Dismiss

No court rule or statute specifically addresses a motion to dismiss criminal charges. MCR 2.504 is the civil court rule governing dismissal of actions. Ordinarily a motion to dismiss is used to address issues such as double jeopardy or entrapment, where the remedy is dismissal of the case.

A motion to dismiss challenging the bindover decision after the preliminary examination is typically designated as a motion to quash.

The trial court exceeds its authority when it dismisses the information against a defendant at a pretrial stage of the proceedings, *People v Morrow*, 214 Mich App 158, 165 (1995), because the prosecutor has exclusive authority to decide whom to prosecute. *People v Williams (Anterio)*, 244 Mich App 249, 254 (2001). MCL 767.29 governs the prosecution's practice of *nolle prosequi*.

The court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Stone*, 269 Mich App 240, 242 (2005).

8.19 Motion to Quash—Improper Bindover[34]

"If, on proper motion, the trial court finds a violation of [MCR 6.110(C) (conduct of examination)], [MCR 6.110(D) (exclusionary rules)], [MCR 6.110(E) (probable cause finding)], or [MCR 6.110(F) (discharge of defendant)], it must either dismiss the information or remand the case to the district court for further proceedings." MCR 6.110(H). MCR 6.110(H) "does not address, and leaves to case law, what effect a violation of these rules or an error in ruling on a motion filed in the trial court may have when raised following conviction." 1989 Staff Comment to MCR 6.110.

See Section 4.35(A) for discussion of motions to quash following bindover.

8.20 Entrapment

A. Generally[35]

Michigan has long recognized the defense of entrapment. *People v Sinclair (John)*, 387 Mich 91, 116 (1972). "The overall purpose of the entrapment defense is to deter the corruptive use of governmental authority by invalidating convictions that result from law enforcement efforts that have as their effect the instigation or manufacture of a new crime by one who would not otherwise have been so disposed." *People v Juillet*, 439 Mich 34, 52 (1991). "The challenge focuses exclusively upon the nature of the police conduct which, if improper, will not be mitigated, justified or excused in any fashion by the disposition of the accused." *People v D'Angelo*, 401 Mich 167, 182 (1977).

[34] For more information on bindover procedures, see Section 4.28.

[35] See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 7, for more information on entrapment.

B. Not an Issue of Guilt or Innocence

A defendant's claim of entrapment does not require an assessment of the defendant's guilt or innocence of the crime charged. *People v White (John)*, 411 Mich 366, 387 (1981). In this respect, the entrapment defense differs from other defenses such as insanity and self-defense. *Id.* at 387. Rather, entrapment is a defense that argues against any prosecution of the defendant's conduct, and in that respect, entrapment is like a jurisdictional defect that is not waived, for example, by a defendant's guilty plea. *Id*. However, "an unconditional plea . . . waives claims that occurred before the entry of the guilty plea." *People v Crall*, 444 Mich 463, 464-465 (1993).

The entrapment defense requires the presentation of evidence that is collateral to the commission of the crime and that justifies the dismissal of charges against the defendant claiming he or she was entrapped. *Juillet*, 439 Mich at 52 (entrapment is not a defense that negates an essential element of the charged crime); *D'Angelo*, 401 Mich at 179 (because test for entrapment focuses on the challenged governmental activity, the defendant is not required to admit the criminal act to raise the issue of entrapment).

C. Hearing

When the defendant raises the issue of entrapment, whether before or during trial, the trial court must conduct an evidentiary hearing outside the presence of the jury. *D'Angelo*, 401 Mich at 177-178. Both the prosecution and the defendant may present evidence, and the defendant has the burden of proving the claim of entrapment by a preponderance of the evidence. *Id.* at 178, 183. The trial court must make findings of fact. *Juillet*, 439 Mich at 61. If the trial court concludes that the defendant was entrapped, the case must be dismissed and the defendant must be discharged. *D'Angelo*, 401 Mich at 184.

D. Test for Entrapment

"Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People v Johnson (Jessie)*, 466 Mich 491, 498 (2002) (internal citations omitted). "Because a defendant may prove police entrapment solely through reprehensible conduct, police instigation is not a prerequisite to a claim of entrapment." *People v Akhmedov*, 297 Mich App 745, 754 (2012), citing *People v Fyda*, 288 Mich App 446, 456 (2010).

The objective test for entrapment "focuses primarily on the investigative and evidence-gathering procedures used by the governmental agents," while the subjective test "focuses on the defendant's predisposition or motivation to commit a new crime." *Juillet*, 439 Mich at 53. The objective entrapment test "determine[s] whether the police conduct in question has as its 'probable and likely outcome the instigation rather than the detection of criminal activity.'" *Id.* at 53-54, quoting *People v Jamieson (Stephen)*, 436 Mich 61, 77 (1990) (opinion by Brickley, J.). "[A]lthough the objective test is mainly concerned with the existence of reprehensible police conduct, consideration must be given to 'the willingness of the accused to commit the act weighed against how a normally law-abiding person would react in similar circumstances.'" *Juillet*, 439 Mich at 54, quoting *Jamieson (Stephen)*, 436 Mich at 74. That is, "whether the police conduct in question would induce or cause a hypothetical person to engage in criminal activity." *Juillet*, 439 Mich at 54. Thus, "not all generally offensive police conduct will necessarily support a claim of entrapment." *Id.*

> "When examining whether governmental activity would impermissibly induce criminal conduct, several factors are considered: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he [or she] was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make commission of the crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted." *Johnson (Jessie)*, 466 Mich at 498-499.

See, e.g., *Fyda*, 288 Mich App at 457-460, for an analysis of several of the factors set out in *People v Johnson (Jessie)*, 466 Mich 491 (2002). In *Fyda*, 288 Mich App at 458-460, the Court of Appeals concluded that the police did not exploit the long-term relationship between the defendant and his confidential informant-friend to manufacture a crime; that a good price was not an inducement that would make soliciting a murder unusually attractive to a hypothetical law-

abiding citizen; and that government pressure was not an issue. In sum, the Court of Appeals concluded that "the police actions were 'insufficient to induce or instigate the commission of a crime by the average person, similarly situated to [defendant], who [was] not ready and willing to commit it.'" *Id*. at 460, quoting *Juillet*, 439 Mich at 55. The record showed that "the police did 'nothing more than present the defendant with the opportunity to commit the crime of which he was convicted,' which is insufficient to support a finding of entrapment." *Fyda*, 288 Mich App at 460, quoting *People v Sexton*, 250 Mich App 211, 220 (2002).

"'An official may employ deceptive methods to obtain evidence of a crime as long as the activity does not result in the manufacturing of criminal behavior.'" *People v Vansickle*, 303 Mich App 111, 117 (2013), quoting *Jamieson (Stephen)*, 436 Mich at 82 (opinion by Brickley, J.). In *Vansickle*, 303 Mich App at 113-114, 117, the trial court properly denied the defendant's motion to dismiss based on entrapment where "[the d]efendant, a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*.," sold marijuana to undercover police officers "pos[ing] as legitimate patients[]" at a medical marijuana dispensary. "[The] defendant was not a target of the undercover investigation of the marijuana dispensary[,] . . . the officers were not familiar with [the] defendant[,]" and "the officers did not appeal to [the] defendant's sympathy, offer him any unusually attractive inducements or excessive consideration, or use any other means to pressure [him] to sell them marijuana[;]" rather, they "merely provided [him] with an opportunity to commit the crime, which is insufficient to establish entrapment." *Vansickle*, 303 Mich App at 116-117.

The fact that undercover officers engaged in "'friendly banter'" with a defendant "does not establish 'impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances.'" *Vansickle*, 303 Mich App at 116, quoting *Fyda*, 288 Mich App at 456.

"Reprehensible conduct by an informant may be attributed to the police if a sufficient agency relationship exists between the informant and the police." *Akhmedov*, 297 Mich App at 754. "However, police do not commit entrapment when they do not become involved with the informant until after the criminal transaction is complete." *Id*. at 754-756 (no entrapment occurred during three separate drug transactions because an agency relationship did not exist between the police and an informant during the period when the informant groomed the defendant in the weeks leading up to the series of drug deals, the police only became involved with the informant on the day of the first

transaction, and the police and informant "had no further contact after the first transaction[]").

> **Note:** The United States Supreme Court has never applied the reprehensible conduct test for entrapment, "but has suggested in dictum that it may be available in extreme situations where '[t]he law enforcement conduct . . . [is] shocking to the universal sense of justice . . . .'" *United States v Al-Cholan*, 610 F3d 945, 952 (CA 6, 2010), quoting *United States v Russell*, 411 US 423, 431-432 (1973). The United States Court of Appeals for the Sixth Circuit has also "never applied the 'outrageous government conduct' defense, and ha[s] stated that 'there are . . . strong reasons for concluding that such a defense simply does not exist . . . .'" *Al-Cholan*, 610 F3d at 952, quoting *United States v Tucker*, 28 F3d 1420, 1427 (CA 6, 1994). The Sixth Circuit noted that "[e]ven if this defense is still available in theory, 'in practice, courts have rejected its application with almost monotonous regularity.'" *Al-Cholan*, 610 F3d at 952, quoting *United States v Santana*, 6 F3d 1, 4 (CA 1, 1993).

E. Entrapment by Estoppel

Entrapment by estoppel applies "[w]hen a citizen reasonably and in good faith relies on a government agent's representation that the conduct in question is legal, under circumstances where there is nothing to alert a reasonable citizen that the agent's statement is erroneous[.]" *People v Woods (Robert)*, 241 Mich App 545, 548 (2000). The due process principle underlying the doctrine of entrapment by estoppel is fairness to a well-intentioned citizen who unwittingly breaks the law while relying on government agents' statements under circumstances where reliance is reasonable. *Id.* at 548. "However, when a citizen who should know better unreasonably relies on the agent's erroneous statement, or when the 'statement' is not truly erroneous, but just vague or contradictory, the defense is not applicable." *Id.* at 548-549.

"'The entrapment by estoppel defense applies where the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law presented, and the substance of the official's statement.'" *Woods (Robert)*, 241 Mich App at 558, quoting *United States v West Indies Transport, Inc*, 127 F3d 299, 313 (CA 3, 1997).

F. Standard of Review

Whether the police entrapped a defendant is reviewed de novo as a matter of law, "but the trial court's specific findings of fact are reviewed for clear error." *Vansickle*, 303 Mich App at 114, citing *Fyda*, 288 Mich App at 456. See also *Johnson (Jessie)*, 466 Mich at 497 ("[a] trial court's finding of entrapment is reviewed for clear error[]"). "Findings of fact are clearly erroneous if [the reviewing court is] left with a firm conviction that the trial court made a mistake." *Vansickle*, 303 Mich App at 115, citing *Fyda*, 288 Mich App at 456.

8.21 Double Jeopardy Issues

A. Generally

Both the United States and Michigan constitutions prohibit a person from twice being placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574 (2004). The Double Jeopardy Clause of the United States Constitution, Am V, provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]" The Clause applies to the states through the Fourteenth Amendment. *North Carolina v Pearce*, 396 US 711, 717 (1969). The Michigan Constitution provides: "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. This provision is "essentially identical to its federal counterpart[]" and was intended to be "construed consistently with the corresponding federal provision." *Nutt*, 469 Mich at 575, 594.

"Both federal and Michigan double jeopardy provisions afford three related protections: (1) against a second prosecution for the same offense after acquittal, (2) against a second prosecution for the same offense after conviction, and (3) against multiple punishments for the same offense. [*Nutt*, 469 Mich] at 574; *Pearce*, [396 US 711]." *People v Ford*, 262 Mich App 443, 447 (2004).

"The purposes of double jeopardy protections against successive prosecutions for the same offense are to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching." *Ford*, 262 Mich App at 447. Collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy," as it "surely protects the [person] who has been acquitted from having to 'run the ga[u]ntlet' a second time." *Ashe v Swenson*, 397 US 436, 445-446 (1970), quoting *Green (Everett) v United States*, 355 US 184, 190 (1957); see also *Bravo-Fernandez v United States*, 580 US ___, ___ (2016) (quoting *Ashe*, 397 US at 443, and noting that "[i]n criminal prosecutions, as in civil litigation, the

issue-preclusion [component of the Double Jeopardy Clause] means that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit[]'"). ~~*People v Wilson (Dwayne)*, 496 Mich 91, 103, 105 (2014) (citing *Yeager v United States*, 557 US 110 (2009), and noting that under the collateral estoppel prong of double jeopardy, "if an issue has been finally resolved at one moment in time, the same issue cannot be resolved differently at a subsequent time[]").~~

"[T]he purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended." *Ford*, 262 Mich App at 447-448. Where multiple punishments are involved, the Double Jeopardy Clause acts as a restraint on the prosecution and the courts, not the Legislature. *Brown (Nathaniel) v Ohio*, 432 US 161, 165 (1977). The *Blockburger*[36] test should be employed to determine whether double jeopardy considerations bar multiple punishments. *People v Smith (Bobby)*, 478 Mich 292, 296 (2007).

"[I]f a defendant can make a prima facie showing of a violation of the Double Jeopardy Clause, a second prosecution is barred unless the government can demonstrate by a preponderance of the evidence why double jeopardy principles do not bar prosecution." *People v Wilson (Amir)*, 454 Mich 421, 428 (1997).

B. Multiple Prosecutions for the Same Offense

MCL 763.5 provides that "[n]o person shall be held to answer on a second charge or indictment for any offense for which he [or she] has been acquitted upon the facts and merits of the former trial but such acquittal may be pleaded or given in evidence by him [or her] in bar of any subsequent prosecution for the same offense."

Same Elements Test. When multiple charges are brought against a defendant for conduct related to a single criminal transaction, the "same-elements" test is used to determine whether the prohibition against double jeopardy is violated. *Nutt*, 469 Mich at 567-568.[37] "Application of the same-elements test, commonly known as the '*Blockburger* test,' is the well-established method of defining the Fifth Amendment term 'same offence.'" *Nutt*, 469 Mich at 576;

[36] *Blockburger v United States*, 284 US 299 (1932).

[37] In *Nutt*, 469 Mich at 567-568, the Michigan Supreme Court overruled *People v White (George)*, 390 Mich 245 (1973), which employed the "same transaction" test (prohibiting successive prosecutions of a defendant for entirely different crimes arising from a single criminal "transaction") to resolve double jeopardy issues.

Blockburger, 284 US at 304. The *Blockburger* test "'focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Nutt*, 469 Mich at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975).

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Nutt*, 469 Mich at 577-578, quoting *Blockburger*, 284 US at 304.

Personal Protection Orders (PPOs) and Double Jeopardy. In the case of PPO violations, the Michigan Legislature has clearly indicated its intent that criminal contempt sanctions be imposed in addition to whatever other criminal penalties may apply for a separate criminal offense.[38] MCL 600.2950(23); MCL 600.2950a(20); *People v Coones*, 216 Mich App 721, 727-728 (1996). The Double Jeopardy Clause applies to non-summary criminal contempt prosecutions just as it does to other criminal prosecutions. *United States v Dixon (Alvin)*, 509 US 688, 696 (1993).

The "Separate Sovereign" Rule. Under "the dual-sovereignty doctrine, a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns." *Puerto Rico v Sanchez Valle*, 579 US ___, ___ (2016). See also *United States v Studabaker*, 578 F3d 423, 430 (CA 6, 2009) (the United States and other countries are separate sovereigns; therefore, the Double Jeopardy Clause does not bar successive prosecutions for the same course of conduct). In determining "whether two prosecuting authorities are different sovereigns for double jeopardy purposes, . . . [the] narrow, historically focused question[]" is "whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same 'ultimate source.'" *Sanchez Valle*, 579 US at ___ (citing *United States v Wheeler*, 435 US 313, 320 (1978), and holding that "the ultimate source of Puerto Rico's prosecutorial power" is the United States Congress, which "authorized and approved its Constitution, from which [its] prosecutorial power now flows[;]" accordingly, Puerto Rico and the United States "are not separate sovereigns[]" and therefore cannot "successively prosecute a single defendant for the same criminal conduct[]").

[38] See the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 5, for more information.

The Double Jeopardy Clause does not bar successive state and federal prosecutions of a defendant for offenses arising from the same criminal episode. *People v Davis (Gevon)*, 472 Mich 156, 162 (2005), citing *Bartkus v Illinois*, 359 US 121 (1959). Because federal and state prosecutorial authority are derived from two distinct and independent sources, a defendant whose conduct violates both federal and state law commits two offenses subject to punishment by both sovereigns. *Davis (Gevon)*, 472 Mich at 163-164; see also *Sanchez Valle*, 579 US at ___ (noting that "the States are separate sovereigns from the Federal Government" for purposes of double jeopardy because "[t]he States' 'powers to undertake criminal prosecutions[]'" do not derive from the United States Congress; rather, "the States rely on 'authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment[]'") (citations omitted).

The dual sovereignty rule for successive federal and state prosecutions also applies to cases involving prosecutions by different *states* for the same criminal conduct; double jeopardy does not prohibit successive state prosecutions where a defendant's conduct violates the law in more than one state and more than one state seeks to prosecute the defendant for a crime resulting from that conduct. *Davis (Gevon)*, 472 Mich at 158, 166-169 (noting that a state is a sovereign separate from another state when it derives its prosecutorial authority from a source independent of the other state's source of authority); see also *Sanchez Valle*, 579 US at ___ (noting that "the States are separate sovereigns from the Federal Government (and from one another)[]" for double jeopardy purposes). In *Davis (Gevon)*, the Double Jeopardy Clause did not bar the State of Michigan from prosecuting a defendant who had already been convicted and sentenced in Kentucky for offenses under Kentucky law that arose from the same conduct on which Michigan based its charges against the defendant. *Id*. at 158-159, 168-169.

Collateral Estoppel and Double Jeopardy. "In criminal prosecutions, as in civil litigation, the issue-preclusion [component of the Double Jeopardy Clause] means that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Bravo-Fernandez v United States*, 580 US ___, ___ (2016), quoting *Ashe v Swenson*, 397 US 436, 443 (1970). "Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally[,]" and "[i]n order for collateral estoppel to operate as a bar to a subsequent prosecution, the jury in the earlier [] proceeding must *necessarily* have determined that [the] defendant was not guilty of the [crime] charged in the prosecutor's complaint."

People v Gates (Gregory), 434 Mich 146, 158 (1990). "Particularly where it appears that a jury's verdict is the result of compromise, compassion, lenity, or misunderstanding of the governing law, the Government's inability to gain [appellate] review 'strongly militates against giving an acquittal [issue] preclusive effect.'" *Bravo-Fernandez*, 580 US at ___ (citation omitted; second alteration in original). "The inability of a court to determine upon what basis an acquitting jury reached its verdict, is, by itself, enough to preclude the defense of collateral estoppel." *Gates (Gregory)*, 434 Mich at 158. "The verdict in the first proceeding need not explicitly have addressed the issue to be precluded, however. The fact that a verdict is a general verdict may make the determination of what issues have been decided problematic, but it does not automatically bar the application of collateral estoppel." *Id.*, citing *Ashe*, 397 US at 444.

"[A]n appellate court's vacatur of a conviction [does not] alter[] issue-preclusion analysis under the Double Jeopardy Clause[;]" accordingly, if "a jury returns inconsistent verdicts, convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact[,]" and an appellate court vacates the conviction for legal error unrelated to the verdicts' inconsistency, retrial on the charge resulting in conviction is not barred by the Double Jeopardy Clause "when [the] verdict inconsistency renders unanswerable 'what the jury necessarily decided.'" *Bravo-Fernandez*, 580 US at ___ (citation omitted). Accordingly, where the jury returned inconsistent verdicts by convicting the petitioners of bribery but acquitting them of two related charges that were dependent on the standalone bribery offense and turned on the same contested issue of fact, the issue-preclusion component of the Double Jeopardy Clause did not bar a subsequent prosecution for bribery after the appellate court vacated the bribery convictions for instructional error. *Id.* at ___. Under these circumstances, the petitioners could not "establish the factual predicate necessary to preclude the Government from retrying them on the standalone [bribery] charges—namely, that the jury in the first proceeding actually decided that they did not violate the federal bribery statute." *Id.* at ___, ___ n 6, abrogating *People v Wilson (Dwayne)*, 496 Mich 91, 105-107 (2014) (which held that the collateral-estoppel strand of Double Jeopardy Clause jurisprudence barred retrial for felony murder where the defendant was convicted of felony murder but inconsistently acquitted of the only underlying felony supporting the felony murder charge, and the felony murder conviction was reversed on appeal for legal error).

Cross-Over Collateral Estoppel. "[I]n the body of case law applying [the] principle [of collateral estoppel,] the vast majority of cases involve the applicability of collateral estoppel where there are two civil proceedings. Cases involving 'cross-over estoppel,' where an

issue adjudicated in a civil proceeding is claimed to be precluded in a subsequent criminal proceeding, or vice versa, are relatively recent and rare." *Gates (Gregory)*, 434 Mich at 155. In *Gates (Gregory)*, 434 Mich at 150-151, 165, the Michigan Supreme Court held that because the defendant's guilt or innocence was not necessarily determined by a jury verdict of "no jurisdiction" in a child protective proceeding, the doctrine of collateral estoppel did not preclude the subsequent criminal prosecution of the defendant for criminal sexual conduct.

In *People v Trakhtenberg*, 493 Mich 38, 42, 48-51 (2012), the Michigan Supreme Court held that "['cross-over'] collateral estoppel [could not] be applied to preclude review of a criminal defendant's claim of ineffective assistance of counsel when a prior civil judgment held that defense counsel's performance did not amount to malpractice[,]" because "[the] defendant did not have a full and fair opportunity to litigate his [ineffective assistance of counsel] claim in the [prior] malpractice proceeding." Noting that "[s]everal Court of Appeals opinions have held that a criminal defense attorney may rely on the doctrine of collateral estoppel in order to avoid malpractice liability when a full and fair determination was made in a previous criminal action that the same client had received effective assistance of counsel[,]"[39] the *Trakhtenberg* Court stated that it nevertheless "must hesitate to apply collateral estoppel . . . when the government seeks to apply collateral estoppel to preclude a *criminal* defendant's claim of ineffective assistance of counsel in light of a prior *civil* judgment that defense counsel did not commit malpractice." *Id*. at 48.

Retrial Following Entry of Directed Verdict of Acquittal.[40] When a trial court grants a defendant's motion for a directed verdict of acquittal, the prohibition against double jeopardy generally prevents further action against the defendant based on the same charges. *People v Nix*, 453 Mich 619, 626-627 (1996). "However, the trial court's characterization of its ruling is not dispositive, and what constitutes an 'acquittal' is not controlled by the form of the action." *People v Mehall*, 454 Mich 1, 5 (1997). Rather, a reviewing court must "determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v Martin Linen Supply Co*, 430 US 564, 571 (1977); see also *Mehall*, 454 Mich at 5. "Retrial is not permitted if the trial court evaluated the evidence and determined that it was *legally insufficient* to sustain a conviction." *Id.* at 6.

[39] "See, e.g., *Barrow v Pritchard*, 235 Mich App 478, 484-485 (1999)." *Trakhtenberg*, 493 Mich at 48.

[40] See Section 10.12(C) for additional discussion of the double jeopardy implications of a directed verdict.

"[R]etrial is barred when a trial court grants an acquittal because the prosecution . . . failed to prove an 'element' of the offense that, in actuality, it did not have to prove." *Evans v Michigan*, 568 US ___, ___ (2013). In *Evans*, 568 US at ___, "[w]hen the State of Michigan rested its case at [the defendant's] arson trial, the [trial] court entered a directed verdict of acquittal, based upon its view that the State had not provided sufficient evidence of a particular element of the offense." However, "the unproven 'element' was not actually a required element at all." *Id*. at ___. The United States Supreme Court held that "a midtrial acquittal in these circumstances is an acquittal for double jeopardy purposes[.]" *Id*. at ___. Accordingly, the defendant's "trial ended in an acquittal when the trial court ruled the State had failed to produce sufficient evidence of his guilt." *Id*. at ___. "The Double Jeopardy Clause thus bars retrial for his offense and should have barred the State's appeal." *Id*. at ___, reversing *People v Evans*, 491 Mich 1 (2012).[41]

Retrial Following Mistrial Declared Due to Deadlocked Jury. Retrial after a mistrial due to a deadlocked jury does not violate the Double Jeopardy Clause. *Renico v Lett*, 559 US 766, 773 (2010). "A 'mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.'" *Id*. at 774, quoting *Arizona v Washington*, 434 US 497, 509 (1978).[42] In *Renico*, 559 US at 775, quoting *Washington*, 434 US at 517, the United States Supreme Court reiterated its holding "that a trial judge declaring a mistrial is not required to make explicit findings of "'"manifest necessity"'" nor to 'articulate on the record all the factors which informed the deliberate exercise of his [or her] discretion.'" The United States Supreme Court has "never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse." *Id*. In fact, the United States Supreme Court has never "'overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the "manifest necessity" standard had not been met.'" *Id*., quoting *Winston v Moore*, 452 US 944, 947 (1981). See also *People v Ackah-Essien*, 311 Mich App 13, 34 (2015) ("neither [the Michigan] Supreme Court nor

[41] On April 5, 2013, the Michigan Supreme Court, "in conformity with the mandate of the Supreme Court of the United States[]" in *Evans*, 568 US ___, entered an order vacating its judgment and opinion in *Evans*, 491 Mich 1, and affirming the judgment of the Wayne County Circuit Court. *People v Evans*, 453 Mich 959, 959-960 (2013).

[42] "[A] trial court, before declaring a mistrial because of a hung jury, [is not required] to consider any particular means of breaking the impasse[or] to consider giving the jury new options for a verdict." *Blueford v Arkansas*, 566 US ___, ___ (2012), citing *Renico*, 559 US at ___.

the United States Supreme Court has ever required that a trial court follow a particular procedure, consider alternatives to a mistrial, or make record findings before declaring a mistrial on the basis that a jury is unable to reach a unanimous verdict[]").

Where, "[b]efore the jury concluded deliberations . . . , [the jury foreperson] reported that [the jury] was unanimous against guilt on charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide[,]" and where the jury then continued deliberations before a mistrial was declared because the jury remained hopelessly deadlocked, the Double Jeopardy Clause did not bar the defendant's retrial on all of the charged offenses. *Blueford v Arkansas*, 566 US ___, ___ (2012). Although the jury was instructed to consider the offenses in order, from greater to lesser, and to proceed to each lesser offense only after agreeing that the defendant was not guilty of the greater offenses, "the foreperson's announcement of the jury's unanimous votes on capital and first-degree murder [did not] represent[] . . . a resolution of some or all of the elements of those offenses in [the defendant's] favor." *Id.* at ___. "The foreperson's report was not a final resolution of anything[,] . . . [and t]he jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report[;]" because it was possible for the "jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes[,] . . . the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses[.]" *Id.* at ___.

Retrial Following Return of Verdict by Unsworn Jury. "[J]eopardy attaches when the jury is selected and sworn." *People v Allan (David)*, 299 Mich App 205, 217 (2013). Therefore, "[i]n the event that an unsworn jury returns a verdict, a defendant may be tried again for the same offense because jeopardy never attached." *Id.* at 217-218.

C. Multiple Punishments for the Same Offense

"The multiple punishments strand of double jeopardy 'is designed to ensure that courts confine their sentences to the limits established by the Legislature' and therefore acts as a 'restraint on the prosecutor and the Courts.'" *People v Miller (Joseph)*, 498 Mich 13, 17-18 (2015) (citation omitted). "The multiple punishments strand is not violated '[w]here "a legislature specifically authorizes cumulative punishment under two statutes[.]"'" *Id.* at 18 (citations omitted). "Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial[; 't]hus, the question of what punishments

are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.'" *Id*. (citations omitted).

"[W]hen considering whether two offenses are the 'same offense' in the context of the multiple punishments strand of double jeopardy, [a court] must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments." *Miller (Joseph)*, 498 Mich at 19. "If the legislative intent is clear, courts are required to abide by this intent[;]" however, "[w]hen legislative intent is not clear, Michigan courts apply the 'abstract legal elements' test articulated in [*People v Ream*, 481 Mich 223 (2008),] to ascertain whether the Legislature intended to classify two offenses as the 'same offense' for double jeopardy purposes." *Miller (Joseph)*, 498 Mich at 19 (additional citations omitted). The *Ream* test

> "focuses on the statutory elements of the offense to determine whether the Legislature intended for multiple punishments. Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if 'each of the offenses for which [the] defendant was convicted has an element that the other does not . . . .' This means that, under the *Ream* test, two offenses will only be considered the 'same offense' where it is impossible to commit the greater offense without also committing the lesser offense." *Miller (Joseph)*, 498 Mich at 19, citing *Ream*, 481 Mich at 225-226, 238, 241.

See also *Smith (Bobby)*, 478 Mich at 315-316 (the *Blockburger* test for determining whether the protection against double jeopardy prohibits multiple prosecutions is the appropriate test for determining whether double jeopardy considerations bar multiple punishments, and the definition of "same offense" for purposes of the multiple punishments strand of the prohibition against double jeopardy is the same as the definition of "same offense" announced by the Court in *Nutt*, 469 Mich 565, for purposes of the multiple prosecutions strand).

"When the dispositive question is whether the Legislature intended two convictions to result from a single statute, it presents a 'unit of prosecution' issue[,]" and "[t]he question is whether the Legislature intended a single criminal transaction to give rise to multiple convictions." *People v Perry (Rodney)*, ___ Mich App ___, ___ (2016), citing *People v Wakeford*, 418 Mich 95, 111-112 (1983). If "no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended." *Perry (Rodney)*, ___ Mich App at ___ (citations and

quotation marks omitted). However, if there is a "clear indication of legislative intent and [an] absence of ambiguity, the rule of lenity does not apply." *Id.* at ___, citing *Wakeford*, 418 Mich at 113-114.

There is no double jeopardy violation where a defendant is convicted and sentenced for both armed robbery, MCL 750.529, and felonious assault, MCL 750.82(1). *People v Chambers (Billy)*, 277 Mich App 1, 8-9 (2007). Applying the same elements test adopted by the Court in *Smith (Bobby)*, 478 Mich 292, the *Chambers* (*Billy)* Court concluded that armed robbery and felonious assault are not the same offense for purposes of the multiple punishments strand of double jeopardy because each offense requires an element for its commission not required by the other. *Chambers (Billy)*, 277 Mich App at 9. See also *People v Strawther*, 480 Mich 900 (2007) (no double jeopardy violation where the defendant was convicted of both assault with intent to commit great bodily harm, MCL 750.84 (1)(a),[43] and felonious assault, MCL 750.82).

A "defendant's convictions of [both] operating while intoxicated (OWI)[, MCL 257.625(1),] and operating while intoxicated causing serious impairment of the body function of another person (OWI-injury)[, MCL 257.625(5),] arising from a single intoxicated driving incident violate[s] the [multiple punishments prong of] the double jeopardy clauses of the United States and Michigan Constitutions." *Miller (Joseph)*, 498 Mich at 15 (citations omitted). The "Court of Appeals erred by concluding that the Legislature did not 'evince a clear expression of any intent to allow . . . multiple punishments for the same offense[;]'" rather, "in light of MCL 257.625(7)(d), [which specifically authorizes multiple convictions of and punishments for OWI with a minor in the car under MCL 257.625(7) and OWI-injury or OWI causing death,] the omission of a similar clause providing explicit authority to convict a defendant of multiple operating while intoxicated offenses arising out of the same incident in either MCL 257.625(1) or [MCL 257.625](5) is a clear indication that the Legislature did not intend for defendants to be convicted of and punished for OWI and OWI-injury arising out of the same incident." *Miller (Joseph)*, 498 Mich at 25-26 (citation omitted).

A defendant's multiple convictions of second-degree murder, MCL 750.317, operating a vehicle under the influence of intoxicating liquor or a controlled substance (OUIL) causing death, MCL 257.625(4), and operating a vehicle with a suspended license causing death, MCL 257.904(4), did not violate the double jeopardy clauses of the United States and Michigan constitutions. *People v Bergman*,

[43] Effective April 1, 2013, 2012 PA 367 amended MCL 750.84 to add MCL 750.84(1)(b), establishing the felony offense of *assaulting another person by strangulation or suffocation*, and to redesignate former MCL 750.84 (governing assault with intent to do great bodily harm less than murder) as MCL 750.84(1)(a).

312 Mich App 471, 491, 492 (2015) (citations omitted). "The statutes governing second-degree murder and driving with a suspended license causing death enforce distinct societal norms, and their respective elements of malice and lack of a valid operator's license are distinctive to each[;] . . . [s]imilarly, the OUIL and suspended-license statutes enforce distinct societal norms, and their respective elements of intoxication while driving and lack of a valid operator's license are distinctive to each." *Id*. at 492 (citations omitted).

Convicting and sentencing a defendant for both assault with intent to rob while armed, MCL 750.89, and armed robbery, MCL 750.529, violates the multiple punishments strand of the Double Jeopardy Clause. *People v Gibbs (Phillip)*, 299 Mich App 473, 488-490 (2013). There is "no substantive difference between the elements of the two crimes[,]" and "[b]ecause assault with intent to rob while armed is a lesser included offense of armed robbery and neither crime contains an element the other does not, [a] defendant [cannot be] convicted of both." *Id.* at 491 (vacating the defendant's assault conviction).

"[C]onvicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not violate the 'multiple punishments' strand of the Double Jeopardy Clause *if* each offense has an element that the other does not." (Emphasis added). *Ream*, 481 Mich at 240-241, overruling *People v Wilder*, 411 Mich 328, 342 (1981). The Court reiterated its holding in *Smith (Bobby)*, 478 Mich at 316, that the *Blockburger* test should be employed to determine whether the protection against double jeopardy prohibits multiple punishments; multiple punishments are authorized if each statute requires proof of an additional fact not required by the other. *Ream*, 481 Mich at 228. In *Ream*, 481 Mich at 225-226, the Supreme Court held that there was no double jeopardy violation where the defendant was convicted and sentenced for both first-degree felony murder and the predicate felony of first-degree criminal sexual conduct (CSC-I). One element required to prove first-degree felony murder, but not required to prove CSC-I, is the killing of a human being. *Id*. at 241. One element of CSC-I, but not an element of first-degree felony murder, is sexual penetration. *Id*. Because each of the offenses contained an element that the other did not, they were not the same offense and the defendant could be punished for both. *Id*. at 241-242.

Convicting and sentencing a defendant for both carjacking, MCL 750.529a(1), and assault with intent to rob while armed, MCL 750.89, does not violate the multiple punishments strand of the Double Jeopardy Clause, because each offense contains an element that the other does not. *People v McGee (Anthony)*, 280 Mich App 680, 684-685 (2008). One element required to prove carjacking, but not required to prove assault with intent to rob while armed, is the

larceny of a motor vehicle. *Id.* at 684-685. One element required to prove assault with intent to rob while armed, but not required to prove carjacking, is the use of a weapon. *Id.*

Convicting and sentencing a defendant for both carjacking, MCL 750.529a, and unlawfully driving away a motor vehicle (UDAA), MCL 750.413, does not violate the multiple punishments strand of the Double Jeopardy Clause, because each offense contains an element that the other does not. *People v Cain (Darryl) (Cain II)*, 495 Mich 874, 874-875 (2013) (holding that "[the] defendant's multiple punishments for carjacking and UDAA do not violate his double jeopardy rights because UDAA requires proof that [the] defendant moved the vehicle, which carjacking does not, and carjacking requires proof of the use of force or violence, or the threat thereof, which UDAA does not[]") (affirming in part and vacating in part *People v Cain (Darryl) (Cain I)*, 299 Mich App 27 (2012)).

"Because CSC-I [(MCL 750.520b)] and CSC-II [(MCL 750.520c)] each require proof of a fact that the other does not, [a] defendant's convictions of both on the same facts do not violate double jeopardy." *People v Duenaz*, 306 Mich App 85, 115 (2014), citing *Blockburger*, 284 US at 304 (additional citations omitted). "'Sexual penetration' is an element of CSC-I but not CSC-II[,]" while "CSC-II requires that 'sexual contact' be done for a 'sexual purpose,' an element not included in CSC[-]I." *Duenaz*, 306 Mich App at 107.

Convicting and sentencing a defendant for four separate counts of CSC where there were only two acts of penetration did not violate the multiple punishments strand of the Double Jeopardy Clause. *People v Garland*, 286 Mich App 1, 5-6 (2009). In *Garland*, 286 Mich App at 5, "the prosecution alleged two acts of sexual penetration: sexual intercourse and cunnilingus. For each act, [the] defendant was charged, tried, and convicted of two criminal offenses: CSC[-]I on the theory that a sexual penetration had occurred during a home invasion [], and CSC[-]III on the theory that the victim was physically helpless[]." One element required to prove CSC-I, but not required to prove CSC-III, is that the sexual penetration occurred "under circumstances involving the commission of any other felony." MCL 750.520b(1)(c). One element required to prove CSC-III, but not required to prove CSC-I, is that the sexual penetration was accompanied by the actor knowing or having "reason to know that the victim [was] . . . physically helpless." MCL 750.520d(1)(c). "[U]nder the *Blockburger* test, because each offense contains an element that the other does not, CSC[-]I and CSC[-]III are separate offenses for which [the] defendant was properly convicted and sentenced . . . ." *Garland*, 286 Mich App at 6.

Convicting and sentencing a defendant for both being a prisoner in possession of a controlled substance, MCL 801.263(2), and delivery of marijuana, MCL 333.7401(2)(d)(*iii*), does not violate the multiple punishments strand of the Double Jeopardy Clause because each offense contains an element that the other does not. *People v Williams (Robert)*, 294 Mich App 461, 468-470 (2011) ("[a]n individual need not be a prisoner to be convicted of delivery [of marijuana][] . . . [and] a person need not deliver a controlled substance to be a prisoner in possession [of a controlled substance][]").

Convicting and sentencing a defendant for two separate counts of first-degree home invasion violated the multiple punishments strand of the Double Jeopardy Clause where there was only one home invasion supported by two theories. *People v Baker*, 288 Mich App 378, 386 (2010). In *Baker*, 288 Mich App at 380, the defendant broke into the victim's apartment where he sexually assaulted her and tried to steal from her. The Court of Appeals noted that "*intending* to commit a felony, larceny, or assault, and *actually* committing a felony, larceny, or assault simply constitute two different methods of establishing the same element of first-degree home invasion." *Id*. at 385. The Court held that the *Blockburger* test was not satisfied because the two first-degree home invasion convictions were not premised on the establishment of different sets of elements. *Id*. Accordingly, the defendant should have been convicted and sentenced for one count of first-degree home invasion supported by two theories. *Id*. at 386.

"[T]here [is] no double jeopardy violation[]" when a defendant is convicted, based on the same underlying conduct, of both refusing or resisting collection of biometric data, MCL 28.243a(1), and resisting, obstructing, or assaulting a police officer, MCL 750.81d(1). *People v Kammeraad*, 307 Mich App 98, 144-145 (2014). "MCL 28.243a(1) requires that the prosecution establish that the refusal or resistance relates to the collection of biometric data, whereas such an element is not part of the proofs necessary to obtain a conviction for resisting and obstructing a police officer[; f]urther, with a charge of resisting and obstructing a police officer, there is a required *mens rea* element of knowledge and a police officer must be involved, which do not appear to be required to establish a crime under MCL 28.243a." *Kammeraad*, 307 Mich App at 144-145.

"[T]here [is] no double jeopardy violation[]" when a defendant is convicted, based on the same underlying conduct, of both resisting, obstructing, or assaulting a police officer, MCL 750.81d(1), and assault of a prison employee, MCL 750.197c(1). *Kammeraad*, 307 Mich App at 145. "[A]ssault of a prison employee contains elements not included in resisting or obstructing, e.g., that the defendant was lawfully imprisoned in a place of confinement[,]" and "resisting or

obstructing contains an element not necessarily included in assault of a prison employee; namely, that the victim is a police officer." *Id*.

A defendant's convictions and sentences for unlawful imprisonment, MCL 750.349b, and assault with a dangerous weapon (felonious assault), MCL 750.82, arising from a "continuous transaction[,]" do not constitute multiple punishments for the same offense. *People v Bosca*, 310 Mich App 1, 41-42 (2015) (noting that "the elements of assault with a dangerous weapon and unlawful imprisonment comprise separate and distinct offenses[,] and . . . 'each [offense] requires proof of a fact that the other does not[]'") (citation omitted).

There is no double jeopardy violation where a defendant receives multiple punishments for the same offense when the legislative intent explicitly provides for the multiple punishments. *People v Mitchell (Shane)*, 456 Mich 693, 695-696 (1998). For example, the Michigan Legislature intended to allow multiple punishments for a defendant charged pursuant to the felony-firearm statute and charged with a felony not expressly excepted from the felony-firearm statute. *Id*. at 694-695, 698 (protection against double jeopardy not violated where defendant was convicted of both felony firearm and the predicate felony of receiving or concealing a stolen firearm or ammunition). See also *People v Sturgis*, 427 Mich 392, 409-410 (1986) (felony firearm and carrying a concealed weapon (CCW) are distinct offenses that may be separately punished in a single trial arising out of a single criminal episode when the CCW offense is not a predicate of the felony-firearm offense); *People v Conley (Aaron)*, 270 Mich App 301, 311-312 (2006) (convictions of first-degree home invasion and felonious assault do not violate constitutional protection against double jeopardy where the statutory language expressly states that a penalty imposed under the home invasion statute does not preclude the imposition of a penalty under other applicable law); *People v Price*, 214 Mich App 538, 542 (1996) ("even if the crimes are the same, this Court's inquiry is at an end, as it pertains to a double jeopardy challenge based on multiple punishment, if it is evident that the Legislature intended to authorize cumulative punishments"); *People v Hallak*, 310 Mich App 555, 583 (2015), rev'd in part on other grounds ___ Mich ___ (2016) ("[b]ecause the Legislature intended that both [a] defendant's prison sentence and the requirement of lifetime [electronic] monitoring [under MCL 750.520n(1)] be sanctions for [CSC-II committed by a defendant who is 17 years of age or older against a victim less than 13 years of age], there [is] no double jeopardy violation[]" for the imposition of both punishments); *Perry (Rodney)*, ___ Mich App at ___ ("the plain language of [MCL 750.253] permits multiple convictions [of uttering counterfeit notes] for uttering multiple notes during only one transaction[;]" the statutory text "evidences

the Legislature's intent to punish a defendant for each counterfeit bill that was introduced[,] uttered, passed, or tendered"). Cf. *People v Meshell*, 265 Mich App 616, 630-633 (2005) ("[u]nder both the *Blockburger* [same-elements] test and the Michigan [legislative-intent] test, the Legislature did not intend to permit separate punishment for [both] operating or maintaining a methamphetamine laboratory and operating and maintaining a methamphetamine laboratory near a specified place[]").

A defendant who receives one conviction of first-degree murder supported by two theories—first-degree premeditated murder and first-degree felony murder—and who is also convicted of the felony underlying the felony-murder charge, and whose conviction of the underlying felony is later vacated on double jeopardy grounds, may have a judgment of conviction of the underlying felony entered against him or her where the defendant's murder conviction is reversed on grounds that only affect the murder element. *People v Williams (Joezell II)*, 475 Mich 101, 103-105 (2006).

In *Williams (Joezell II)*, 475 Mich at 103, the underlying felony at issue was larceny. The prosecutor was concerned that if the judgment vacated the larceny conviction, in the rare event that the defendant's conviction of murder was overturned for a reason unrelated to the larceny conviction, the defendant could avoid punishment for the larceny, even though he was originally found guilty of that crime. *Id.* Relying on *Rutledge v United States*, 517 US 292 (1996), the Court determined that if the defendant's murder conviction was "reversed on grounds only affecting the murder element, entry of a judgment of conviction of larceny may be directed by the appellate court." *Williams (Joezell II)*, 475 Mich at 104-105.

When a defendant is convicted "of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim[,]" the resulting double jeopardy violation is remedied by "modify[ing] the conviction to specify that it is for a single count of first-degree murder supported by two theories." *People v Orlewicz*, 293 Mich App 96, 112 (2011), citing *People v Williams (Joezell I)*, 265 Mich App 68, 72 (2005), aff'd 475 Mich 101 (2006).

"'[W]here one statute incorporates most of the elements of a base statute and adds an aggravating conduct element with an increased penalty compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes.'" *People v Franklin (John)*, 298 Mich App 539, 547 (2012) (holding that "[a]ggravated indecent exposure and indecent exposure are the 'same offense' for purposes of double jeopardy[] . . . [because t]he offense of indecent exposure does not contain any elements that are distinct from the offense of aggravated indecent exposure[]").

D. Standard of Review

A double jeopardy challenge presents a question of constitutional law that is reviewed de novo. *Conley (Aaron)*, 270 Mich App at 310.

8.22 Speedy Trial

A. Right to a Speedy Trial

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan Constitutions, as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1. MCR 6.004(A) provides that the defendant and the prosecution are entitled to a speedy trial and to a speedy resolution of all matters before the court.[44] "'The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest.'" *People v Patton*, 285 Mich App 229, 236 (2009), quoting *People v Williams (Cleveland)*, 475 Mich 245, 261 (2006). "Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice." MCR 6.004(A). To preserve the issue of speedy trial for appeal, a defendant must make a formal demand for a speedy trial on the record. *People v Cain (Janice)*, 238 Mich App 95, 111 (1999).

Where there has been a delay of at least six months after a defendant's arrest, further investigation into a claim of denial of the right to a speedy trial is necessary. *People v Daniel (Hank)*, 207 Mich App 47, 51 (1994). Where the delay following a defendant's arrest is less than 18 months, the defendant bears the burden of showing prejudice by reason of the delay. *Id.* at 51. After a delay of 18 months, prejudice to the defendant is presumed and the burden shifts to the prosecution to rebut the presumption. *People v Collins (Harold)*, 388 Mich 680, 695 (1972).

In deciding whether a defendant has been afforded a speedy trial, the Michigan Supreme Court adopted the general rule established by the United States Supreme Court in *Barker v Wingo*, 407 US 514 (1972). *Cain (Janice)*, 238 Mich App at 112. When a defendant claims a violation of the right to a speedy trial, the trial court must consider four factors: (1) the length of delay; (2) the reasons for the delay; (3)

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[44] The Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]" and therefore does not "apply to the sentencing phase of a criminal prosecution[.]" *Betterman v Montana*, 578 US ___, ___ (2016) (holding "that the Clause does not apply to delayed sentencing[]"). However, "although the Speedy Trial Clause does not govern[inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* at ___.

the defendant's assertion of the right; and (4) any prejudice to the defendant.[45] *People v McLaughlin*, 258 Mich App 635, 644 (2003). Violation of a defendant's constitutional right to a speedy trial requires dismissal with prejudice. MCR 6.004(A).

B. Length of the Delay

The length of the delay itself is not determinative of a speedy trial claim. *People v Hammond*, 84 Mich App 60, 67 (1978). A delay of six months is necessary to trigger further investigation when a defendant raises a speedy trial issue. *Daniel (Hank)*, 207 Mich App at 51. However, where the delay is less than 18 months, the defendant must show prejudice. *Cain (Janice)*, 238 Mich App at 112. A delay of more than 18 months is presumptively prejudicial to the defendant and shifts the burden to the prosecution to show that the delay has not prejudiced the defendant. *Id.* at 112.

C. Reasons for the Delay

Regarding the second prong—reason for delay—the court balances the conduct of both the prosecution and the defendant. *Collins (Harold)*, 388 Mich at 690. The reasons for the delay are examined by the court, and each period of delay is attributed to either the prosecution or the defendant. *People v Ross (Edward)*, 145 Mich App 483, 491 (1985). Ordinarily, "delays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned[,]" because "assigned counsel generally are not state actors for purposes of a speedy-trial claim." *Vermont v Brillon*, 556 US 81, 92, 94 (2009). However, it is possible that an assigned counsel's delay could be charged to the state if a breakdown in a state's public defender system caused the delay. *Id.* at 94.

"[I]f the defendant has not contributed to the delay, a period of otherwise unexplained inaction in excess of 180 days in the prosecution of a charge pending against an inmate is per se a violation of the statute, unless the people make an affirmative showing of exceptional and unavoidable circumstances which hamper the normally efficient functioning of the trial courts." *People v Forrest*, 72 Mich App 266, 273 (1976).

Unexplained delays are charged to the prosecution. *Ross (Edward)*, 145 Mich App at 491. Delays inherent in the court system (e.g., docket congestion) are technically attributed to the prosecution but are given a neutral tint and assigned only minimal weight. *People v Gilmore*, 222 Mich App 442, 460 (1997).

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[45] These four factors are known as the *Barker* factors.

Delays occasioned by the prosecution's successful pursuit of an interlocutory appeal are "'taken out of the calculation,'" and therefore, are not attributable to either party when determining whether a defendant's right to a speedy trial has been violated. *People v Waclawski*, 286 Mich App 634, 664 (2009), quoting *People v Missouri*, 100 Mich App 310, 321 (1980).

D. Assertion of the Right

A defendant's failure to assert his or her right to a speedy trial is the third factor the court must consider in determining if the right to a speedy trial has been violated. *Cain (Janice)*, 238 Mich App at 112. While failure to assert the right to a speedy trial does not automatically constitute a waiver of the right, it is strong evidentiary support for the conclusion that the defendant's right was not violated. *Collins (Harold)*, 388 Mich at 692-694. In *People v Missouri (Milton)*, 100 Mich App 310, 322 (1980), the Court of Appeals concluded that the defendants' assertion of the right to a speedy trial two weeks before trial and nearly 30 months after indictment was strong evidence that the delay had not caused a serious deprivation of their right to a speedy trial.

E. Resulting Prejudice

The final inquiry is whether the defendant experienced any prejudice as a result of the delay. *Collins (Harold)*, 388 Mich at 694. There are two types of prejudice a defendant may experience: (1) prejudice to his or her person; and (2) prejudice to his or her defense. *Id.* at 694. Prejudice to the defendant's person generally takes the form of oppressive pretrial incarceration leading to anxiety and concern. *Id*. Prejudice to the defendant's defense might include the unavailability of key witnesses. *Id*. Delay that impairs the defendant's defense is the most serious because a defendant's inability to adequately defend against criminal charges skews the fairness of the entire system. *Id*.

General allegations of possible prejudice (e.g., witness's memories fade, financial burden) are insufficient. *Gilmore*, 222 Mich App at 462. Rather, a defendant must "specifically argue[] how the delay caused him [or her] prejudice." *People v Rivera*, 301 Mich App 188, 194 (2013) (the defendant's "general statement that being in prison on unrelated charges for 10 months caused prejudice[]" did not constitute a "basis . . . to conclude that [he] was denied his right to a speedy trial[]").

F. Recognizance Release

MCR 6.004(C) provides potential relief for defendants who have been incarcerated and are awaiting trial:

> "In a felony case in which the defendant has been incarcerated for a period of 180 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, or in a misdemeanor case in which the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance, unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community."

The following periods of delay are excluded from the computation of the 28-day or 180-day period:

> "(1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,
>
> (2) the period of delay during which the defendant is not competent to stand trial,
>
> (3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,
>
> (4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either
>
> > (a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or
> >
> > (b) exceptional circumstances justifying the need for more time to prepare the state's case,
>
> (5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not

> granting the defendant a severance so as to enable trial within the time limits applicable, and
>
> (6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion." MCR 6.004(C)(1)–MCR 6.004(C)(6).

The moving party has the burden of proof. The party opposing the motion has the burden to show good cause for the delay. MCR 6.004(C)(1)–MCR 6.004(C)(6). The prosecution has the burden of showing that a period of delay resulting from an adjournment requested by the prosecution should not be included in determining whether the defendant has been incarcerated for the requisite period. MCR 6.004(C)(4).

G. Untried Charges Against State Prisoners—180-Day Rule

MCR 6.004(D)(1) provides that, except for crimes exempted by MCL 780.131(2):[46]

> "the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail."

MCR 6.004(D)(2) describes the remedies for violations of the 180-day rule:

> "In the event that action is not commenced on the matter for which request for disposition was made as required in subsection (1), no court of this state shall any

[46] Warrants, indictments, informations, or complaints arising from a criminal offense by an inmate committed while an inmate, or a criminal offense by an escaped inmate committed before the inmate was returned to custody. A community corrections center is a state correctional facility for purposes of the exception in MCL 780.131(2)(a). *People v McCullum*, 201 Mich App 463, 465-466 (1993).

> longer have jurisdiction thereof, nor shall the untried warrant, indictment, information, or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

MCL 780.131 "contains no exception for charges subject to consecutive sentencing." *People v Williams (Cleveland)*, 475 Mich 245, 248 (2006), overruling *People v Smith (Rosie)*, 438 Mich 715 (1991), to the extent of its inconsistency with MCL 780.131. Consequently, unless specifically excepted under MCL 780.131(2), the 180-day rule applies to *any* untried charge against *any* prisoner, without regard to potential penalty. *Williams (Cleveland)*, 475 Mich at 254-255. According to the Court, the plain language of MCL 780.131 permits a prisoner subject to mandatory consecutive sentencing to assert his or her right to a speedy trial. *Williams (Cleveland)*, 475 Mich at 254-255. After concluding that the defendant raised a valid claim under MCL 780.131, the Court considered the delay in bringing the defendant to trial and determined that the defendant's speedy trial rights had not been violated. *Williams (Cleveland)*, 475 Mich at 265.

The statutory time period of 180 days begins to run when the prosecution receives notice from the Department of Corrections:

> "The statutory trigger is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges. The statute does not trigger the running of the 180-day period when the Department of Corrections actually learns, much less should have learned, that criminal charges were pending against an incarcerated defendant." *Williams (Cleveland)*, 475 Mich at 259, overruling *People v Hill (James)*, 402 Mich 272 (1978), and *People v Castelli*, 370 Mich 147 (1963), to the extent of their inconsistency with MCL 780.131.

See also *People v Rivera*, 301 Mich App 188, 192 (2013) (noting that "[t]he clear language of MCL 780.131(1) provides that the MDOC must send written notice, by certified mail, *to the prosecutor* to trigger the 180-day requirement[,]" and holding that because "the MDOC sent a notice to the district court[] . . . [but] did not send, by certified mail, a notice to the prosecuting attorney[,] . . . the 180-day rule was never triggered, so it could not have been violated[]").

The 180-day rule does not require that trial be commenced within 180 days, but rather, that the prosecution make good-faith efforts on the case during the 180-day period, and that the prosecution then promptly proceed to prepare the case for trial. *People v Hendershot*, 357 Mich 300, 304 (1959). If the prosecution takes preliminary action within the 180-day period but the initial action is followed by

inexcusable delay that shows an intent not to promptly bring the case to trial, the court may find the absence of good-faith action and dismiss the case. *Id.* at 303-304. For example, in *People v Davis (Michael)*, 283 Mich App 737, 743-744 (2009), the trial court erred in dismissing the pending charges against the defendant, because the prosecution commenced proceedings against the defendant within 180 days of receiving notice from the Department of Corrections that the defendant was incarcerated, thereby satisfying the requirements of MCL 780.131 (prisoner must be brought to trial within 180 days) and MCL 780.133 (dismissal required only if action has not been commenced within 180 days). "The prosecution made good-faith efforts to proceed promptly with pretrial proceedings," and "[t]here [wa]s no indication that any delay in bringing [the] defendant to trial was inexcusable or demonstrated an intent not to promptly bring the case to trial." *Davis (Michael)*, 283 Mich App at 743.

See also *People v Lown*, 488 Mich 242, 246-247 (2011), which clarified the correct interpretation of the statutory "180-day rule" established by MCL 780.131 and MCL 780.133:

> "[T]he [180-day] rule does not require that a *trial* be commenced or completed within 180 days of the date notice was delivered. Rather . . . it is sufficient that the prosecutor 'proceed promptly' and 'move[] the case to the point of readiness for trial' within the 180-day period. *People v Hendershot*, 357 Mich 300, 304 (1959). Significantly, although a prosecutor must proceed promptly and take action in good faith in order to satisfy the rule, there is no good-faith *exception* to the rule. Instead, as originally articulated in *Hendershot*, good faith is an implicit component of proper action by the prosecutor, who may not satisfy the rule simply by taking preliminary steps toward trial but then delaying inexcusably. . . . [T]he statutory 180-day period is, by the plain terms of the statute, a fixed period of consecutive days beginning on the date when the prosecutor receives the required notice from the DOC [Department of Corrections]. Thus, the relevant question is not whether 180 days of delay since that date may be attributable to the prosecutor, but whether action was commenced within 180 calendar days following the date the prosecutor received the notice. If so, the rule has been satisfied unless the prosecutor's initial steps are 'followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly . . . .' Accordingly, a court should not calculate the 180-day period by apportioning to each party any

> periods of delay after the DOC delivers notice. . . . [A] violation of the 180-day rule—which deprives the court of 'jurisdiction,' MCL 780.133—specifically divests the court of *personal jurisdiction* over the defendant for the particular action."

In *Lown*, 488 Mich at 247, the statutory 180-day rule was satisfied "because the prosecutor commenced action well within 180 days after receiving notice from the DOC, 'proceed[ed] promptly and with dispatch thereafter toward readying the case for trial,' and '[stood] ready for trial within the 180-day period . . . .'"

H. Detainers

A detainer, under the Interstate Agreement on Detainers Act (IAD), MCL 780.601 *et seq.*, is generally defined as "a notification filed with the institution in which an individual is serving a sentence, advising that the prisoner is wanted to face pending charges in the notifying state." *People v Shue*, 145 Mich App 64, 70 (1985). "The purpose of the IAD is to facilitate the prompt disposition of outstanding charges against an inmate incarcerated in another jurisdiction." *People v Patton*, 285 Mich App 229, 232 (2009). "'Once a detainer is filed, it is then that the IAD is triggered and compliance with the provisions of the agreement is required.'" *Patton*, 285 Mich App at 232, quoting *People v Gallego (Luis)*, 199 Mich App 566, 574 (1993). The IAD applies only to prisoners serving a prison sentence; it does not apply to a person in custody awaiting extradition. *People v Monasterski*, 105 Mich App 645, 653 (1981).

Article III of the IAD involves notice instituted by the prisoner, and has a time limit of 180 days. *People v Waclawski*, 286 Mich App 634, 646 (2009). Article IV of the IAD involves notice instituted by the prosecutor, and has a time limit of 120 days. *Waclawski*, 286 Mich App at 646.

Article III requires that a defendant be brought to trial within 180 days "after he [or she] shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition[.]" MCL 780.601, Article III(a); see *People v Swafford*, 483 Mich 1, 3, 17 (2009). There is no requirement that the detainer be lodged during the defendant's term of imprisonment, only that the detainer be lodged at the time the defendant requests disposition of the pending charges. *Swafford*, 483 Mich at 9-10. In addition, there is no requirement that the detainer be sent to the institution in which the defendant is imprisoned if all parties are aware of the detainer and it follows the defendant to the institution where he or she is imprisoned when the defendant files

for final disposition of the pending charges. *Id*. at 13-14. In sum, "[t]he clear language of the IAD, MCL 780.601, states that if the prosecutor fails to bring a defendant to trial within 180 days of receiving the defendant's request for a final disposition made while the defendant is serving a term of imprisonment if a 'detainer has been lodged against the prisoner,' the court 'shall enter an order dismissing the [complaint] with prejudice.'" *Swafford*, 483 Mich at 17. In *Swafford*, 483 Mich at 3, that is "precisely what happened," and the trial court properly dismissed with prejudice the charges pending against the defendant.

"Article III(a) of the IAD sets forth the procedure for a prisoner against whom a detainer is filed to notify the prosecutor in the detaining state of his [or her] place of imprisonment and to request final disposition of the charges." *People v Duenaz*, 306 Mich App 85, 108 (2014). MCL 780.601, Art III(a), provides that "[t]he request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner."

"'[T]he 180-day time period in Article III(a) of the IAD does not commence until the prisoner's request for final disposition of the charges against him [or her] has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him [or her].'" *People v Duenaz*, 306 Mich App 85, 111 (2014), quoting *Fex v Michigan*, 507 US 43, 52 (1993). The prisoner's "demand for disposition . . . [is] not 'caused to be delivered' to the prosecutor until" the necessary forms, including the custodial official's certificate, are received. *Duenaz*, 306 Mich App at 111, 115 (quoting MCL 780.601, Article III(a), and noting that "[t]he prosecution complie[s] with the IAD by bringing [a] defendant to trial within 180 days of receiving the necessary Article III(a) documents from [the out-of-state] authorities[]").

Article III(c) of the IAD provides that "[t]he warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him [or her] of the source and contents of any detainer lodged against him [or her] and shall also inform him [or her] of his [or her] right to make a request for final disposition of the indictment, information or complaint on which the detainer is based." However, the IAD does not expressly provide for a remedy in cases involving a violation of Article III(c). "'The IAD [only] expressly requires dismissal of a criminal charge in three circumstances: (1) if, after a prisoner has made the required request

pursuant to Article III, trial does not occur within the required 180 days; (2) when trial does not occur before the prisoner, having been transferred to the receiving state, is sent back to the sending state; or (3) when the receiving state fails or refuses to accept temporary custody of the prisoner.'" *Patton*, 285 Mich App at 232-233, quoting *Lara v Johnson*, 141 F3d 239, 243 (CA 5, 1998), mod 149 F3d 1226 (CA 5, 1998). In *Patton*, 285 Mich App at 232, the defendant was not notified that a detainer had been lodged against him until six months after its entry (i.e., he was not "promptly inform[ed]" of the detainer as required by Article III(c)). However, the defendant was not entitled to have his conviction vacated and the charge dismissed because the IAD does not expressly provide for the remedy of dismissal for a violation of Article III(c). *Patton*, 285 Mich App at 235.

Article IV (120-day time limit) was triggered when the prosecution sent Form V of the IAD (*Request for Temporary Custody*) to bring the defendant back to Michigan to face untried charges before any action was taken by the defendant under Article III. *People v Waclawski*, 286 Mich App 634, 652 (2009). The form "clearly list[ed] the charges against [the] defendant and state[d] that the prosecutor 'request[ed] temporary custody of the prisoner pursuant to Article IV(a) of the Interstate Agreement on Detainers (IAD).'" *Waclawski*, 286 Mich App at 651. Once the prosecutor initiated the form, the IAD was triggered and compliance with the 120-day time limit in Article IV(c) was required. *Waclawski*, 286 Mich App at 652. The defendant's later completion of Form I of the IAD (*Notice of Untried Indictment*, *Information or Complaint and of Right to Request Disposition*), which demands trial within 180 days under Article IV, and Form II (*Inmate's Notice of Place of Imprisonment and Request for Disposition of Indictments*, *Informations or Complaints*), did not constitute a valid request for extradition under the IAD because the forms were never mailed or received by the court. *Waclawski*, 286 Mich App at 650-651. Therefore, the 180-day time limit of Article III was never triggered, and the defendant was entitled to trial within the 120-day time limit set out in Article IV. *Waclawski*, 286 Mich App at 650-652.

"But for good cause shown in open court," Article IV(c) of the IAD requires that trial begin against a prisoner within 120 days of the prisoner's arrival in the receiving state. *People v Harris (Michael)*, 148 Mich App 506, 513 (1986). The phrase "but for good cause shown" applies only to adjournments and other delays caused by the prosecution; a trial court should not include adjournments requested by the defendant or other delays caused by the defendant in calculating the actual delay attributable to the prosecution. *Id.* at 513.

However, the 120-day time limit may be tolled when the delay was caused by defense counsel's motion to withdraw from representing a defendant due to a conflict of interest. *People v Stone*, 269 Mich App 240, 244-245 (2005). In *Stone*, 269 Mich App at 245-246, the trial court properly excluded the 13-day period from the IAD's time limit calculations because defense counsel's withdrawal on the basis of a conflict of interest is an act "typically [done] [] for the benefit of the defendant." Where a delay results from action taken to accommodate the defendant's interests, the period of delay is properly excluded from the IAD's 120-day limit. *Id*.

MCR 1.108 provides the method for computing time. *People v Sinclair (Jody)*, 247 Mich App 685, 687-688 (2001). "The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order." MCR 1.108(1).

I. Standard of Review

The trial court's findings with regard to an alleged violation of the defendant's right to a speedy trial are reviewed for an abuse of discretion. *People v Krum*, 374 Mich 356, 363 (1965). A defendant's unconditional guilty plea waives appellate review of the violation of the right to a speedy trial. *People v Depifanio*, 192 Mich App 257, 258 (1991).

Whether a defendant was denied his or her constitutional right to a speedy trial is a mixed question of law and fact. *Gilmore*, 222 Mich App at 459. An appellate court reviews de novo questions of law, and reviews for clear error a trial court's factual findings. *Id.* at 459.

Part D: Pretrial Motions to Suppress Evidence

8.23 Motion to Suppress Evidence

A. Burden

The defendant has the burden of going forward on a motion to suppress. See, e.g., *Nardone v United States*, 308 US 338, 341 (1939) ("[t]he burden is, of course, on the accused in the first instance to

prove to the trial court's satisfaction" that the wiretap used was illegal).

Although it is generally stated that the defendant has the burden of "proving" or "establishing" his or her claim, the standard of persuasion is not always clear. The general rule is a preponderance of the evidence. But it is difficult to generalize because in many circumstances, the burden of persuasion is either on the prosecution once the issue is raised, or may shift upon the presentation of some evidence. In many circumstances, the Constitution requires that the prosecution carry the burden, and by a particular evidentiary standard. See *Coolidge v New Hampshire*, 403 US 443, 454-455 (1971) (searches conducted outside of the judicial process are per se unreasonable under the Fourth Amendment, subject to a few exceptions; there must be a showing by those who seek an exemption that the exigencies of the situation made the course taken necessary); *United States v Jeffers*, 342 US 48, 51 (1951) (mandate of the Fourth Amendment requires adherence to judicial processes; burden is on those seeking the exemption to show the need for it); and *Nardone*, 308 US at 341 (defendant has the burden in the first instance of proving that an illegal wiretap was used in procuring evidence, and, once established, must be given the opportunity to prove that a substantial portion of the case against him or her was therefore unlawfully procured; this leaves the prosecution an ample opportunity to convince the trial court that its proof had an independent origin).

B. Timing

Ordinarily, a motion to suppress evidence must be made before trial; however, the trial court may permit it during trial. *People v Ferguson*, 376 Mich 90, 93-94 (1965); *People v Gentner, Inc*, 262 Mich App 363, 368 (2004). The trial court need not permit an untimely motion to suppress when the factual circumstances giving rise to the issue were known to the defendant before trial and could have been raised in advance. *Ferguson*, 376 Mich at 94-95.

C. Evidentiary Hearing

An evidentiary hearing is required where the admissibility of evidence is challenged on constitutional grounds and questions of fact exist. *People v Wiejecha*, 14 Mich App 486, 488 (1968); *Jackson (Nathan) v Denno*, 378 US 368, 376-377 (1964) (voluntariness of confession).

If the parties stipulate, a motion to suppress evidence may be decided on the basis of the information contained in the preliminary

examination transcript. *People v Kaufman*, 457 Mich 266, 276 (1998); MCR 6.110(D)(2).

MRE 104(b) provides that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

Often, evidence is only relevant if other facts are also demonstrated. For example, evidence proffered under MRE 404(b) of uncharged misconduct by the defendant may only be relevant if it is shown that the misconduct occurred and that the defendant committed the misconduct. Accordingly, the question with conditional relevance is: have the facts upon which the proffered evidence depends for its relevance been demonstrated?

At an evidentiary hearing on those types of issues, the court must only find that there is sufficient evidence for the trier of fact to find by a preponderance of the evidence, that the conditional fact has been proven. *Huddleston v United States*, 485 US 681, 690 (1988). Unlike preliminary questions of admissibility, the ultimate resolution of the question of conditional relevance is for the jury. Stated another way, whether the conditional fact has actually been proven is for the fact-finder to decide at trial. *Id.* at 690-691.

Because, unlike preliminary questions of admissibility, the ultimate determination of whether the condition has been met for conditional relevance is for the jury, the rules of evidence apply. MRE 104(b); MRE 1101(a).

Because MRE 104(b) provides that the evidence is admissible upon submission of evidence "sufficient to support a finding" of that upon which its relevance is conditioned, the standard of persuasion for proving that conditional fact is a preponderance of the evidence. Accordingly, in order to be admissible, there must be evidence presented, consistent with the rules of evidence, upon which the jury could find by a preponderance of the evidence that the condition has been satisfied. *Huddleston*, 485 US at 690.

With conditional relevance, then, the role of the trial court is not to find that the facts upon which the evidence relies have been proven by a preponderance of the evidence, but only that the evidence is sufficient to allow the jury to make that conclusion; the trial court must not determine the credibility of witnesses or resolve conflicts in their testimony. *Huddleston*, 485 US at 690.

If the defendant testifies at an evidentiary hearing, the defendant's testimony is not admissible at trial on the question of guilt or innocence. *People v Walker (Lee)*, 374 Mich 331, 338 (1965).

D. Disposition

The court is the trier of fact in evidentiary hearings. *People v Yacks*, 38 Mich App 437, 440 (1972). Oral or written findings of fact and conclusions of law are required. *People v LaBate*, 122 Mich App 644, 647-648 (1983). MCR 2.517(A)(1) provides:

> "In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment."

According to the Court in *LaBate*, 122 Mich App at 647, the language used in the court rule meant that a trial court was required to make a record of its findings of fact and conclusions of law in every case in which a dispute existed and the parties presented evidence to support their respective positions. Specifically, the Court noted:

"Clearly, the term 'actions' as used in [MCR 2.517(A)(1)][47] contemplates a finding of fact and a statement of law in all contested matters where evidence is presented to the trial judge for his [or her] decision." *LaBate*, 122 Mich App at 647.

E. Interlocutory Appeal

MCR 7.205(F)(3) provides:

> "Where the trial court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the trial court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the trial court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. The appealing party must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1). If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate."

[47] Formerly GCR 1963, 517.1.

F. Standard of Review

A trial court's factual findings at a suppression hearing are reviewed for clear error, and the ultimate ruling on a motion to suppress is reviewed de novo. *People v Jones (Jeffrey)*, 279 Mich App 86, 90 (2008).

8.24 Motion to Suppress Defendant's Statement

A. Admissibility

"No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Pennsylvania v Muniz*, 496 US 582, 588 n 5 (1990).

Generally, a defendant's statement is admissible as nonhearsay under MRE 801(d)(2), or under the statement against interest exception to the hearsay rule, MRE 804(b)(3), if the declarant is unavailable as defined in MRE 804(a). A defendant may be unavailable to testify by exercising his or her constitutional right to remain silent.

MRE 410 precludes the admission of statements made during plea discussions or in connection with a plea that was withdrawn.[48] However, a defendant's voluntary testimony at a prior proceeding, including a guilty plea proceeding involving an unrelated crime, is generally admissible. *People v Plato*, 114 Mich App 126, 134-135 (1981).

A statement can also be used for impeachment under MRE 613(b), the rule governing the use of a prior inconsistent statement when the statement is offered to prove inconsistency, and not to show the truth of the matter asserted. See *People v Jenkins (Steven)*, 450 Mich 249, 256 (1995) (witness's claim that he did not remember making prior inconsistent statement was sufficient foundation for prosecution to introduce extrinsic evidence of prior statement to impeach witness, but not to prove the contents of the statement); *People v Steanhouse*, 313 Mich App 1, 29, 30 (2015) (holding that where a witness's "police statement implicating [the] defendant in [a crime] was admissible [under MRE 613(b)] only to impeach [the witness's] testimony, the prosecution's use of the statement as substantive evidence of [the] defendant's guilt, and the trial court's

[48] "MRE 410(4) does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority[; i]t only requires that the defendant's statement be made 'in the course of plea discussions' with the prosecuting attorney." *People v Smart*, 497 Mich 950, 950 (2015) (overruling the "statement to the contrary in *People v Hannold*, 217 Mich App 382, 391 (1996)[]").

instruction[that the jury could consider prior inconsistent statements as substantive evidence], constituted plain error[,]" but nevertheless concluding that "in light of the extensive evidence admitted at trial linking [the] defendant to the [crime], . . . these errors did not prejudice [the] defendant[]") (citations omitted).

However, "the prosecutor may not . . . refer to [a] defendant's post-arrest, post-*Miranda*[49] silence with the police[.]" *People v Clary*, 494 Mich 260, 271-272 (2013) (citing *Doyle v Ohio*, 426 US 610, 618-619 (1976), and holding that the prosecutor improperly referred to the defendant's failure, "after he was arrested and arraigned, . . . [to tell] the police that he did not shoot the complainant[]").[50]

The *Miranda* rule bars only testimonial, not physical evidence.[51] *United States v Patane*, 542 US 630, 636 (2004). Physical (nontestimonial) evidence obtained as a direct result of unwarned but voluntary statements given in violation of *Miranda* is not covered by the exclusionary rule. *Patane*, 542 US at 637.

In the absence of police misconduct, the exclusionary rule does not apply to prohibit the admission of evidence obtained as a result of a defendant's confession even when the defendant's confession was obtained in violation of the defendant's Sixth Amendment right to counsel and is inadmissible in the prosecution's case-in-chief. *People v Frazier (Corey)*, 478 Mich 231 (2007). The exclusionary rule does not apply because excluding a confession (and evidence discovered as a result of the confession) that did not result from police misconduct would not further the purpose of the exclusionary rule—to deter future police misconduct. *Id.* at 252. The *Frazier* (*Corey)* Court further commented that even if the defendant's confession did result from police misconduct, the exclusionary rule did not apply because any connection between the misconduct involved in obtaining the defendant's confession, and the witness's testimony obtained as a result, was sufficiently attenuated to dissipate any taint. *Id*. at 253.

"The trial court abused its discretion by admitting the recording of the defendant's interrogation[;] . . . [b]ecause nothing of any relevance was said during the interrogation, it was simply not relevant evidence, and thus was not admissible evidence." *People v Tomasik*, ___ Mich ___, ___ (2015) (citing MRE 401 and *People v Musser*, 494 Mich 337 (2013), and noting that "[i]n a trial in which the

[49] *Miranda v Arizona*, 384 US 436 (1966).

[50] See Section 10.7(E) for discussion of references to the defendant's pre- or post-arrest silence.

[51] "A law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony" must capture the entire interrogation, including notification of a defendant's *Miranda* rights, in a time-stamped, audiovisual recording. MCL 763.8(2). See Section 8.24(B) for discussion of major felony recordings.

evidence essentially presents a 'one-on-one' credibility contest between the complainant and the defendant, the prosecutor cannot improperly introduce statements from the investigating detective that vouch for the veracity of the complainant and indicate that the detective believes the defendant to be guilty[]").

B. Major Felony Recordings

"A law enforcement official[52] interrogating an individual in custodial detention[53] regarding the individual's involvement in the commission of a major felony[54] shall make a time-stamped, audiovisual recording of the entire interrogation.[55] A major felony recording shall include the law enforcement official's notification to the individual of the individual's *Miranda* rights." MCL 763.8(2).[56]

"The requirement in [MCL 763.8] to produce a major felony recording is a directive to departments and law enforcement officials and not a right conferred on an individual who is interrogated." MCL 763.10. In addition, "[a]ny failure to record a statement as required under [MCL 763.8] or to preserve a recorded statement does not prevent any law enforcement official present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement if the court determines that the statement is otherwise admissible. However, unless the individual objected to having the interrogation recorded and that objection was properly documented under [MCL 763.8(3)], 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

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[52] For purposes of MCL 763.7–MCL 763.10, "'[l]aw enforcement official' means any of the following:

(*i*) A police officer of this state or a political subdivision of this state as defined in . . . MCL 28.602.

(*ii*) A county sheriff or his or her deputy.

(*iii*) A prosecuting attorney.

(*iv*) A public safety officer of a college or university.

(*v*) A conservation officer of the department of natural resources and environment.

(*vi*) An individual acting under the direction of a law enforcement official described in [MCL 763.7(*i*)-(*v*)]." MCL 763.7(c).

[53] For purposes of MCL 763.7–MCL 763.10, "'[c]ustodial detention' means an individual's being in a place of detention because a law enforcement official has told the individual that he or she is under arrest or because the individual, under the totality of the circumstances, reasonably could believe that he or she is under a law enforcement official's control and is not free to leave." MCL 763.7(a).

[54] For purposes of MCL 763.7–MCL 763.10, "'[m]ajor felony' means a felony punishable for imprisonment for life, for life or any term of years, or for a statutory maximum of 20 years or more, or a violation of . . . MCL 750.520d [(third-degree criminal sexual conduct)]." MCL 763.7(d).

[55] For purposes of MCL 763.7–MCL 763.10, "'[i]nterrogation' means questioning in a criminal investigation that may elicit a self-incriminating response from an individual and includes a law enforcement official's words or actions that the law enforcement official should know are reasonably likely to elicit a self-incriminating response from the individual." MCL 763.7(b).

absence of a recording in evaluating the evidence relating to the individual's statement." MCL 763.9.

"[F]ailure to comply with [MCL 763.8 and MCL 763.9] does not create a civil cause of action against a department or individual." MCL 763.10.

C. Corpus Delicti Rule

According to Michigan common law, a defendant's confession is inadmissible unless the corpus delicti of the offense is established. *People v Modelski*, 164 Mich App 337, 341 (1987). "Corpus" means body, and "delict" means wrong or injury; therefore, the corpus delicti of a homicide, for example, is established (and a defendant's confession may be admitted) when the prosecution demonstrates that the victim is dead and that the death resulted from criminal agency. *Id.* at 341.

"The purpose of the corpus delicti rule is to prevent the use of a defendant's confession to convict him [or her] of a crime that did not occur." *People v Ish*, 252 Mich App 115, 116 (2002). "[A] defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of a specific injury (for example, death in cases of homicide), and (2) some criminal agency as the source of the injury." *People v Konrad*, 449 Mich 263, 269-270 (1995). "Once this showing has been made, '[a] defendant's confession then may be used to elevate the crime to one of a higher degree or to establish aggravating circumstances.'" *Ish*, 252 Mich App at 117, quoting *People v Cotton*, 191 Mich App 377, 389 (1991). Accordingly, "it is not necessary that the prosecution present independent evidence of every element of the offense before a defendant's confession may be admitted." *Ish*, 252 Mich App at 117.

"The corpus delicti rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury and criminal agency as the source of the injury before such statements may be admitted as evidence." *People v Burns*, 250 Mich App 436, 438 (2002). Proof beyond a reasonable doubt is unnecessary. *Modelski*, 164 Mich App at 341-342 ("[p]rosecutor established corpus delicti of homicide by showing that [the victim] could not be located and ha[d] not been heard from since her sudden disappearance and by showing that [the] defendant had a motive to kill her, his deteriorating marriage

[56] MCL 763.8 "applies if the law enforcement agency has audiovisual recording equipment that is operational or accessible as provided in [MCL 768.11(3)-(4)] or upon the expiration of the relevant time periods set forth in [MCL 768.11(3)-(4)], whichever occurs first." MCL 763.8(1).

and his claim of infidelity, and by showing that [the] defendant's actions suggest[ed] that he had murdered [the victim]").

When the corpus delicti of the underlying crime is established, admission of a defendant's confession to being an accessory after the fact requires no independent evidence showing that the principal was assisted after committing the crime; "[t]he corpus delicti of accessory after the fact is the same as the corpus delicti of the underlying crime itself." *People v King (Genevieve)*, 271 Mich App 235, 237 (2006). See also *People v Williams (John L Jr)*, 422 Mich 381, 388-392 (1985), for a discussion of the history and development of the corpus delicti rule.

D. Evidentiary ("*Walker*") Hearing

A defendant may move to suppress his or her statement, either because it was involuntary, or because it was otherwise obtained in violation of his or her constitutional rights. Hearings on the admissibility of confessions must be conducted outside the presence of the jury. MRE 104(c). If the accused testifies, he or she does not become subject to cross-examination on other issues in the case. MRE 104(d). The hearing is typically called a *Walker* hearing. *People v Walker (Lee)*, 374 Mich 331, 338 (1965). With the exception of the rules of evidence regarding privilege, the rules of evidence do not apply to *Walker* hearings. MRE 104(a); *People v Richardson (Derrie)*, 204 Mich App 71, 80 (1994).

MRE 104(c) requires that hearings be conducted outside the presence of the jury on other preliminary matters when the interests of justice require it or when a defendant is a witness and requests that the hearing be conducted outside the presence of the jury.

The prosecution bears the burden of showing the admissibility of a confession. *Brown (Richard) v Illinois*, 422 US 590, 604 (1975).

E. Voluntary, Knowing, and Intelligent Confession

Statements made by a defendant during custodial interrogation are not admissible against the defendant unless he or she makes a voluntary, knowing, and intelligent waiver of his or her Fifth Amendment rights. *People v Howard (Connell)*, 226 Mich App 528, 538 (1997).[57]

"Whether a waiver was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently tendered form separate prongs of a two-part test for a valid waiver of *Miranda* rights. Both inquiries must proceed through examination of the totality of the circumstances surrounding the interrogation. The

state has the burden of proving by a preponderance of the evidence that there was a valid waiver of the suspect's rights." *People v Abraham (Nathaniel)*, 234 Mich App 640, 644-645 (1999) (internal citations omitted).

See also *People v Arroyo*, 138 Mich App 246, 256-258 (1984), for a comprehensive discussion and application of factors relevant to assessing the voluntariness of a defendant's confession.

A waiver is "knowing and intelligent" if the suspect is aware of the nature of the rights being abandoned and the consequences of the decision to abandon them. *Moran v Burbine*, 475 US 412, 421 (1986) (addressing the issue of waiver where the defendant was not informed that his sister had retained counsel for him and that counsel had contacted the police on his behalf).

"The prosecutor must show by a preponderance of the evidence that the defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment right." *People v Tierney*, 266 Mich App 687, 707 (2005), citing *People v Daoud*, 462 Mich 621, 634 (2000). "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law, which the court must determine under the totality of the circumstances." *Tierney*, 266 Mich App at 707 (citation omitted). "Furthermore, the analysis must be bifurcated, i.e., considering (1) whether the waiver was voluntary, and (2) whether the waiver was knowing and intelligent." *Id.*, citing *Daoud*, 462 Mich at 639.

Severe intoxication from drugs or alcohol may preclude an effective waiver of *Miranda* rights, but it is not dispositive; the totality of the circumstances must be examined. *People v Leighty*, 161 Mich App 565, 571 (1987).

"'[Even though] language difficulties may impair the ability of a person in custody to waive [his [or her] *Miranda*] rights in a free and aware manner[.]'" evidence that the accused spoke and understood English supports the validity of the accused's *Miranda* waiver. *United States v Al-Cholan*, 610 F3d 945, 954 (CA 6, 2010), quoting

[57] "A law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony" must capture the entire interrogation, including notification of a defendant's *Miranda* rights, in a time-stamped, audiovisual recording. MCL 763.8(2). However, if the defendant's "statement is otherwise admissible[,]" a law enforcement officer may "testify[] in court as to the circumstances and content of the . . . statement" even if the recording requirements of MCL 763.8 are not fulfilled. MCL 763.9. In such a situation, "unless the individual objected to having the interrogation recorded and that objection was properly documented under [MCL 763.8(3)], 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." MCL 763.9. See Section 8.24(B) for discussion of major felony recordings.

United States v Heredia-Fernandez, 756 F2d 1412, 1415 (CA 9, 1985) (where the police knew that the defendant had lived in the United States for 12 years and, as part of the naturalization process, had passed an English proficiency test and sworn under penalty of perjury that he could speak and understand English, his written English-language *Miranda* waiver was valid).

A defendant's Fifth Amendment right to counsel is violated when a law enforcement officer interrogates the defendant after he or she expresses his or her desire to speak with an attorney and provides the officer with the attorney's name and telephone number. *Abela v Martin (William)*, 380 F3d 915, 925-927 (CA 6, 2004). Unlike the circumstances in *Davis (Robert) v United States*, 512 US 452, 462 (1994), where the United States Supreme Court concluded that the defendant's statement—"[m]aybe I should talk to a lawyer"—was "not sufficiently clear such that a reasonable police officer in the circumstances would have understood the statement to be a request for an attorney," the defendant in *Abela* "named the specific individual with whom he wanted to speak and then showed [the police officer] the attorney's business card." *Abela*, 380 F3d at 926.

Under the circumstances in *Abela*, the Sixth Circuit found that a reasonable officer should have recognized that the defendant was making an unequivocal request for counsel. *Abela*, 380 F3d at 926. Once a defendant makes such a request, the rule of *Edwards v Arizona*, 451 US 477, 484-485 (1981), prohibited the police from further interrogation until the defendant's counsel was present or the defendant initiated further communication with the police. *Abela*, 380 F3d at 927.

The "valid waiver rule" of *Edwards*, 451 US 477, was not applicable to the subsequent interrogation of a suspect who was not held in continuous custody between his first interrogation (at which he requested counsel and denied involvement in the crime), and his second interrogation 11 days later (at which he acknowledged his right to counsel and implicated himself in the crime). *People v Harris (Isaiah)*, 261 Mich App 44, 54 (2004). Notwithstanding the time that passed between interrogations in *Harris (Isaiah)*, and the fact that the defendant was not held in custody during that time, the Court of Appeals found that the prosecution established by a preponderance of the evidence that the defendant executed a valid waiver of his right to counsel at the second interrogation. *Id.* at 55. Two police officers involved in the defendant's interrogation refuted the defendant's claim that he requested counsel at the second interrogation, and the prosecution's evidence included the defendant's videotaped acknowledgement of his right to counsel and a signed waiver of that right. *Id.*

A break in custody of 14 days ends the presumption of involuntariness established in *Edwards v Arizona*, 451 US 477 (1981), because that duration "provides plenty of time for the suspect to get reacclimated to his [or her] normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his [or her] prior custody." *Maryland v Shatzer*, 559 US 98, 110 (2010). The Court also held that when an individual is interrogated while in prison for an unrelated crime, released back into the general prison population, then questioned again at a later time, the situation constitutes a break in custody for purposes of *Miranda v Arizona*, 384 US 436 (1966). *Shatzer*, 559 US at 112-114. According to the Court, "[w]ithout minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*." *Shatzer*, 559 US at 113. See also *Howes v Fields*, 565 US ___, ___ (2012) (holding that "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*[]"; rather, "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation[,] . . . includ[ing] the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted[]").

The Michigan Court of Appeals set out four factors to consider in determining whether a defendant's statement was given voluntarily:

> "(1) the duration and conditions of detention,
>
> (2) the attitude of the police towards the accused,
>
> (3) the physical and mental state of the accused, and
>
> (4) the diverse pressures which sap or sustain the accused's power of resistance or self-control." *Arroyo*, 138 Mich App at 256.

In *People v Cipriano*, 431 Mich 315, 334 (1988), the Michigan Supreme Court elaborated on the four factors first discussed in *Arroyo*, 138 Mich App at 256. According to the *Cipriano* Court, the following factors are relevant to determining whether a defendant's statement was voluntary:[58]

> (1) the age of the accused;
>
> (2) the accused's lack of education or intelligence level;
>
> (3) the extent of the accused's previous experience with the police;

[58] Known as the "Cipriano factors."

> (4) the repeated or prolonged nature of the questioning;
>
> (5) the length of detention before the accused gave the statement;
>
> (6) lack of any advice to the accused regarding his or her constitutional rights;
>
> (7) an unnecessary delay in bringing the accused before a magistrate before the accused gave the confession;
>
> (8) whether the accused was injured, intoxicated, drugged, or ill when he or she gave the statement;
>
> (9) whether the accused was deprived of food, sleep, or medical attention;
>
> (10) whether the accused was physically abused; and
>
> (11) whether the accused was threatened with abuse. *Cipriano*, 431 Mich at 334.

"The legal analysis [applicable to determining whether a confession was voluntary] is essentially the same with respect to examining the 'voluntary' prong of a *Miranda*[59] waiver." *People v Ryan (Sean)*, 295 Mich App 388, 397 (2012). For a confession to be voluntary, it "'must have been . . . the product of a free and deliberate choice rather than intimidation, coercion or deception[.]'" *Id.* at 397, quoting *Daoud*, 462 Mich at 635.

A defendant made a voluntary, knowing, and intelligent waiver of his or her right against self-incrimination, even when the defendant was intoxicated and suicidal at the time of the confession. *People v Tierney*, 266 Mich App 687, 709-710 (2005). The *Tierney* Court affirmed the trial court's analysis of the *Cipriano* factors and emphasized that a defendant's intoxication was only one of the eleven *Cipriano* factors. *Tierney*, 266 Mich App at 709-710. The Court noted that any effect that the defendant's intoxication may have had on the defendant was significantly outweighed by other factors, including the defendant's college education, his experience with the criminal justice system, the absence of any threats, and the fact that necessities (e.g., medical care) were not withheld from the defendant during police questioning. *Id.* at 709.

One of the most influential personal characteristics of a suspect is his or her mental capacity. On numerous occasions, the United States Supreme Court has referred to the education and IQ of a suspect in finding that he or she was highly susceptible to coercion

[59] *Miranda v Arizona*, 384 US 436 (1966).

and that the police overpowered the suspect's will in obtaining an incriminating statement. See *Culombe v Connecticut*, 367 US 568, 620 (1961) (involving a defendant with mental retardation); *Spano v New York*, 360 US 315, 316, 321-322 (1959) (involving a foreign-born defendant with a junior high education who was described as "emotionally unstable"), and *Payne v Arkansas*, 356 US 560, 562 n 4 (1958) (involving a 19-year-old with a fifth-grade education who was described as "mentally dull" and "slow to learn").

A defendant's mental incompetence alone does not render a defendant's confession involuntary; for a confession to be involuntary, evidence of police misconduct or coercion must exist. *Colorado v Connelly*, 479 US 157, 164 (1986). While psychological interrogation tactics may make a suspect's mental condition more significant, mental illness by itself and apart from its relation to official coercion should never decide the question of voluntariness. *Id.* at 164. "[Although] mental illness does not affect the voluntariness prong under *Miranda*[,]" "[t]he Supreme Court has never directly addressed under what circumstances a suspect's mental illness can impede his [or her] ability to knowingly and intelligently waive his [or her] *Miranda* rights." *Daoud v Davis*, 618 F3d 525, 530 (CA 6, 2010). However, "[m]ost courts have recognized that mental illness is a factor to consider in determining whether a waiver was knowing and intelligent." *Id.* at 530. In *Daoud*, 618 F3d at 530-531, three experts could not agree on whether the mentally ill defendant knowingly and intelligently waived his *Miranda* rights, but agreed that he "comprehended what was said to him and understood that the officers would use his statements against him." "Because a defendant does not have to understand 'every possible consequence of a waiver,' and the evidence demonstrate[d] that [the defendant] had an understanding of his rights, the Michigan Supreme Court[reasonably] conclu[ded] that [the defendant's] waiver was knowing and intelligent[.]" *Daoud*, 618 F3d at 531, quoting *Colorado v Spring*, 479 US 564, 574 (1987).

"The fact that police lie to a suspect about the evidence against him [or her] does not automatically render an otherwise voluntary statement involuntary." *People v Perkins (Floyd)*, ___ Mich App ___, ___ (2016), citing *People v Hicks (James)*, 185 Mich App 107, 113 (1990). "Instead, misrepresentation by the police is just one factor to be considered; the focus remains the totality of the circumstances." *Perkins (Floyd)*, ___ Mich App at ___ (holding that where the totality of the circumstances demonstrated that the defendant's statement to police was voluntary, he was not entitled to suppression of the statement on the ground that the investigating officer "lied to him about what evidence existed in the case[]").

Police promises or threats can make a statement involuntary. "[A] statement induced by a law enforcement official's promise of leniency is involuntary and inadmissible, if there was a promise of leniency and that promise caused the defendant to confess." *People v Conte*, 421 Mich 704, 712 (1984). To determine whether a promise of leniency exists requires an analysis of whether the defendant reasonably understood the officer's statements to be a promise of leniency. *Id.* at 712. To determine whether the officer's promise of leniency caused the defendant to confess requires an analysis of whether the defendant relied on the promise when he or she decided to offer inculpatory evidence and whether, in fact, the promise of leniency prompted the defendant to make the incriminating statements. *Id.*

"'Use' immunity protects a witness [] from the prosecutorial use of compelled testimony." *People v Jones (Bennie)*, 236 Mich App 396, 399 n 1 (1999). "A witness granted 'use' immunity may still be prosecuted for a crime in which he [or she] was involved and to which his [or her] immunized testimony relates." *Id.* at 399 n 1. That is, while a coerced confession is inadmissible in a criminal trial, it does not bar prosecution. *Kastigar v United States*, 406 US 441, 461 (1972).

F. Inadmissible Confessions

Confessions obtained in violation of constitutional rights are inadmissible. Possible challenges to the constitutionality of a defendant's confession include:

1. Illegal Arrest

A confession obtained following an illegal arrest is inadmissible. Detention is unlawful where the police do not have probable cause to arrest the individual. *People v Mosley (Richard)*, 400 Mich 181, 183 (1977). To determine whether the illegal arrest caused the confession, the court should consider the time between the illegal arrest and confession, whether the official misconduct was flagrant, whether there were intervening circumstances, and any events that occurred before the arrest. *People v Mallory*, 421 Mich 229, 243 n 8 (1984).

2. Unlawful Detention

A confession obtained during an unlawful detention is inadmissible. According to *People v Lewis (James)*, 160 Mich App 20, 25 (1987), there must be a warrant or probable cause to arrest, or the detention is illegal and "any evidence obtained as a result of that unlawful detention or any statement made [by

an individual] while unlawfully detained must be suppressed." See also *People v Dowdy*, 211 Mich App 562, 569 (1991), where an initial warrantless entry was unconstitutional but a defendant's statement was admissible because it was made after police had probable cause to arrest the defendant.

Where the defendant comes forward with proof that his or her confession was involuntary and was obtained as a result of a statutorily unlawful detention, the prosecution has the burden of proving that the confession was voluntary and admissible. *People v Jordan (Timothy)*, 149 Mich App 568, 577 (1986).

3. Unreasonable Prearraignment Delay

A confession obtained during an unreasonable prearraignment delay may be inadmissible. *Mallory*, 421 Mich at 243; *People v White (James)*, 392 Mich 404, 424 (1974).

Although the "48 hour" rule established in *Riverside v McLaughlin*, 500 US 44 (1991), forms a presumption of unreasonableness, the delay is only one factor to be considered in determining whether the statement was involuntary. *People v Manning*, 243 Mich App 615, 642-643 (2000).

4. Violation of the Right to Counsel

Confessions obtained in violation of the Sixth Amendment right to counsel are inadmissible. *People v Gonyea*, 421 Mich 462, 478 (1984).

In *Escobedo v Illinois*, 378 US 478, 490-491 (1964), the United States Supreme Court held that where "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect" and the suspect has been taken into custody for interrogation, any statement elicited by the police cannot be used against the defendant unless he or she was given an opportunity to consult with counsel and was advised of his or her right to remain silent, because such a situation constitutes a denial of the assistance of counsel in violation of the Sixth Amendment.

To use a confession deliberately elicited following arraignment in its case-in-chief, the prosecution must prove that police obtained a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel before they interrogated the accused. *Patterson v Illinois*, 487 US 285, 292-293 (1988); *Brewer v Williams (Robert)*, 430 US 387, 409-410 (1977).

5. Violation of Right Against Self-Incrimination

Confessions obtained in violation of a defendant's Fifth Amendment privilege against compulsory self-incrimination are not admissible. *Miranda*, 384 US at 474-477; *People v Hill (ML)*, 429 Mich 382, 394-395 (1987). *Miranda* warnings are constitutionally required and apply to the admissibility of statements made during custodial interrogations in both federal and state courts. *Dickerson v United States*, 530 US 428, 432, 442 (2000). If a defendant asserts his or her right to counsel, the interrogation must cease until counsel is present, or, after the lapse of a significant period of time, the defendant knowingly and intelligently waives his or her right to counsel. *People v Parker (Jeffrey)*, 84 Mich App 447, 457 (1978).

There is no due process requirement under either the United States Constitution or the Michigan Constitution that an electronic recording be made when a defendant is informed of his or her *Miranda* rights, *People v Geno*, 261 Mich App 624, 627-628 (2004), or that a defendant's statement be recorded by audio or visual means, *People v Fike*, 228 Mich App 178, 183-186 (1998). However, MCL 763.8(2) requires "[a] law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony" to capture the entire interrogation, including notification of a defendant's *Miranda* rights, in a time-stamped, audiovisual recording.[60]

When a defendant contends that his or her confession was involuntary, the prosecution must make an affirmative showing that *Miranda* warnings were given prior to the custodial interrogation and that a waiver was properly obtained before the defendant's statements may be admitted in the prosecution's case-in-chief. *Miranda*, 384 US at 444; *Arroyo*, 138 Mich App at 249-250. In *Miranda*, 384 US at 444-445, the United States Supreme Court held that the prosecution must present evidence that the defendant voluntarily, knowingly, and intelligently waived his or her privilege against self-incrimination and rights to consult with counsel and to have counsel present during a custodial interrogation. If the

[60] However, if the defendant's "statement is otherwise admissible[,]" a law enforcement officer may "testify[] in court as to the circumstances and content of the . . . statement" even if the recording requirements of MCL 763.8 are not fulfilled. MCL 763.9. In such a situation, "unless the individual objected to having the interrogation recorded and that objection was properly documented under [MCL 763.8(3)], 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." MCL 763.9. See Section 8.24(B) for discussion of major felony recordings.

defendant claims that he or she did not validly waive *Miranda* rights, the prosecution has the burden of proving by a preponderance of the evidence that there was a voluntary, knowing, and intelligent waiver of those rights. *Connelly*, 479 US at 168; *People v Daoud*, 462 Mich 621, 634 (2000). The court must examine the totality of the circumstances surrounding the interrogation when evaluating the validity of a purported waiver of *Miranda* rights. *Fare v Michael C*, 442 US 707, 724-725 (1979).

Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way." *Miranda*, 384 US at 444. Whether a suspect is in custody or deprived of his or her freedom of action in any significant manner requires a two-pronged analysis. *Thompson (Carl) v Keohane*, 516 US 99, 112 (1995). First, the reviewing court must look at the circumstances surrounding the interrogation. *Id*. at 112. Second, the reviewing court must determine whether, given those circumstances, a reasonable person would have felt that he or she was at liberty to terminate the interrogation and leave. *Id*. See *People v Vaughn (Joseph)*, 291 Mich App 183, 186-190 (2010), reversed in part on other grounds 491 Mich 642 (2012) (*Miranda* warnings not required where plainclothes police officers entered the defendant's home with the defendant's mother's permission, did not draw their weapons, requested the defendant to come from the basement to the main floor, did not handcuff him or otherwise restrict his movement, and questioned him in his mother's presence). See also *People v Zahn*, 234 Mich App 438, 449 (1999) ("[t]o determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he [or she] was not free to leave . . . [t]he determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned").

Additional factors to consider in evaluating a custody determination are: "'(1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during

questioning; and whether the suspect initiated contact with the police or voluntarily admitted the officers to the residence and acquiesced to their requests to answer some questions.'" *Coomer v Yukins*, 533 F3d 477, 486 (CA 6, 2008), quoting *United States v Salvo*, 133 F3d 943, 950 (CA 6, 1998).

In *Coomer*, 533 F3d at 486, the Court determined that the defendant's oral confession in her apartment was properly admitted even though some facts could have supported a finding that the confession resulted from an improper custodial interrogation. For example, evidence established that as many as eleven officers, both uniformed and in plain clothes, arrived at the defendant's apartment late at night and that more than one police vehicle blocked the defendant's vehicle in her driveway. *Id.* at 486. Material facts on which the Sixth Circuit based its conclusion that the defendant's confession was not obtained during a custodial interrogation in violation of the defendant's *Miranda* rights included: (1) the defendant voluntarily permitted the police officers to enter her apartment and the questioning took place in the defendant's own home; (2) the defendant's confession spanned approximately 30 minutes, was primarily the defendant's own narrative, and involved only intermittent questioning by the police; and (3) the police informed the defendant on several occasions that she was not under arrest and that the officers would leave if she asked them to do so. *Coomer*, 533 F3d at 486-487. The Court explained that although the defendant testified that she did not feel free to leave, she also testified that her confession was not coerced. *Id.* at 487. The Court further noted that

> "[the defendant] moved freely around her apartment, offered the officers refreshments, and told the officers to stay quiet out of respect for her sleeping son. These facts imply that [the defendant] exercised control over her surroundings in her own home, not that *she* was controlled by her interrogators, as was the concern in *Miranda*." *Coomer*, 533 F3d at 487.

"[O]rdinarily a motorist detained for a routine traffic stop or investigative stop is not in custody within the meaning of *Miranda* [*v Arizona*, 384 US 436 (1966)]." *People v Steele (James)*, 292 Mich App 308, 319 (2011) ("[g]iven the circumstances that justified the *Terry* [*(John) v Ohio*, 392 US 1 (1968)] stop, [the police officer] was permitted to temporarily detain [the] defendant and make a reasonable inquiry into possible criminal activity"; "[the police officer's] brief questioning was within the scope of the stop and confirmed the officer's

suspicions concerning the presence of narcotics without subjecting [the] defendant to custodial interrogation"). See also *People v Jones (Cynthia)*, 301 Mich App 566, 580 (2013) ("[the] defendant was not in custody for purposes of *Miranda* during [a] traffic stop or while she was waiting in the police cruiser during the search of her vehicle[]" where the detaining officer "asked [the] defendant and her children to sit in his police cruiser for their own safety;" because "[the] defendant was not handcuffed and was informed that she was not under arrest[,] . . . under the totality of the circumstances, a reasonable person in [the] defendant's position would have believed she was free to leave[]").

Interrogation involves questioning or its functional equivalent which includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 301 (1980).

Two Circuit Courts of Appeal (the Second and Third Circuits) "have concluded that informing the accused that he had been implicated in a crime by a co-defendant constitutes interrogation under the [*Rhode Island v*] *Innis*[, 446 US 291 (1980)] definition." *Shaneberger v Jones*, 615 F3d 448, 453 (CA 6, 2010). In *Shaneberger*, 615 F3d at 451, after the defendant was given *Miranda* warnings and asked to speak to his father who would decide whether to obtain counsel, the detectives ceased questioning the defendant because they understood the defendant's statement to be an invocation of his right to counsel. One detective, however, remained in the room and told the defendant that his co-defendant had implicated the defendant in the robbery. *Id*. The detective instructed the defendant not to say anything and left the room without giving the defendant an opportunity to respond. *Id*. Later, the defendant initiated conversation with a different detective during which he confessed to participating in the crime. *Id*.

"While [the courts] do not focus on the intent of the police, a practice that is subjectively intended to elicit an incriminating response will very likely produce a finding that the police should have known that such a result would occur." *Shaneberger*, 615 F3d at 453. The Sixth Circuit noted that whether the detective who informed the defendant of his co-defendant's statement implicating the defendant "*should have known* that his comments would elicit an incriminating response is a close question," however the Court concluded that a state court could reasonably answer the question in the negative under the circumstances in the case. *Id*. at 454. In

Shaneberger, 615 F3d at 454, because the defendant was given no opportunity to respond to the detective's statement and in fact, was instructed not to respond, and because the defendant initiated the conversation in which he confessed after some time had passed and with a different detective, the Court concluded that the detective's statement did not constitute interrogation after the defendant's invocation of counsel and therefore, the trial court did not err in admitting the defendant's confession at trial.

Where the defendant asserted his right to remain silent after an officer provided him with *Miranda* warnings, the officer's statement to the 17-year-old defendant that he "'hope[d] that the gun [was] in a place where nobody [could] get a hold [sic] of it and nobody else [could] get hurt by it[]'" did not constitute either "'express questioning'" or its "'functional equivalent[]'" under *Innis*, 446 US at 299-303, and the trial court therefore erred in suppressing the defendant's subsequent incriminating statements. *People v White (Kadeem) (White (Kadeem) II)*, 493 Mich 187, 191-192, 195, 198, 202 (2013), affirming *People v White (Kadeem) (White (Kadeem) I)*, 294 Mich App 622 (2011). "The officer's comment . . . was not a question because it did not ask for an answer or invite a response[, but instead] was a mere expression of hope and concern[, and] . . . the officer's addition of the words 'okay' and 'all right' at the end of his comment did not transform a non-question into a question[]" where he had "*repeatedly* used [these] words . . . in a manner that failed to garner any response from [the] defendant." *White (Kadeem) II*, 493 Mich at 198. "Furthermore, immediately before the officer made the statement at issue, he said, 'I'm not asking you questions, I'm just telling you[;]' [a]lthough this [was] certainly not dispositive of whether what follow[ed] constituted a 'question,' . . . [t]he very utterance itself made it less likely either that the officer would have reasonably expected [the] defendant to answer with an incriminating response *or* that [the] defendant would have proffered an incriminating response." *Id*. at 199-200. Unlike the remark at issue in *Innis*, 446 US at 299-303, the officer's comment about the location of the gun was a "direct statement[] to the defendant[;]" however, because there was "nothing in the record to suggest that the officer was aware that [the] defendant was 'peculiarly susceptible to an appeal to his conscience' concerning the safety of others[,]" and because "the officer's remark [was not] 'particularly "evocative[,]"'" the "defendant was not subjected to the 'functional equivalent' of express questioning[.]" *White (Kadeem) II*, 493 Mich at 202, 204-206, quoting *Innis*, 446 US at 302-303.

Individuals not acting on the government's behalf may not be required to give *Miranda* warnings before eliciting a statement. See *People v Anderson (Robert)*, 209 Mich App 527, 533-534 (1995) (a juvenile corrections officer whose job duties did not require the interrogation of suspects, who did not wear a badge or uniform or carry a gun, and who did not have authority to arrest or detain citizens, was not required to give a defendant *Miranda* warnings). See also *People v Porterfield*, 166 Mich App 562, 567 (1988) (a protective services caseworker not charged with enforcement of criminal laws and not acting on behalf of police, is not required to advise an individual of *Miranda* rights), and *People v Faulkner*, 90 Mich App 520, 525 (1979) (a private investigator is not required to advise individuals of their constitutional rights before eliciting a statement).

There is no "categorical rule . . . that the questioning of a prisoner is always custodial [within the meaning of *Miranda*, 384 US 436,] when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison." *Howes v Fields*, 565 US ___, ___ (2012). Rather, "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation[,] . . . includ[ing] the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." *Fields*, 565 US at ___ (holding that *Miranda* warnings were not required where the respondent, a jail inmate, was escorted to a conference room and questioned by officers regarding allegations that he had committed an unrelated offense prior to his incarceration; "[t]aking into account all of the circumstances of the questioning[,]" including that the respondent was not physically restrained or threatened, that he was interviewed under conditions that were not uncomfortable, and, "especially[,] . . . that [he] was told that he was free to end the questioning and to return to his cell[,] . . . [the] respondent was not in custody within the meaning of *Miranda*[]").[61]

Similarly, "[w]here[] . . . a parolee is incarcerated for an alleged parole violation, 'custodial' means more than just the normal restrictions that exist as a result of the incarceration." *People v Elliott (Samuel) (Elliott (Samuel) II)*, 494 Mich 292, 305-306 (2013). "Pursuant to *Fields*, [565 US at ___,] the first

[61] Cf. *Mathis v United States*, 391 US 1, 3-5 (1968) (holding that a state prisoner was entitled to *Miranda* warnings before being questioned by a federal revenue agent, and rejecting the Government's assertions that *Miranda* was inapplicable where "(1) . . . the[] questions were asked as a part of a routine tax investigation where no criminal proceedings might even [have been] brought, and (2) . . . the [prisoner] had not been put in jail by the officers questioning him, but was there for an entirely separate offense[]").

constitutional step is to determine 'whether an individual's freedom of movement was curtailed[.]' . . . If so, the court should then ask 'the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.' . . . Thus, '[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*.'" *Elliott (Samuel) II*, 494 Mich at 308, quoting *Fields*, 565 US at ___.

In *Elliott (Samuel) II*, 494 Mich at 297, the defendant was taken into custody by police for failing to report to his parole officer. After advising him of his *Miranda* rights, detectives questioned the defendant about a robbery, but the interrogation was discontinued when the defendant requested an attorney. *Elliott (Samuel) II*, 494 Mich at 297. Subsequently, a different parole officer met with the defendant at the jail to serve him with an amended notice of parole violation; during the meeting, the defendant confessed to his involvement in the robbery. *Id*. at 297-299. The Court of Appeals held that "a parole officer is a law enforcement officer for purposes of *Miranda*[]" and that the defendant's meeting with the parole officer constituted a custodial interrogation for purposes of *Miranda*. *People v Elliott (Samuel) (Elliott (Samuel) I)*, 295 Mich App 623, 646 (2012). The Court of Appeals further concluded that because the defendant had invoked the right to counsel before the meeting with the parole officer, the trial court erred in denying his motion to suppress his confession. *Elliott (Samuel) I*, 295 Mich App at 633-635, 646.

The Michigan Supreme Court reversed, holding that, irrespective of whether the parole officer was a law enforcement officer for *Miranda* purposes, the defendant was not subjected to a custodial interrogation. *Elliott (Samuel) II*, 494 Mich at 295-296. Because "neither *Miranda*'s right to be given a series of warnings nor *Edwards*'s[62] right to have counsel present apply absent custodial interrogation," the Court of Appeals had "focus[ed] on the wrong constitutional question[]" in concluding that the parole officer was a law enforcement officer. *Elliott (Samuel) II*, 494 Mich at 304-305. Instead, "[the] defendant was not subjected to the type of coercive pressure against which *Miranda* was designed to guard[]" where "the meeting . . . took place in the jail library, it was of short duration (15 to 25 minutes), [the] defendant was not physically restrained, . . . he was escorted to the library by a deputy, not by the parole officer[,] . . . [the] defendant was not free to leave the jail library by himself[under any

[62] *Edwards v Arizona*, 451 US 477, 484-485 (1981).

circumstances,] . . . [and], much like the prisoner in *Fields*, [565 US at ___,] a 'reasonable person' in [the] defendant's 'position,' i.e., a *parolee*, would be aware that a parole officer is acting independently of the police who placed him in custody and has no control over the jail, its staff, or the individuals incarcerated there[;]" additionally, "there [was] no evidence of coercion or any other manner of psychological intimidation[, and] . . . [the] defendant . . . did not even once indicate that he did not want to talk to the parole officer." *Elliott (Samuel) II*, 494 Mich at 308-313. Under these circumstances, "[the] defendant was not subjected to 'custodial interrogation[,' and] . . . neither [the] defendant's *Miranda* nor [the] defendant's *Edwards* rights were violated[.]" *Elliott (Samuel) II*, 494 Mich at 295.

See also *People v Cortez (On Remand)*, 299 Mich App 679, 685-688, 699-701 (2013) (the defendant prisoner who, after being handcuffed and confined in an office with a closed door, was questioned about a weapon that was found in his cell was not in custody for purposes of *Miranda*; although "[the] defendant was not told that he was free to end the questioning and return to his cell[,] . . . other coercive aspects of the interrogation that existed in *Fields*[, 565 US ___, were] absent" where the interview lasted only 15 minutes, there was no evidence that the defendant's sleep schedule was interrupted or that he was made uncomfortable, the questioning corrections officer did not threaten him, and he was questioned about gang activity inside the prison away from the general prison population).

The age of a child subjected to police questioning "properly informs the *Miranda* custody analysis." *JDB v North Carolina*, 564 US 261, 264 (2011). In *JDB*, 564 US at 264-267, a uniformed police officer removed a 13-year-old student ("JDB") from his seventh-grade classroom and escorted him to a conference room, where, upon interrogation by police, he confessed his involvement in two home break-ins. In the ensuing juvenile proceedings, JDB sought suppression of his statements, asserting that he had been subjected to a custodial interrogation without being afforded *Miranda* warnings. *Id.* at 267-268. The United States Supreme Court, addressing the state supreme court's refusal to "'extend the test for custody to include consideration of [a suspect's] age[,]'" held that JDB's age at the time of the interrogation was relevant to the custody analysis. *Id.* at 268, 277, 281 (internal citation omitted). "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. . . . [C]ourts can account for that reality without doing any damage to the objective nature of the custody analysis." *Id.* at 272. Although officers are not required

to consider a suspect's subjective state of mind or other unknowable circumstances, a child's age is a fact that "yields objective conclusions" that "are self-evident to anyone who was a child once . . . , including any police officer or judge[;]" thus, "a child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his [or her] freedom of action." *Id*. at 271-272, 275. Cautioning that "a child's age will [not] be a determinative, or even a significant, factor in every case[,]" the Court concluded that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." *Id*. at 277.

See also *White (Kadeem) II*, 493 Mich at 203 (holding that "the mere fact that [the] defendant was 17 years old and inexperienced in the criminal justice system [did] not mean that he was 'peculiarly susceptible to an appeal to his conscience' or 'unusual[ly] susceptib[le] . . . to a particular form of persuasion[]' [within the meaning of *Innis*, 446 US at 302][]").

"[T]he failure of police to inform a suspect of an attorney's efforts to contact him [or her] does not invalidate[, under the Self-Incrimination Clause of the Michigan Constitution, Const 1963, art 1, § 17,] an otherwise 'voluntary, knowing, and intelligent' *Miranda*[63] waiver." *Tanner (George)*, 496 Mich at 203, 249, 256, citing *Moran*, 475 US 412, and overruling *Bender (Jamieson Todd)*, 452 Mich 594. Rather, "'[o]nce it is determined that a suspect's decision not to rely on his [or her] rights was uncoerced, that he [or she] at all times knew he [or she] could stand mute and request a lawyer, and that he [or she] was aware of the State's intention to use his [or her] statements to secure a conviction, the analysis is complete and the [*Miranda*] waiver is valid as a matter of law.'" *Tanner (George)*, 496 Mich at 211, 256 (quoting *Moran*, 475 US at 422-423, and concluding "that the United States Supreme Court's interpretation of the Self–Incrimination Clause of the Fifth Amendment in *Moran*[that '[e]vents occurring outside of the presence of the suspect and entirely unknown to him [or her] . . . have no bearing on' the validity of a *Miranda* waiver] constitutes the proper interpretation of [Const 1963, art 1, § 17] as well[]").

[63] 384 US 436 (1966).

6. Public Safety Exception to *Miranda*

The *Miranda* rule does not apply "in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." *New York v Quarles*, 467 US 649, 656 (1984); *People v Attebury*, 463 Mich 662, 670 (2001). To excuse the *Miranda* warnings, the circumstances must present an immediate threat to public or police safety and the questions posed to the accused must be objectively reasonably necessary to protect the public or the police from an immediate danger. *Quarles*, 467 US at 655-658; *Attebury*, 463 Mich at 664, 670-671, 674 (officers executing an arrest warrant for assault with a dangerous weapon were justified in questioning the defendant about the location of his gun before giving him *Miranda* warnings, where the questioning was "directly related to an objectively reasonable need to secure protection from the possibility of immediate danger associated with the gun").

G. Use of Improper Confession

An involuntary statement may not be used for any purpose. *People v Tyson*, 423 Mich 357, 377 (1985). "A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, and must be the product of an essentially free and unconstrained choice by its maker." *People v Akins*, 259 Mich App 545, 564 (2003) (internal citation omitted). "The burden is on the prosecution to prove voluntariness by a preponderance of the evidence." *Id.* at 564. In *Lego v Twomey*, 404 US 477, 489 (1972), the United States Supreme Court held that the prosecution must prove by a preponderance of the evidence that a defendant's confession was voluntary, but noted that states are free to set a higher burden of proof.

A statement taken in violation of a defendant's *Miranda* rights may be used in limited situations:

- Impeachment. *People v Stacy*, 193 Mich App 19, 24-25 (1992) (voluntary statements taken in violation of a defendant's right to counsel may be used for impeachment purposes, even though they cannot be used in the prosecution's case-in-chief). Defendant's voluntary statement solicited in violation of his or her Sixth Amendment right to counsel may be used for impeachment purposes if the defendant waives the Fifth Amendment privilege against self-incrimination and testifies. *People v Frazier (Corey)*, 270 Mich App 172, 180-183 (2006), rev'd in part on other grounds and vacated in part on other grounds 478 Mich 231, 235 n 1 (2007).

- Testimony of witnesses discovered as a result of the *Miranda* violation. *People v Kusowski*, 403 Mich 653, 662 (1978).

- Physical (nontestimonial) evidence discovered as a result of unwarned but voluntary statements given in violation of *Miranda*. *Patane*, 542 US at 636-637.

H. Assertion of *Miranda* Rights

After a *Miranda* warning, the questioning may continue until and unless a suspect clearly requests an attorney. *Davis (Robert)*, 512 US at 458. When a defendant invokes his or her Sixth Amendment right to counsel, any subsequent waiver of this right in a police-initiated custodial interview is ineffective; once invoked, a defendant's Sixth Amendment right to counsel may be waived only when the *defendant* initiates contact with the police officer *and* makes a valid waiver of his or her once-invoked right to counsel. *People v Harrington*, 258 Mich App 703, 706 (2003). See also *Edwards*, 451 US at 484-485 (once an accused has asserted the right to counsel, further interrogation is precluded unless he or she initiates communication with the police).

However, "neither *Miranda*'s right to be given a series of warnings nor *Edwards*'s[64] right to have counsel present apply absent custodial interrogation[.]" *People v Elliott (Samuel) (Elliott (Samuel) II)*, 494 Mich 292, 304 (2013). "If the accused is never subjected to custodial interrogation after he [or she] has invoked his [or her] right to counsel, *Edwards* is inapplicable[; i]n other words, according to *Edwards*, [451 US at 485-486,] the [Fifth Amendment] right the accused invokes under *Miranda* is the right to have counsel present during custodial interrogation[, and] . . . [i]n the absence of a post-invocation custodial interrogation, there can be no infringement of that right." *Elliott (Samuel) II*, 494 Mich at 303-305, 322 (reversing *People v Elliott (Samuel) (Elliott (Samuel) I)*, 295 Mich App 623 (2012), and holding that "[b]ecause . . . [the] defendant was not subjected to custodial interrogation by the parole officer[]" to whom he made incriminating statements, it was unnecessary to "consider whether a parole officer . . . may be considered a law enforcement officer for purposes of *Miranda*[]").[65]

In determining whether a defendant's right to remain silent was fully respected, five factors should be considered: "(1) whether the suspect was advised prior to initial interrogation that he [or she] was under no obligation to answer question[s]; (2) whether the

[64] *Edwards*, 451 US at 484-485.

[65] See Section 8.24(F) for additional discussion of *Elliott (Samuel) II*, 494 Mich 292.

suspect was advised of his [or her] right to remain silent prior to the reinterrogation; (3) the length of time between the two interrogations; (4) whether the second interrogation was restricted to a crime that had not been the subject of [the] earlier interrogation; and (5) whether the suspect's first invocation of rights was honored." *United States v Alvarado-Saldivar*, 62 F3d 697, 699 (CA 5, 1995), citing *Michigan v Mosley (Richard Bert)*, 423 US 96, 104-105 (1975).

"[A] defendant's nonverbal conduct [sitting with his head in his hands, looking down] cannot be characterized as 'silence' that is inadmissible per se under the Michigan Constitution." *People v McReavy*, 436 Mich 197, 205, 222 (1990).

A defendant's refusal to write out the first statement he made to the police did not constitute an invocation of his right to silence; therefore, the defendant's second custodial interrogation did not violate his *Miranda* rights. *People v Williams (Reginald)*, 275 Mich App 194, 197-200 (2007).

On a defendant's motion to suppress his or her statement allegedly obtained in violation of *Miranda*, the prosecution must prove waiver by a preponderance of the evidence. *Connelly*, 479 US at 168. The prosecution also bears the burden of proving by a preponderance of the evidence that the confession was voluntary. *Lego*, 404 US at 489.

A criminal suspect generally must "expressly invoke the privilege against self-incrimination in response to [noncustodial police questioning] . . . in order to benefit from it," because "[a] suspect who stands mute has not done enough to put police on notice that he [or she] is relying on his [or her] Fifth Amendment privilege."[66] *Salinas v Texas*, 570 US ___, ___ (2013) (plurality opinion). Accordingly, where "[the] petitioner voluntarily answered the [noncustodial] questions of a police officer who was investigating a murder[, b]ut . . . balked when the officer asked whether a ballistics test would show that the shell casings found at the crime scene would match [the] petitioner's shotgun[,]" the prosecution's argument at trial "that [the petitioner's] reaction to the officer's question suggested that he was guilty[]" did not violate the Fifth Amendment privilege against self-incrimination, because the petitioner had failed to expressly invoke the privilege. *Id*. at ___.

[66] "[T]wo exceptions [apply] to the requirement that witnesses invoke the privilege[against self-incrimination:] . . . First, . . . a criminal defendant need not take the stand and assert the privilege at his [or her] own trial[, *Griffin (Eddie) v California*, 380 US 609, 613-615 (1965), and] . . . [s]econd, . . . a witness' failure to invoke the privilege must be excused where governmental coercion makes his [or her] forfeiture of the privilege involuntary[, *Miranda*, 384 US at 467-468, 468 n 37]." *Salinas v Texas*, 570 US ___, ___ (2013) (plurality opinion).

I. Waiver of Miranda Rights

A suspect may waive his or her *Miranda* rights. *Moran*, 475 US at 421.

"[A suspect] must be warned prior to any questioning (1) that he [or she] has the right to remain silent, (2) that anything he [or she] says can be used against him [or her] in a court of law, (3) that he [or she] has the right to the presence of an attorney, and (4) that if he [or she] cannot afford an attorney one will be appointed for him [or her] prior to any questioning if he [or she] so desires." *Miranda v Arizona*, 384 US 436, 479 (1966).

The following is an example of a *Miranda* waiver form:

> *MIRANDA* WARNING
>
> 1. You have the right to remain silent.
>
> 2. Anything you say can and will be used against you in a court of law.
>
> 3. You have the right to talk to a lawyer and have him or her present with you while you are being questioned.
>
> 4. If you cannot afford to hire a lawyer, one will be appointed to represent you at county expense before any questioning, if you wish.
>
> 5. If you give up your right to remain silent, and later wish to stop answering questions, no further questions will be asked.
>
> *MIRANDA* WAIVER
>
> 1. Do you understand each of these rights I have explained to you?
>
> 2. Having these rights in mind, do you wish to talk to me now?
>
> Time_____
> Signature_____
>
> Date_____
>
> Officer advising rights_____

"[A]dvice that a suspect has 'the right to talk to a lawyer before answering any of [the law enforcement officers'] questions,' and that he [or she] can invoke this right 'at any time . . . during th[e]

interview,' satisfies *Miranda*." *Florida v Powell*, 559 US 50, 53 (2010). Because "[t]he first statement communicated that [the defendant] could consult with a lawyer before answering any particular question, and the second statement confirmed that [the defendant] could exercise that right while the interrogation was underway[,]" the United States Supreme Court held that "[i]n combination, the two warnings reasonably conveyed [the defendant's] right to have an attorney present, not only at the outset of interrogation, but at all times." *Powell*, 559 US at 62.

A waiver must be the "product of a free and deliberate choice, rather than intimidation, coercion, or deception."*Moran*, 475 US at 421. That is, a waiver must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Id.* at 421. A waiver does not have to be explicit; it can be determined by the surrounding facts and circumstances. *North Carolina v Butler (Willie)*, 441 US 369, 375-376 (1979). "[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Id.* at 373. However, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda*, 384 US at 475.

"The voluntariness of a *Miranda* waiver is evaluated under a totality of the circumstances test, but also includes additional safeguards for juveniles." *People v Eliason*, 300 Mich App 293, 305 (2013). Additional factors a trial court must consider in deciding whether a juvenile defendant's waiver was voluntary are:

> (1) whether *Miranda* requirements have been met and the juvenile defendant clearly understands and waives those rights;
>
> (2) the degree of police compliance with MCL 764.27 (concerning arrest procedures for children under 17 years of age) and the juvenile court rules;
>
> (3) the presence of an adult parent, custodian, or guardian;
>
> (4) the juvenile defendant's personal background;
>
> (5) the juvenile defendant's age, education, and intelligence level;
>
> (6) the extent of the juvenile defendant's prior experience with the police;

(7) the length of detention before the statement was made;

(8) the repeated and prolonged nature of the questioning; and

(9) whether the juvenile defendant was injured, intoxicated, in poor health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. *Eliason*, 300 Mich App at 305-306; *People v Givans*, 227 Mich App 113, 121 (1997).

"[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his [or her] *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." *Berghuis v Thompkins*, 560 US 370, 388-389 (2010). During the three-hour interview in *Berghuis*, 560 US at 376, 382, the defendant did not invoke his right to remain silent, because he never said "that he wanted to remain silent or that he did not want to talk with the police." Further, the record demonstrated that the defendant waived his right to remain silent by knowingly and voluntarily making a statement to the police, where (1) "there [wa]s no contention that [he] did not understand his rights; and from this it follows that he knew what he gave up when he spoke"; (2) his response to a detective's question regarding "whether [he] prayed to God for forgiveness for shooting the victim [wa]s a 'course of conduct indicating waiver' of the right to remain silent"; and (3) there was no evidence that his statement was coerced. *Id*. at 385-387, quoting *North Carolina v Butler (Willie)*, 441 US 369, 373 (1979). Additionally, the police were not required to obtain a waiver of the defendant's right to remain silent before questioning him, because "after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights." *Berghuis*, 560 US at 388.

"When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of the right to remain silent." *McReavy*, 436 Mich at 222. A defendant who speaks following *Miranda* warnings must affirmatively reassert the right to remain silent. *People v Davis (Leroy)*, 191 Mich App 29, 35-36 (1991).

A *Miranda* waiver made midway through an interrogation does not permit the use of a confession obtained before the *Miranda* warning was given. *Missouri v Seibert*, 542 US 600, 609-610, 613, 617 (2004).

While intoxication may preclude an effective waiver of *Miranda* rights, the fact that an individual is under the influence of drugs

does not automatically render that person's statement involuntary. *People v Lumley*, 154 Mich App 618, 624 (1986).

A defendant who is intoxicated and claims to be suicidal may make a valid waiver of his or her *Miranda* rights as long as the totality of circumstances supports a finding that the waiver was knowingly, intelligently, and voluntarily given. *Tierney*, 266 Mich App at 709-710. In *Tierney*, the defendant's college education and familiarity with the criminal justice system, coupled with the evidence that the defendant conducted himself in a coherent and rational manner during police questioning, supported the trial court's conclusion that the defendant's confession was voluntary and properly admitted at trial. *Id.* at 709-710.

The prosecution bears the burden of proving that a suspect's waiver of his or her rights was voluntary, knowing, and intelligent. *People v Bishop*, 117 Mich App 553, 559 (1982). The burden is satisfied if the prosecution proves the validity of the waiver by a preponderance of the evidence. *Connelly*, 479 US at 168.

There is a distinction between determining whether a defendant's waiver of his or her *Miranda* rights was voluntary and whether an otherwise voluntary waiver was knowing and intelligent. *People v Garwood*, 205 Mich App 553, 555 (1994). A valid waiver of *Miranda* rights requires a showing that the waiver was voluntarily made—the result of the defendant's uncoerced choice—and that the waiver was made with complete awareness of the rights waived and the consequences of waiving those rights. *Garwood*, 205 Mich App at 556.

A preponderance of the evidence proved that a deaf-mute defendant knowingly, intelligently, and voluntarily waived her *Miranda* rights when she made inculpatory statements during interrogation after a detective placed a constitutional rights form within the defendant's range of vision, read portions of the form aloud while a sign language interpreter signed and mouthed the detective's words to the defendant, and the defendant signed the form. *People v McBride (Mary Ann)*, 480 Mich 1047 (2008); *People v McBride (Mary)*, 273 Mich App 238, 240-244 (2006).

A defendant's Fifth and Fourteenth Amendment rights to counsel were violated when the trial court admitted into evidence a statement he made to a police officer while in custody after requesting an attorney and without waiving his right to counsel, where the government did not meet its burden of showing by a preponderance of the evidence that the defendant (and not the police officer) initiated further conversation. *Moore v Berghuis*, 700 F3d 882, 884, 888 (CA 6, 2012). In *Moore*, 700 F3d at 884, the defendant, after being taken into custody, asked a police officer to

call his attorney; however, the officer indicated that he was unable to reach the attorney. The defendant later indicated that he wanted to make a statement, waived his right to remain silent, and, upon questioning by the officer, made incriminating statements, giving no indication to the officer that he wanted an attorney before making a statement or at any time during the interrogation. *Id*. at 884-885. The state courts held that the defendant was not entitled to suppression of the statement. *People v Moore*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2003 (Docket No. 236015); see also *People v Moore*, 469 Mich 1025 (2004) (denying leave to appeal). The United States Court of Appeals for the Sixth Circuit reversed the federal district court's denial of the defendant's petition for a writ of habeas corpus, holding that the Michigan Court of Appeals erred "by finding a waiver [of counsel] absent a factual finding by the trial court—and despite testimonial evidence to the contrary—that [the defendant], not the officer, had reinitiated communications, . . . and by not finding it to be error that the trial court effectively required that [the defendant] assert his right to counsel a second time in order to secure it." *Moore*, 700 F3d at 889-890.

J. Standard of Review

The trial court's decision regarding application of the corpus delicti rule is reviewed for an abuse of discretion. *Burns*, 250 Mich App at 438.

The trial court's factual findings regarding a defendant's knowing and intelligent waiver of *Miranda* rights are reviewed for clear error. *Daoud*, 462 Mich at 629.

A defendant is required to testify to preserve for review a challenge to the trial court's ruling in limine allowing the prosecution to admit evidence of the defendant's exercise of the *Miranda* right to remain silent. *People v Boyd*, 470 Mich 363, 365 (2004).

A trial court's determination that the entire context of a given pretrial statement is admissible to explain the statement, is reviewed for an abuse of discretion. *People v Badour*, 167 Mich App 186, 191 (1988), rev'd on other grounds *People v Beckley*, 434 Mich 691 (1990).

"Application of the exclusionary rule to a constitutional violation is a question of law that is reviewed de novo." *Frazier (Corey)*, 478 Mich at 240.

8.25 Motion to Suppress Evidence Due to Illegal Prearraignment Delay

Failure to comply with the time requirements prescribed for a criminal defendant's arraignment may jeopardize the nature or amount of evidence admissible in subsequent court proceedings against the defendant. Pre-arraignment delay is only one factor to be considered when determining whether a defendant's confession was voluntary or whether physical evidence was obtained lawfully. *People v Cipriano*, 431 Mich 315, 319 (1988). Evidence must be excluded when it was obtained during an unlawful detention designed to allow law enforcement personnel additional time to gather evidence. *People v Mallory*, 421 Mich 229, 240 (1984). See Section 6.6 for more information on prearraignment delay and its consequences.

8.26 Motion to Suppress Evidence Due to Illegal Search/ Seizure

A. Defective Search Warrant

Where the defendant seeks to suppress evidence seized pursuant to a search warrant,[67] the defendant has the burden of proving the illegality of the search or seizure. See *People v Ward*, 107 Mich App 38, 52 (1981), citing *Franks v Delaware*, 438 US 154, 171 (1978), and *People v Williams*, 134 Mich App 639, 643 (1984) (defendant must show by a preponderance of the evidence that affiant knowingly and intentionally or with reckless disregard for the truth inserted false material in the affidavit supporting the search warrant to have such information excluded from the affidavit). The defendant also has the burden of establishing his or her standing to challenge the search. *People v Zahn*, 234 Mich App 438, 446 (1999), and *People v Lombardo*, 216 Mich App 500, 505 (1996). See Chapter 9 for more information on suppressing evidence based on a defective search warrant.

B. Warrantless Search

Where the defendant seeks to suppress evidence seized pursuant to a warrantless search and seizure, the burden of proof is on the prosecution to show that the search and seizure were reasonable and fell under a recognized exception to the warrant requirement. *People v White*, 392 Mich 404, 410 (1974). Because warrantless searches are per se unreasonable and violate US Const, Am IV, and

[67] Required procedures and standards for issuing search warrants are discussed beginning in Section 2.15.

Const 1963, art 1, §11, the burden is on the party who seeks exemption from the constitutional mandate to show that the exigencies of the situation made the warrant requirement unreasonable. *People v Reed*, 393 Mich 342, 362 (1975), and *People v Mason*, 22 Mich App 595, 617-618 (1970). See Chapter 9 for more information on suppressing evidence based on an illegal warrantless search.

8.27 Motion to Suppress Identification of Defendant

A. Generally

Identification testimony is admissible unless a pretrial identification procedure was impermissibly suggestive; however, even if a pretrial identification procedure was impermissibly suggestive, identification testimony is admissible if it did not create a substantial risk of misidentification considering the totality of the circumstances. *Manson v Brathwaite*, 432 US 98, 110, 114 (1977); *Neil v Biggers*, 409 US 188, 199-200 (1972). "'[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *People v Hickman*, 470 Mich 602, 607 (2004), quoting *Moore (James) v Illinois*, 434 US 220, 227 (1977).

In assessing the reliability of the identification testimony in light of the suggestive identification procedure, the court must consider:

- The opportunity of the witness to observe the criminal at the time of the crime;
- The degree of attention of the witness at the time of the crime;
- The accuracy of the witness's prior description of the criminal;
- The level of certainty demonstrated by the witness at pretrial confrontation; and
- The length of time between the crime and the pretrial confrontation. *Manson*, 432 US at 114-116.

"Given the scope of human diversity," a witness is not required to "accurately guess the age of another person—at least, one who is neither obviously a child nor obviously a senior—with any more precision than a decade or so, especially on the basis of a single visual interaction with little context from which an age could otherwise be deduced." *People v Ratcliff*, 299 Mich App 625, 629

(2013), vacated in part on other grounds 495 Mich 876 (2013) (a robbery victim's statement that the perpetrator "appeared to be in his twenties," where the defendant was actually 17, did not render the identification "inherently unreliable or implausible[]").

Any discrepancy between a victim's initial description and the defendant's actual appearance is relevant to the weight of the evidence, not to its admissibility. *People v Davis (Thomas)*, 241 Mich App 697, 705 (2000).

"[U]nder MRE 801(d)(1)(C), statements of identification are not hearsay when the identifier is subject to cross-examination." *Hickman*, 470 Mich at 607.

If the totality of circumstances support the reliability of a witness's pretrial identification and that reliability outweighs any improper suggestiveness, the pretrial identification may be used to advance the witness's identification of the defendant at trial. *Howard (Frank) v Bouchard*, 405 F3d 459, 472-474 (CA 6, 2005).

Absent an intelligent waiver by the defendant, counsel is required to be present at a lineup. *Frazier (Corey)*, 478 Mich at 244 n 11, citing *United States v Wade (Billy)*, 388 US 218, 237 (1967). The prosecution has the burden of proving by clear and convincing evidence that the defendant waived his or her right to counsel. *People v Daniels (Chris)*, 39 Mich App 94, 96-97 (1972). Additionally, when counsel is not present at the lineup, the prosecution bears the burden of proving that the lineup was not unduly suggestive. *People v Young (Donnie)*, 21 Mich App 684, 693-694 (1970). When counsel is present at the lineup, the defendant bears the burden of proving that the lineup was unduly suggestive. *People v Morton*, 77 Mich App 240, 244 (1977).

If the court finds a violation of the right to counsel, or that a pretrial identification procedure was unduly suggestive, in-court identification of the defendant at trial is inadmissible as the fruit of the illegal procedure unless the prosecution establishes by clear and convincing evidence that the in-court identification is based on observations of the suspect other than at the illegal pretrial identification. *People v Gray (Allen)*, 457 Mich 107, 115 (1998).

"An appellate court reviews a trial court's determination following a *Wade*[68] hearing[69] by examining the totality of the circumstances

[68] *United States v Wade (Billy)*, 388 US 218 (1967).

[69] "Where the risk of a tainted in-court identification is alleged, this procedure is a useful tool to aid the trial court's determination of whether an independent basis for that identification exists." *People v Baker*, 103 Mich App 255, 258 (1981).

surrounding the challenged pretrial identification and determining whether those procedures were so impermissibly suggestive that they gave rise to a substantial likelihood of misidentification." *People v Hampton*, 138 Mich App 235, 238 (1984).

B. Evaluating a Lineup's Suggestiveness

A lineup may be so suggestive and conducive to irreparable misidentification that an accused is denied due process of law. *Stovall v Denno*, 388 US 293, 301-302 (1967). "[D]ue process concerns arise . . . when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry v New Hampshire*, 565 US ___, ___ (2012). When the police use such a procedure, "the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" *Perry*, 565 US at ___, quoting *Neil v Biggers*, 409 US 188, 201 (1972). "Where the 'indicators of [a witness's] ability to make an accurate identification' are 'outweighed by the corrupting effect' of law enforcement suggestion, the identification should be suppressed[;] . . . [o]therwise, the evidence (if admissible in all other respects) should be submitted to the jury." *Perry*, 565 US at ___, quoting *Manson v Brathwaite*, 432 US 98, 114, 116 (1977).

A court must consider the totality of the circumstances to determine whether an identification procedure is fair. *People v Kurylczyk*, 443 Mich 289, 311-312 (1993). The test is whether the totality of the circumstances shows the procedure to be reliable. *People v Davis (Melvin)*, 146 Mich App 537, 548 (1985). However, "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry*, 565 US at ___. Rather, "[w]hen no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Id.* at ___, ___ (where an eyewitness, in response to a police officer's request for a more specific description of the perpetrator of a theft, pointed out her window at the petitioner, who was standing near another officer, the trial court did not err in denying the petitioner's motion to suppress the identification without first conducting a preliminary assessment of its reliability; no such inquiry was required because "law enforcement officials did not arrange the suggestive circumstances surrounding [the] identification[]").

If counsel was present at the lineup, the defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286 (1996). If counsel was not present at the pretrial identification procedure, the prosecution has the burden of establishing that the procedure was not impermissibly suggestive. *Young (Donnie)*, 21 Mich App at 693-694. If the prosecution claims the defendant waived the right to have counsel present at the lineup, the burden is on the prosecution to establish the waiver. *Wade (Billy)*, 388 US at 240.

Where the differences in the lineup participants' physical appearances from the defendant's physical appearance were minimized at the lineup and the store employees identified the defendant as the armed robber at both the lineup and in court, and testified that differences in appearance did not influence their identification, there was no error requiring reversal in the lineup identification. *People v Hornsby*, 251 Mich App 462, 466-467 (2002).

C. Right to Counsel

"Defendants who face incarceration are guaranteed the right to counsel at all critical stages of the criminal process by the Sixth Amendment, which applies to the states through the Due Process Clause of the Fourteenth Amendment." *People v Willing*, 267 Mich App 208, 219 (2005). "The right attaches and represents a critical stage in the proceedings only after adversarial legal proceedings have been initiated against a defendant by way of indictment, information, formal charge, preliminary hearing, or arraignment." *People v Marsack*, 231 Mich App 364, 376-377 (1998).

"[T]he right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings." *Hickman*, 470 Mich at 603. In *Hickman*, 470 Mich at 610, the challenged identification took place "on-the-scene" and before the initiation of adversarial proceedings; therefore, counsel was not required. The Michigan Supreme Court's decision in *Hickman* overruled its previous decision in *People v Anderson (Franklin)*, 389 Mich 155 (1973), where "the right to counsel was extended to all pretrial corporeal identifications, including those occurring before the initiation of adversarial proceedings." *Hickman*, 470 Mich at 605. "[I]t is now beyond question that, for federal Sixth Amendment purposes, the right to counsel attaches only at or after the initiation of adversarial judicial proceedings." *Id.* at 607. "This conclusion is also consistent with our state constitutional provision, Const 1963, art 1, § 20[.]" *Hickman*, 470 Mich at 608. The Court added that "identifications conducted before the initiation of adversarial judicial criminal proceedings could still be challenged" on the basis that a defendant's due process rights were violated by the

identification's undue suggestiveness or by other factors unfairly prejudicial to the defendant. *Id*. at 607. In *Hickman*, 470 Mich at 609 n 4, the Michigan Supreme Court declined to address whether a defendant has the right to an attorney during a photographic lineup after the initiation of adversarial judicial proceedings, because *Hickman* involved a corporeal identification conducted before the initiation of adversarial judicial proceedings.

The defendant was not entitled to a corporeal lineup with counsel rather than a photographic lineup where he was in custody for another offense at the time of the lineup; under *Hickman*, 470 Mich at 607, "a defendant's right to counsel 'attaches only to . . . [an] identification conducted at or after the initiation of adversarial judicial proceedings[,]'" and adversarial proceedings for the subject offense had not yet been initiated when the photographic lineup occurred. *People v Perry (Rodney)*, ___ Mich App ___, ___ (2016) (extending the reasoning of *Hickman*, 470 Mich at 603-604, 607-609—which addressed a *corporeal* identification—to a *photographic* lineup).

There is no right to counsel at precustodial investigatory photographic lineups. *Kurylczyk*, 443 Mich at 302.

There is no right to have counsel present at a post-lineup interview of a witness. *People v Sanger*, 222 Mich App 1, 3-4 (1997).

D. Photo Lineup

A photographic lineup should generally not be used if a suspect is in custody or if the suspect could be compelled to take part in a corporeal lineup. *People v Strand*, 213 Mich App 100, 104 (1995) (photographic lineup was permissible because defendant not in custody at the time; because he was also not under arrest, he could not be compelled to participate in a corporeal lineup). "However, this rule is subject to certain exceptions, including situations in which a corporeal lineup is not feasible because 'there are insufficient numbers of persons available with the defendant's physical characteristics[.]'" *People v Cain (Darryl) (Cain I)*, 299 Mich App 27, 47-48 (2012), vacated in part on other grounds 495 Mich 874 (2013) (quoting *People v Currelley*, 99 Mich App 561, 564 (1980), and holding that "there were not enough young black men with similar physical characteristics to [the] defendant[,] . . . a photographic lineup was clearly proper[, and] . . . [the] defendant would have suffered significant prejudice if he had been placed in a corporeal lineup with men of difference races or ages[]").

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification."

Gray (Allen), 457 Mich at 111. The same standard of "unduly suggestive" applies to photo lineups as well as corporeal lineups:

> "A suggestive lineup is not necessarily a constitutionally defective one. Rather, a suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification. The relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all the circumstances surrounding the identification." *Kurylczyk*, 443 Mich at 306 (internal citation omitted).

However, a trial court does not clearly err in allowing identification testimony based on a photographic lineup where the defendant "does not indicate any unique differences about his [or her] photograph that served to make the lineup unduly suggestive and there are none apparent on the record[.]" *People v Henry (After Remand)*, 305 Mich App 127, 161 (2014).

"[P]lacing [a] defendant's photograph first in a lineup is [not] inherently suggestive, and in a random assortment the first slot is no less [sic] likely than any other." *People v Blevins*, ___ Mich App ___, ___ (2016). However, showing a witness only a *single* photograph or a group in which one person is singled out can be impermissibly suggestive. *Gray (Allen)*, 457 Mich at 111. Nevertheless, the use of a single photograph "only to help confirm the identity of the person the witness had already identified[as defendant]—using a nickname—as the [perpetrator of a murder]" did not violate due process where "[t]he witness testified that he knew, and grew up with, the [defendant]." *People v Woolfolk*, 304 Mich App 450, 457-458 (2014), aff'd on other grounds 497 Mich 23 (2014) (citing *Kurylczyk*, 443 Mich at 302-303, and *Gray (Allen)*, 457 Mich at 111, 114-115, and holding that "the prior relationship and the witness's identification of the [defendant] by name before seeing the photograph established an untainted, independent basis for the in-court identification[]").

In *Blevins*, ___ Mich App at ___, the Court of Appeals rejected, as "pure speculation[,]" the defendant's argument that because "[photographic] lineups [in which he was identified] were not 'double blind,' . . . the officers conducting the lineup[s] might have subtly or unconsciously suggested a 'correct' choice to the witnesses[.]" The defendant "had ample opportunity to argue why the *specific* witnesses against him should have been deemed unreliable," and "[a]ny infirmities [in the witnesses' testimony] either were or could have been presented to the jury, . . . [which] was properly instructed to consider these infirmities." *Id.* at ___.

Mug shots, unless edited, are not admissible because they may suggest bad character, *People v Jones (Alphonzo)*, 228 Mich App 191, 202 (1998), or a past criminal record. *People v Heller*, 47 Mich App 408, 411 (1973).

E. Defendant's Request for a Lineup

A trial court has discretion to grant a defendant's motion for a lineup. *People v McAllister*, 241 Mich App 466, 471 (2000). "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *Id.* at 471. Where the defendant meets his or her requisite burden, he or she has a due process right to a lineup. *People v Gwinn*, 111 Mich App 223, 249 (1981). In determining whether the defendant's due process rights have been implicated, the court should consider the benefits of a lineup to an accused; the burden on the prosecution, police, courts, and witnesses; and the timeliness of the motion involved. *Id.* at 249.

F. Identification of Defendant's Voice

1. Voice Identification Lineup

A defendant can be required to speak during a lineup to determine if his or her voice is recognized. *People v Hayes (Phillip)*, 126 Mich App 721, 725 (1983). Care should be taken to determine that there is a basis for familiarity with a voice (e.g., familiarity, peculiarity) and a reasonably positive identification. *Id.* at 725-726; *People v Bozzi*, 36 Mich App 15, 18-22 (1971).

The trial court properly admitted the victim's identification of the defendant based on the defendant's appearance and his voice where the victim "had ample opportunity to hear and see the [defendant] robber with the shotgun," and "the totality of the circumstances, combined with [the victim's] certainty regarding his identification of [the] defendant, supplied sufficient reliability of the voice identification." *People v Murphy (Bernard) (On Remand)*, 282 Mich App 571, 584 (2009).

Even where a defendant is not entitled to have counsel present during a victim's voice identification, the identification must still be suppressed if it is unduly suggestive. *People v Williams (Kevin)*, 244 Mich App 533, 542-544 (2001) (a tape recording containing three voices, two of which were identified as police officers, was unduly suggestive).

2. Voice Demonstration

The use of voice exemplars solely to measure physical properties of the voice does not implicate the Fifth Amendment privilege against self-incrimination. *People v Henderson*, 69 Mich App 418, 421 (1976). Courts have attempted to distinguish between something like a demonstration, and testimony, which would violate the prohibition against self-incrimination. See *Pennsylvania v Muniz*, 496 US 582, 590-592, 600 (1990) (admission of the fact that a drunk-driving suspect's speech was slurred did not violate his privilege against self-incrimination, because slurred speech is a physical characteristic, and is not testimonial). "Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case." *People v Bulmer*, 256 Mich App 33, 35 (2003).

G. In-Court Identification

1. Pretrial Identification Challenged

A pretrial motion to suppress an in-court identification by a witness may be brought if it is asserted that the identification is the product of a prior, illegal confrontation. For example, the defendant may claim that the prior confrontation was the result of a lineup conducted after arrest and appointment of counsel but without the presence of that counsel, *Wade (Billy)*, 388 US at 236-237, or that the pretrial identification procedure was impermissibly suggestive in some other manner. *Simmons v United States*, 390 US 377, 384 (1968); *Stovall*, 388 US at 301-302.

2. Independent Basis for Identification

If the pretrial identification procedure violated the defendant's right to counsel or due process, then the prosecution must establish by clear and convincing evidence that the in-court identification has a basis independent of the illegal procedure. *Wade (Billy)*, 388 US at 240; *People v Colon*, 233 Mich App 295, 304 (1999).

Courts should weigh the following factors when determining if an independent basis exists to admit an in-court identification:

> (1) prior relationship with or knowledge of the defendant;

> (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act;
>
> (3) length of time between the offense and the disputed identification;
>
> (4) accuracy of the description compared to the defendant's actual description;
>
> (5) previous proper identification or failure to identify the defendant;
>
> (6) any identification prior to the lineup of another person as the defendant;
>
> (7) the nature of the offense, including the age, intelligence, effect of any drugs on the victim, and the psychological state of the victim; and
>
> (8) any idiosyncratic or special features of the defendant. *Gray (Allen)*, 457 Mich at 116-124.

A defendant is not entitled to an evidentiary hearing on suggestiveness simply by making a vague claim of suggestiveness. *People v Johnson (James)*, 202 Mich App 281, 286-287 (1993) (trial court properly denied defendant's motion for an evidentiary hearing to evaluate the identification procedures because defendant's assertion that he appeared at the lineup in the same clothing he wore when he committed the crimes did not automatically render the lineup impermissibly suggestive, especially where the victim testified that she was able to identify defendant by his facial features and had a substantial independent basis for the in-court identification). Generally, the use of surveillance photographs or videos of the actual events surrounding an offense are not impermissibly suggestive. *Kurylczyk*, 443 Mich at 309-310 (surveillance photographs had potential suggestive influence because they refreshed and enhanced bank tellers' memory of the robbery; however, trial court did not clearly err in concluding that the tellers would have recognized defendant as the robber, regardless of the publication of the surveillance photographs).

H. Standard of Review

A trial court's decision to admit identification evidence is reviewed for clear error. *People v Harris (Isaiah)*, 261 Mich App 44, 51 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 51.

Part E: Motions in Limine

8.28 Motion in Limine—Impeachment of Defendant by Evidence of Prior Convictions

If a prior conviction contains no element of dishonesty, false statement, or theft, evidence of the prior conviction is not admissible for impeachment purposes. If a prior conviction contains an element of dishonesty or false statement, evidence of the prior conviction is admissible if more than ten years have not elapsed since the date of the conviction or the defendant's release from confinement, whichever is later. MRE 609(a) and MRE 609(c). The trial court has discretion to admit evidence of prior convictions for impeachment purposes if the prior conviction is a theft offense punishable by imprisonment for more than one year and the time requirement of MRE 609(c) is satisfied. MRE 609(a)(2)(A). If the prior conviction is such a theft offense, the court must balance its probative value and prejudicial effect. MRE 609(a)(2)(B). The prosecutor bears the burden of justifying admission of the evidence. *People v Crawford*, 83 Mich App 35, 38 (1978). See the Michigan Judicial Institute's *Evidence Benchbook* for more information on this topic.

8.29 Motion in Limine—Impeachment of Defendant by His or Her Silence

See the Michigan Judicial Institute's *Evidence Benchbook* for more information on this topic.

8.30 Motion in Limine—Evidence of Other Crimes, Wrongs, or Acts

MRE 404(b), MCL 768.27, MCL 768.27a, and MCL 768.27b provide rules for the admission of evidence of other crimes, wrongs, or acts.

"MRE 404(b) applies to the admissibility of evidence of other acts of *any* person, such as a defendant, a plaintiff, or a witness." *People v Rockwell*, 188 Mich App 405, 409-410 (1991). A ruling on whether to admit MRE 404(b) evidence does not require an evidentiary hearing if no motion in limine was filed. See *People v Williamson*, 205 Mich App 592, 596 (1994). MCL 768.27 provides for the admission of other acts evidence. It is the statutory equivalent of MRE 404(b). *People v Smith (Anthony)*, 282 Mich App 191, 204 (2009).

MCL 768.27a governs the admissibility of evidence of sexual offenses against minors. "MCL 768.27a permits the admission of evidence that

MRE 404(b) precludes." *People v Watkins (Watkins II)*, 491 Mich 450, 470 (2012).

MCL 768.27b governs the admissibility of evidence of acts of domestic violence. "[P]rior-bad-acts evidence of domestic violence can be admitted at trial because 'a full and complete picture of a defendant's history . . . tend[s] to shed light on the likelihood that a given crime was committed.'" *People v Cameron*, 291 Mich App 599, 610 (2011), quoting *People v Pattison*, 276 Mich App 613, 620 (2007).

For a full discussion on this topic, see the Michigan Judicial Institute's *Evidence Benchbook*.

Chapter 9: Fourth Amendment Search and Seizure Issues

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9.1 Motions to Suppress Evidence–Generally

The federal and state constitutions prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417 (2000). The reasonableness of a search or seizure is determined by balancing the governmental interest that justifies the intrusion against an individual's right to be free of arbitrary police interference. *Terry (John) v Ohio*, 392 US 1, 20-21 (1968). "'The Fourth Amendment does not require a police[officer] who lacks the precise level of information necessary for probable cause to arrest to simply shrug his [or her] shoulders and allow a crime to occur or a criminal to escape.'" *People v Nelson*, 443 Mich 626, 638 (1993), quoting *Adams (Frederick) v Williams (Robert)*, 407 US 143, 145 (1972).

The protections against unreasonable searches and seizures provided in the United States and Michigan constitutions apply to three categories of encounters between the police and citizens:

- Arrests, for which the Fourth Amendment requires that the police have probable cause to believe that a person has committed or is committing a crime, *People v Shabaz*, 424 Mich 42, 59 (1985);

- Investigatory stops (*Terry*[1] stops), which are limited to brief, non-intrusive detentions. In order to justify an investigatory stop, the police must have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime, *Shabaz*, 424 Mich at 57; and

- Situations in which there is no restraint upon the citizen's liberty and the officer is seeking the citizen's voluntary cooperation through non-coercive questioning, *Shabaz*, 424 Mich at 56-57.

Courts frequently entertain motions to suppress evidence that is based on a violation of the Fourth Amendment. This section briefly addresses the two most common types of motions related to this issue. When addressing a challenged search or seizure, several preliminary questions may be appropriate:

- Was there a search or seizure?

- Does the defendant have standing to challenge the search?

- Where did the search take place?

[1] *Terry (John) v Ohio*, 392 US 1 (1968).

- Was a warrant required?
- Was there probable cause?
- Is exclusion the remedy if a violation is found?

A detailed discussion of each of these questions follows this section.

A. Defective Search Warrant

Where the defendant seeks to suppress evidence seized pursuant to a search warrant, the defendant has the burden of proving the illegality of the search or seizure. See *People v Ward*, 107 Mich App 38, 52 (1981), citing *Franks v Delaware*, 438 US 154, 171 (1978), and *People v Williams*, 134 Mich App 639, 643 (1984) (defendant must show by a preponderance of the evidence that affiant knowingly and intentionally or with reckless disregard for the truth inserted false material in the affidavit supporting the search warrant to have such information excluded from the affidavit). The defendant also has the burden of establishing his or her standing to challenge the search. *People v Zahn*, 234 Mich App 438, 446 (1999), and *People v Lombardo*, 216 Mich App 500, 505 (1996).

See Section 9.3 for discussion on defendant's standing.

See Section 9.6 for discussion on probable cause.

B. Warrantless Search

Where the defendant seeks to suppress evidence seized pursuant to a warrantless search and seizure, the burden of proof is on the prosecution to show that the search and seizure were reasonable and fell under a recognized exception to the warrant requirement. *People v White*, 392 Mich 404, 410 (1974). Because warrantless searches are per se unreasonable and violate US Const, Am IV, and Const 1963, art 1, § 11, the burden is on the party who seeks exemption from the constitutional mandate to show that the exigencies of the situation made the warrant requirement unreasonable. *People v Reed*, 393 Mich 342, 362 (1975), and *People v Mason*, 22 Mich App 595, 617-618 (1970). "The fact that an intrusion is negligible is of central relevance to determining reasonableness[.]" *Maryland v King*, 569 US ___, ___ (2013).

9.2 Search and Seizure Issues—Was There a Search or Seizure?

A "search" within the context of the Fourth Amendment involves

> "'some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinary searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search."'" See *Brown (Delbert) v State of Alaska*, 372 P2d 785, 790 (Alas, 1962), quoting *People v West (Billy)*, 300 P2d 729, 733 (Cal App, 1956).

"[A] seizure may be of a person, a thing, or even a place." *Bailey v United States*, 568 US ___, ___ (2013). A person is seized for purposes of the Fourth Amendment when there is an application of physical touching or force, or a nonphysical show of authority to which the person submits. *California v Hodari D*, 499 US 621, 626 (1991). A "seizure" of property within the context of the Fourth Amendment occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v Jacobsen*, 466 US 109, 113 (1984).

"[A Fourth Amendment] violation occurs when government officers violate a person's 'reasonable expectation of privacy[.]'" *United States v Jones (Antoine)*, 565 US ___, ___ (2012), quoting *Katz v United States*, 389 US 347, 360 (1967) (Harlan, J., concurring). Establishing such a violation requires "first that a person ha[s] exhibited an actual (subjective) expectation of privacy, and, second, that the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. Urine and breath tests, even though they are less intrusive than blood tests, are searches within the meaning of the Fourth Amendment. *People v Chowdhury*, 285 Mich App 509, 523-524 (2009) (preliminary breath test (PBT) constituted a search under the Fourth Amendment). See also *Kyllo v United States*, 533 US 27, 34 (2001) (scanning with a thermal imaging device was a search because it was similar to a physical intrusion).

When police conduct does not affect a defendant's legitimate interest in privacy, the conduct cannot be characterized as a search and therefore, the conduct does not merit Fourth Amendment analysis. *Illinois v Caballes*, 543 US 405, 408 (2005), citing *Jacobsen*, 466 US at 123. Because a defendant has no legitimate interest in possessing contraband, no legitimate interest is implicated when police conduct reveals only the defendant's possession of contraband. *Caballes*, 543 US at 408, citing *Jacobsen*, 466 US at 123. However, see *Jones (Antoine)*, 565 US at ___ (noting that the concept of "reasonable expectation of privacy" as discussed in *Katz*, 389 US at 360-361 [Harlan, J., concurring], and its progeny "did not narrow the Fourth Amendment's scope[]" or otherwise "erode the principle 'that, when the Government . . . engage[s] in

physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment[,]'" irrespective of any inquiry into a person's reasonable expectation of privacy).

"[T]he attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search . . . within the meaning of the Fourth Amendment." *Jones (Antoine)*, 565 US at ___, ____, ___. In *Jones*, 565 US at ___, police officers installed a GPS tracking device on the undercarriage of a vehicle known to be used by the respondent, who was suspected of trafficking in narcotics. Over a 28-day period, data concerning the vehicle's location was collected by use of the device, connecting the respondent to a house containing large amounts of cash and cocaine. *Id*. at ___. The respondent's ensuing drug conspiracy conviction was reversed by the federal court of appeals on the ground that "admission of the evidence obtained by warrantless use of the GPS device . . . violated the Fourth Amendment." *Id*. at ___. The United States Supreme Court affirmed. *Id*. at ___. Noting its obligation to "'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted[,]'" the Court reaffirmed that "a vehicle is an 'effect' as that term is used in the [Fourth] Amendment[,]" which has historically "embod[ied] a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *Id*. at ___, ___ (citations omitted). Accordingly, when "[t]he Government physically occupied private property for the purpose of obtaining information[,]" it conducted a search in violation of the Fourth Amendment's warrant requirement. *Id*. at ___.

An individual who does not submit to an officer's show of authority is not seized, and the Fourth Amendment does not apply to any item the individual abandons during his or her attempt to avoid seizure. *United States v Martin (Rickey)*, 399 F3d 750, 753 (CA 6, 2005). In *Martin (Rickey)*, two police officers saw the defendant trespassing and stopped their patrol car to arrest him. *Id.* at 752. The defendant ran from the officers and, as he fled, discarded a revolver. *Id*. Although the gun resulted from the defendant's conduct after the officers' show of authority, the gun did not result from the defendant's seizure—lawful or unlawful—because the defendant discarded the weapon before submitting to the officers' show of authority. *Id*. at 753.

The following instances are not searches:

- When the object is in the officer's plain view, smell, hearing, or touch. When an officer is able to detect something by utilizing one or more of his or her senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a

"search" within the meaning of the Fourth Amendment. *Coolidge v New Hampshire*, 403 US 443, 468 (1971).

- The use of a flashlight or other form of illumination to see an area that is obscured by darkness is not a search. *United States v Lee (James)*, 274 US 559, 563 (1927).

- The use of binoculars, telescopes, or photo enlargements, so long as they are used to observe more clearly or carefully that which was in the open, or in order to view at a distance that which could have lawfully been observed from a closer proximity. *United States v Lace*, 669 F2d 46, 51 (CA 2, 1982).

- The use of trained dogs to detect the presence of explosives or narcotics, if the search does not otherwise violate an individual's reasonable expectation of privacy or effectuate a physical intrusion into a constitutionally-protected area. See *Florida v Jardines*, 569 US ___, ___ (2013); *Illinois v Caballes*, 543 US 405, 408-409 (2005); *United States v Place*, 462 US 696, 697-698, 707 (1983).

9.3 Search and Seizure Issues—Does the Defendant Have Standing?[2]

There is no "automatic standing." Fourth Amendment rights are personal in nature and may only be asserted by one whose own constitutional rights were violated by the search and seizure. A defendant must demonstrate that he or she personally had an expectation of privacy in the object of the search and seizure, and that the expectation is one that society recognizes as reasonable. *People v Smith (Lee)*, 420 Mich 1, 28 (1984). The defendant has the burden of establishing standing, *People v Lombardo*, 216 Mich App 500, 505 (1996), and in deciding the issue, the court should consider the totality of the circumstances. *People v Perlos*, 436 Mich 305, 317-318 (1990). The "reasonable expectation of privacy test" applies to issues of warrantless searches and seizures. *Smith (Lee)*, 420 Mich at 28. In other words, "the central legal question [is] whether, under Fourth Amendment jurisprudence, the defendant could assert a privacy right under the circumstances." *People v Antwine*, 293 Mich App 192, 195 n 1 (2011), citing *Rakas v Illinois*, 439 US 128, 139 (1978). However, see *United States v Jones (Antoine)*, 565 US ___, ___ (2012) (noting that the concept of "reasonable expectation of privacy" as discussed in *Katz v United States*, 389 US 347, 361 [1967] [(Harlan, J., concurring], and its progeny "did not narrow the Fourth Amendment's scope[]" or otherwise "erode the principle 'that, when the Government . . . engage[s] in physical intrusion of a

[2] See Section 9.4(A)(2) for more information on standing as it relates to dwelling searches.

constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment[,]'" irrespective of any inquiry into a person's reasonable expectation of privacy); *Florida v Jardines*, 569 US ___, ___ (2013) (noting that "[t]he *Katz* reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas[]") (quoting *Jones (Antoine)*, 565 US at ___).

For a discussion of factors that are relevant to a determination of standing, see *People v Brown (Craig)*, 279 Mich App 116, 130-131 (2008) (the defendant did not have standing to challenge the warrantless search of a computer he did not own but to which he was allowed access because he exercised no control over others' access to the computer and he did not own the residence in which the computer was located).

"[W]hen the stop of a vehicle is legal, a passenger with no property or possessory interest in the vehicle does not have standing to contest the search of the vehicle." *People v Earl (Ronald)*, 297 Mich App 104, 108 (2012), aff'd on other grounds 495 Mich 33 (2014) (because the defendant did not assert a proprietary or possessory interest in the vehicle in which he was a passenger, he lacked standing to contest the search of the vehicle and the seizure of evidence during the search; "[t]he mere fact that [the] defendant was engaged to the owner of the vehicle did not endow him with an ownership interest in the vehicle or a reasonable expectation of privacy in it[]").

An individual may abandon property for purposes of the Fourth Amendment without losing his or her ownership interest in that property. *People v Henry (Darrin)*, 477 Mich 1123 (2007). Under the circumstances present in *Henry (Darrin)*, the Court explained that for Fourth Amendment purposes, the defendant abandoned the property at issue when

> "[he] placed a bag containing illegally copied recordings on an electric box attached to a utility pole when he saw an unmarked police car approaching him. In doing so, defendant left the bag in a public place where any passerby could have access to it. Defendant thus voluntarily 'left behind or otherwise relinquished his interest' in the bag. He had no reasonable expectation of privacy in the bag once he abandoned it by the pole. [*United States v*] *Colbert*, [] [474 F2d 174,] 176 [(CA 5, 1973)]. Moreover, he did not object or assert his ownership when the police officer walked over to the bag and looked inside. Defendant's silence reflects his intent to distance himself from any connection with the bag when he set it down.

> "Fourth Amendment abandonment is distinguishable from abandonment in the property law context . . . . [W]hile abandonment in the property law context looks to whether the person relinquished his *ownership* in the property, abandonment under the Fourth Amendment inquires whether 'the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy [in it].'" *Henry (Darrin)*, 477 Mich at 1123, quoting *Colbert*, 474 F2d at 176.

However, a person can abandon property and entirely deprive him- or herself of the ability to contest a search and seizure of that property. *People v Zahn*, 234 Mich App 438, 448 (1999). The search and seizure of property that has been abandoned is "presumptively reasonable," because the owner no longer has an expectation of privacy in the abandoned property. *People v Rasmussen*, 191 Mich App 721, 725 (1991). The defendant bears the burden of showing that the property searched was not abandoned. *Id.* at 725. Whether an owner abandoned his or her property is an ultimate fact that turns on a combination of act and intent. *People v Shabaz*, 424 Mich 42, 65-66 (1985).

There exists no reasonable expectation of privacy in information a defendant has exposed to third parties (banks and vendors, for example) in the course of transacting his or her business or personal matters. *People v Gadomski*, 274 Mich App 174, 179 (2007). Consequently, a defendant lacks standing to contest on constitutional grounds the admission of that information against him or her at trial. *Id.* at 179.

9.4 Search and Seizure Issues—Where Did the Search Take Place?

The rules pertaining to search and seizure vary depending upon the location of the search. Courts have justified the different levels of protection by examining the expectation of privacy a person might have in a particular location or object and balancing the level of intrusiveness of the search and any overriding societal interests.

A. Dwelling Searches

1. Generally

The federal constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and further requires that any search warrant issued be based "upon probable cause, supported by oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized." US Const, Am IV. Michigan's Constitution protects "[t]he person, houses, papers and possessions of every person . . . from unreasonable searches and seizures." Const 1963, art 1, § 11. "No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." *Id*.

An individual's expectation of privacy in his or her residence extends to the curtilage, i.e., the area immediately surrounding the dwelling. *United States v Dunn*, 480 US 294, 300 (1987); see also *Florida v Jardines*, 569 US ___, ___ (2013) (police officers may not "physically enter[] and occupy[] [the curtilage of a home] to engage in conduct not explicitly or implicitly permitted by the homeowner[]"). In evaluating whether an area is included in the curtilage of a dwelling, the court should examine four factors (the "*Dunn* factors"):

> (1) the proximity of the area claimed to be curtilage to the home;
>
> (2) whether the area is included within an enclosure surrounding the home;
>
> (3) the nature of the uses to which the area is put;
>
> (4) and the steps taken by the resident to protect the area from observation by people passing by. *Dunn*, 480 US at 301.

"The front porch is the classic exemplar" of an area included within the curtilage of a home. *Jardines*, 569 US at ___.

Depending on the circumstances, an individual may not have a reasonable expectation of privacy in an enclosed porch through which a person must pass in order to get to the dwelling's front door. *People v Tierney*, 266 Mich App 687, 697 (2005). In *Tierney*, 266 Mich App at 701-702, the trial court conducted a fact-intensive inquiry and determined that the defendant did not have a reasonable expectation of privacy in an enclosed porch. The trial court noted that although the porch was enclosed, it was unheated and used as a storage area, not a living area. *Id*. Additionally, there was not a doorbell adjacent to the exterior porch door; instead, the dwelling's doorbell was located next to the interior door. *Id*. at 701. Furthermore, a "welcome" sign hung, not next to the outer porch door, but next to the interior door. *Id*. Based on the trial court's examination of the porch's physical attributes and the uses to which the porch was put, the trial court properly concluded that the defendant had no reasonable expectation of

privacy in the porch area and that police officers, who had "no intention [to and did not] attempt to search the porch or its contents[,]" did not violate the Fourth Amendment when they "opened the unlocked porch door and crossed the porch to knock on the inner residence door[.]" *Id*. at 691, 703-704.

However, officers may not "physically intrud[e] on [a homeowner's] property[,]" including a front porch, for the purpose of gathering evidence, and "[the use of] a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment[]" because it constitutes "an unlicensed physical intrusion[]" into an area that is protected under the Fourth Amendment. *Jardines*, 569 US at ___, ___ (holding that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" went beyond the "implicit license [that] typically permits [a] visitor to approach [a] home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave[]"); see also *People v Frederick (On Remand)*, ___ Mich App ___, ___ (2015) (quoting and distinguishing *Jardines*, 569 US at ___, and holding that "the knock-and-talk procedures utilized" by officers who "approached [a] home, knocked, and waited to be received[,] . . . [and] were received by the homeowner[][,]" did not "amount to a 'search' within the meaning of the Fourth Amendment[;]" rather, this "ordinary knock and talk [was] well within the scope of the license that may be '"implied from the habits of the country[]"'") (internal and additional citations omitted).

A person's privacy expectation in his or her own dwelling is such that warrantless searches are allowed only in limited—or exigent—circumstances. The warrantless entry of a dwelling may be justified by "hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to preclude a suspect's escape, and where there is a risk of danger to police or others inside or outside a dwelling." *People v Cartwright*, 454 Mich 550, 558 (1997).

An individual may lack a reasonable expectation of privacy with respect to a search of a dwelling that he or she owns but illegally occupies. *People v Antwine*, 293 Mich App 192, 195-196, 198 (2011), citing *Rakas v Illinois*, 439 US 128 (1978), and other cases cited therein. The Court of Appeals stated:

> "[F]irst, an overall reasonable expectation of privacy—not the existence (or the lack) of a property right—controls the analysis and, second, wrongful presence [on the property]

> weighs against a reasonable expectation of privacy." *Antwine*, 293 Mich App at 198.

In *Antwine*, 293 Mich App at 195-196, police officers received a report that someone was illegally occupying the defendant's house, which had been condemned as "unfit for human occupancy or use." The defendant allowed the officers to enter and admitted that he had removed a condemnation notice that had been posted on the house. *Id.* at 196. "[O]nce the officers confirmed that [the] defendant resided in the condemned house illegally, it was reasonable for them to secure the home and look for other illegal residents[.]" *Id.* at 200. Accordingly, the Court of Appeals found that the "defendant had no reasonable expectation of privacy that precluded the police from conducting the initial search of his house during which they discovered drugs in plain view." *Id.* at 202. Moreover, the trial court's concern that the officers were not *actually* motivated to look for other individuals in the house was misplaced, because the officers' subjective intentions were "irrelevant to the Fourth Amendment analysis." *Id.* at 200-201, citing *Whren v United States*, 517 US 806, 813 (1996) (additional citations omitted).

2. Standing

Defendants may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated; there is no "automatic standing." *United States v Salvucci*, 448 US 83, 85 (1980). A defendant has the burden of establishing standing, and in deciding the issue, the court should consider the totality of circumstances. *People v Powell (Paul)*, 235 Mich App 557, 561 (1999). Whether a defendant has standing is determined by discerning whether he or she had a reasonable expectation of privacy in the area that was searched. *Id.* at 561. "A defendant must satisfy a two-pronged test to show a legitimate expectation of privacy: (1) he [or she] must manifest an actual, subjective expectation of privacy; and (2) that expectation is one that society is prepared to recognize as legitimate." *United States v Pollard*, 215 F3d 643, 647 (CA 6, 2000). "When determining the legitimacy of a defendant's subjective expectation of privacy, [a court should] consider all of the facts and circumstances of the case, and 'no single factor invariably will be determinative' in deciding the reasonableness of asserted privacy expectations." *United States v Domenech*, 623 F3d 325, 329 (CA 6, 2010), quoting *United States v Smith (Steven)*, 263 F3d 571, 586 (CA 6, 2001) (internal quotation marks omitted).

An individual who is an overnight guest in a dwelling may establish that he or she has a reasonable expectation of privacy recognized by the Fourth Amendment in the home of his or her host. *Minnesota v Olson*, 495 US 91, 96-97 (1990). Conversely, a person who is briefly present in a dwelling, with the owner's consent, may not claim the protections intended by the Fourth Amendment. *Minnesota v Carter (Wayne)*, 525 US 83, 90 (1998).

"[The] defendant had a legitimate expectation of privacy in his mother's apartment that society recognizes as reasonable[,]" and he therefore "had standing to challenge the search of [the apartment] and the seizure of" incriminating evidence from the apartment. *People v Mahdi*, ___ Mich App ___, ___ (2016). "[P]olice officers recovered . . . several items indicating that [the] defendant resided [in the apartment] with his mother, including tax paperwork listing [the] defendant's name and the address of [the apartment,]"[P]olice officers recovered . . . several items indicating that [the] defendant resided [in the apartment] with his mother, including tax paperwork listing [the] defendant's name and the address of [the apartment,] . . . a collections notice for [the] defendant at [the apartment], . . . Friend of the Court paperwork for [the] defendant[] . . . list[ing] [the apartment] as his address[, and] . . . a land sale registration form signed by [the] defendant listing [the apartment] as his address[,]" and "the officers found [the] defendant's personal belongings in [the apartment] after arresting [him;]" furthermore, he "answered the door when the police officers arrived at [the apartment], indicating that he had control over the apartment and the ability to regulate its access." *Id.* at ___.

"[A] hotel guest has a periodic right to occupy a room, not a permanent one." *United States v Lanier*, 636 F3d 228, 232 (CA 6, 2011). "'Once a hotel guest's rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room or in any article therein of which the hotel lawfully takes possession.'" *Id.* at 232, quoting *United States v Allen*, 106 F3d 695, 699 (CA 6, 1997) (internal quotation omitted). "'[A] hotel guest's right to a room is limited to a predetermined period of occupancy,' and it is reasonable to presume as a general matter 'that hotel guests will check out at the designated time and their right in the premises does not automatically continue for some indefinite period.'" *Lanier*, 636 F3d at 232, quoting *United States v Washington*, 573 F3d 279, 285 (CA 6, 2009). However, "a hotel's practices and communications with the guest may modify the general rule." *Lanier*, 636 F3d at 232. "'[T]he policies and

practices of a hotel may result in the extension past checkout time of a defendant's reasonable expectation of privacy.'" *Id.*, quoting *United States v Dorais*, 241 F3d 1124, 1129-1130 (CA 9, 2001). "[T]hese practices often take two forms: giving a guest permission to stay until a later check-out time or generally acquiescing when a guest stays until a later check-out time." *Lanier*, 636 F3d at 232. In *Lanier*, 636 F3d at 232-233, "[t]he general rule, not the exceptions, applie[d] to [the defendant]" where the search occurred after the appointed check-out time, the defendant did not ask the hotel to extend his stay or receive permission from the hotel for a later check-out time, and the hotel had no history of acquiescing in delayed departures by the defendant. Accordingly, the defendant did not have a reasonable expectation of privacy in his hotel room after the appointed check-out time, and, accordingly, did not have standing to challenge the search of his hotel room which yielded a substantial quantity of drugs. *Id.* at 230-233.

Under Michigan law, a trespasser has no legitimate expectation of privacy in a dwelling house even when the trespasser lawfully occupied the premises at an earlier date. *United States v Hunyady*, 409 F3d 297, 300-302 (CA 6, 2005).

3. Factors Involved in Dwelling Searches

a. Knock and Announce

The knock and announce statute, MCL 780.656, requires that police executing a search warrant give notice of their authority and purpose and be refused entry before forcing their way in. *People v Fetterley*, 229 Mich App 511, 521 (1998). Specifically, MCL 780.656 provides:

> "The officer to whom a warrant is directed, or any person assisting him [or her], may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his [or her] authority and purpose, he [or she] is refused admittance, or when necessary to liberate himself [or herself] or any person assisting him [or her] in execution of the warrant."

The interests protected by the knock and announce rule include:

- protection of human life and limb (because an unannounced entry may provoke

violence when a surprised resident acts in self-defense);

- protection of property; and
- protection of those elements of privacy and dignity that can be destroyed by a sudden entrance. *Hudson (Booker) v Michigan*, 547 US 586, 593-594 (2006).

Evidence seized pursuant to a violation of the knock and announce rule need not always be suppressed. *People v Howard (Troy)*, 233 Mich App 52, 60-61 (1998). Suppression is appropriate for violations of the "knock and announce" statute only where the police conduct is unreasonable by Fourth Amendment standards. *Id.* at 60-61. Further, where an interest that is violated is not an interest protected by the knock and announce rule, the exclusionary rule is inapplicable. *Hudson (Booker)*, 547 US at 594. Interests protected by the knock and announce rule include the protection of human life and limb, the protection of property, and the protection of those elements of privacy and dignity that can be destroyed by a sudden entrance. *Id.* at 594. The knock and announce rule does not protect an individual's interest in preventing the police from seeing or taking evidence described in a warrant. *Id.*

b. Knock and Talk

"[T]he knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in the illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items." *People v Frohriep*, 247 Mich App 692, 697 (2001).

The knock and talk procedure is constitutional, but it is subject to judicial review to ensure compliance with general constitutional protections. *Frohriep*, 247 Mich App at 698. "Whenever the knock and talk procedure is utilized, the ordinary rules that govern police conduct must be applied to the circumstances of the particular case." *People v Galloway*, 259 Mich App 634, 639 (2003).

Officers may not "physically intrud[e] on [a homeowner's] property[,]" including a front porch, for the purpose of gathering evidence, and "[the use of] a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment[]" because it constitutes "an unlicensed physical intrusion[]" into an area that is protected under the Fourth Amendment. *Jardines*, 569 US at ___, ___ (holding that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" went beyond the "implicit license [that] typically permits [a] visitor to approach [a] home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave[]").

However, "the knock-and-talk procedures utilized" by officers who "approached [a] home, knocked, and waited to be received[,] . . . [and] were received by the homeowner[][,]" did not "amount to a 'search' within the meaning of the Fourth Amendment[;]" rather, this "ordinary knock and talk [was] well within the scope of the license that may be '"implied from the habits of the country[.]"'" *Frederick (On Remand)*, ___ Mich App at ___ (quoting and distinguishing *Jardines*, 569 US at ___, in which "circumstances existed" that "transform[ed] what was otherwise a lawful entrance onto private property into an unlawful, warrantless search[,] . . . because when the officers [in that case] stepped foot on a protected area, they were accompanied by a drug-sniffing dog[]") (internal and additional citations omitted).

Police officer's purpose. Under *Jardines*, 569 US at ___ n 4, "police [may not] enter a protected area not intending to speak with the occupant, but rather, solely to conduct a search[;]" however, "even post-*Jardines*, an officer may conduct a knock and talk with the intent to gain the occupant's consent to a search or to otherwise acquire information from the occupant." *Frederick (On Remand)*, ___ Mich App at ___, ___. "That an officer intends to obtain information from the occupant does not transform a knock and talk into an unconstitutional search." *Id.* at ___. Accordingly, where "officers approached [a] home, knocked, . . . waited for a response[,] . . . [and] made no attempt to search for evidence until obtaining consent to do so[]" after explaining the purpose of the visit and providing *Miranda* warnings, "the officers' purpose did

not exceed the scope of the implied license as articulated in *Jardines*." *Frederick (On Remand)*, ___ Mich App at ___.

Time of day. *Jardines*, 569 US ___, did not "adopt[] any sort of bright-line rule that prohibits officers from entering an area protected by the Fourth Amendment at certain times of day[;]" although "the time of a visit by police officers may be relevant when evaluating the constitutional validity of a knock and talk[,] . . . it is not simply the presence of a person at a particular time, but rather, the reaction that a typical person would have to that individual's presence, that determines whether the scope of the implied license has been exceeded." *Frederick (On Remand)*, ___ Mich App at ___ (citations omitted). Accordingly, where "officers proceeded in the early morning hours" to engage in a knock-and-talk procedure, but "[n]othing in the record indicate[d] that the officers chose to proceed at [that] time of day in order to frighten or intimidate [the defendants], or to otherwise use the time of day to their advantage[,]" the knock and talk was not "render[ed] . . . unconstitutional." *Id.* at ___ (noting that "[the o]fficers did not furtively approach" or behave in a "clandestine" manner, and that the defendants "answered the door and spoke with the officers[]") (citations omitted).

c. "No Knock" Entry

"In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by… allowing the destruction of evidence. This standard . . . strikes the appropriate balance between legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. . . . This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged." *Richards (Steiney) v Wisconsin*, 520 US 385, 394-395 (1997).

d. Warrantless Entry

The warrantless entry of a dwelling may be justified by "hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to preclude a suspect's escape, and where there is a risk of danger to police or others

inside or outside a dwelling." *Cartwright*, 454 Mich at 558. Additionally, a police officer may enter a dwelling without a warrant where it is reasonable to believe that a person inside the dwelling is in need of immediate medical assistance. *People v Davis (Harriet)*, 442 Mich 1, 14 (1993); *People v Ohlinger*, 438 Mich 477, 483-484 (1991); see also *People v Hill (Eric)*, 299 Mich App 402, 404-405, 407, 409-410 (2013) (applying the community caretaking exception to the warrantless entry of the defendant's home by police officers while performing "a welfare check after [the] defendant's neighbor . . . called police with concerns about [the] defendant's well-being[,]" despite "a lack of direct evidence definitively showing that [he] was present and in actual need of aid or assistance[,]" where "it was reasonable[, under all of the circumstances, for the officers] to conclude that [the] defendant was not only present but in need of attention, aid, or some kind of assistance[]"); *People v Slaughter*, 489 Mich 302, 316-317 (2011) (extending the "community caretaking exception" discussed in *Davis (Harriet)*, 442 Mich at 20-23, to "a firefighter, responding to an emergency call involving a threat to life or property, [who] reasonably enters a private residence in order to abate what is reasonably believed to be an imminent threat of fire inside[]"). The officer must limit his or her actions to those that are necessary to assess the situation and deliver any assistance that is required. *Ohlinger*, 438 Mich at 484; see also *Slaughter*, 489 Mich at 320-321, quoting *Davis (Harriet)*, 442 Mich at 26 (firefighter entering residence pursuant to community caretaking function must limit scope of entry to "what [is] 'reasonably necessary' to abate the hazard"); *Tierney*, 266 Mich App at 704-705 (emergency aid exception justified police officers' warrantless entry into a home after the officers saw through a window in the front door that a motionless person was slumped over the kitchen table and a rifle and ammunition were in close proximity to the person); *People v Lemons (Cory)*, 299 Mich App 541, 546-548 (2013) (emergency aid exception justified warrantless entry where "police . . . were alerted by a phone call that something may have been amiss in [the] defendant's home, as the door was wide open and blowing in the wind[]" and where "[n]o one came to the open door[]" when "[t]he officers knocked on the door, rang the doorbell, and repeatedly announced their presence[;]" because the officers "suspected a home invasion" rather than drug activity, they were justified in entering the

home "to secure the premises and locate any [victims or suspects] inside[]").

With respect to abandoned or vacant structures, several factors must be evaluated on a case-by-case basis to determine whether police officers may enter a dwelling without securing a warrant:

> "(1) the outward appearance, (2) the overall condition, (3) the state of the vegetation on the premises, (4) barriers erected and securely fastened in all openings, (5) indications that the home is not being independently serviced with gas or electricity, (6) the lack of appliances, furniture, or other furnishings typically found in a dwelling house, (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows, (8) the history surrounding the premises and prior use, and (9) complaints of illicit activity occurring in the structure." *People v Taylor (Paul)*, 253 Mich App 399, 407 (2002).

The *Taylor (Paul)* Court further advised that the listed factors were "not exhaustive or otherwise dispositive[; rather], a trial court must necessarily place them into the totality of the circumstances equation where a vacant structure is at issue." *Taylor (Paul)*, 253 Mich App at 407.

e. Detention Incident to Execution of Search Warrant

Officers executing a valid search warrant may "detain the occupants of the premises while a proper search is conducted." *Michigan v Summers*, 452 US 692, 704-705 (1981) (noting that "[i]f the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home[,]" and concluding that "[b]ecause it was lawful to require [the] respondent to re-enter and to remain in the house until evidence establishing probable cause to arrest him was found, his arrest and the search incident thereto were constitutionally permissible[]"). "The categorical authority to detain [an occupant] incident to the execution of a search warrant must be limited to the immediate

vicinity of the premises to be searched[,]" and "the decision to detain must be acted upon at the scene of the search and not at a later time in a more remote place." *Bailey v United States*, 568 US ___, ___ (2013). "[*Summers*, 452 US 692, does not] justif[y] the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant." *Bailey*, 568 US at ___.

Detention of a person in the immediate vicinity of premises on which a search warrant is being executed "does not require law enforcement to have particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers[;] . . . [rather, t]he rule announced in *Summers*[, 452 US 692,] allows detention incident to the execution of a search warrant 'because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial.'" *Bailey*, 568 US at ___ (quoting *Muehler v Mena*, 544 US 93, 98 (2005), and holding that where the defendant was observed leaving a residence as a search unit prepared to execute a search warrant there, *Summers*, 452 US 692, did not permit officers to "stop[] and detain[the defendant approximately one mile] away from the premises to be searched when the only justification for the detention was to ensure the safety and efficacy of the search[;]" in such a situation, "[i]f officers elect to defer [a] detention until the suspect or departing occupant leaves the immediate vicinity[of the premises to be searched], the lawfulness of detention is controlled by other standards, including[] . . . a brief stop for questioning based on reasonable suspicion under *Terry* [*(John) v Ohio*, 392 US 1 (1968),] or an arrest based on probable cause[]").

B. Automobile Searches

1. Generally

"A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment." *Heien v North Carolina*, 574 US ___, ___ (2014) (citation omitted).[3]

"[A] vehicle is an 'effect' as that term is used in the [Fourth] Amendment." *United States v Jones (Antoine)*, 565 US ___, ___

[3] See Section 9.5(B)(4)(a) for discussion of the reasonableness of a traffic stop.

(2012) (citing *United States v Chadwick*, 433 US 1, 12 (1977), and holding that "the Government's installation of a [Global-Positioning-System (GPS)] device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search[]'").

However, a warrantless search of a vehicle is permissible under certain circumstances. See *People v Levine (Brian)*, 461 Mich 172, 178-179 (1999) (exception to warrant requirement applies to vehicle search, but only if the search is based on facts that would have justified the issuance of a warrant).

When police have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle even after it has been impounded and is in police custody. *People v Carter (Deborah)*, 250 Mich App 510, 516 (2002).

If probable cause exists to believe that a vehicle contains contraband, the ability to conduct a warrantless search extends to closed containers that might conceal the object of the search. *People v Kazmierczak*, 461 Mich 411, 422 (2000).

If a driver or other occupant of a vehicle is lawfully arrested, the police may search the arrestee and the area within his or her immediate control, including a search of the passenger compartment of an automobile occupied by the arrestee as a contemporaneous search incident to that arrest. *People v Eaton (Charles)*, 241 Mich App 459, 463 (2000), citing *New York v Belton*, 453 US 454, 460 (1981).[4] The police may also examine the contents of any containers found within the passenger compartment. *Eaton (Charles)*, 241 Mich App at 463. "Container" means "any object capable of holding another object," i.e., "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment . . . ." *Belton*, 453 US at 460 n 4. The search for a weapon is limited to the area where the weapon may be placed or hidden. *Michigan v Long (David)*, 463 US 1032, 1049 (1983).

"[Police officers] may order out of a vehicle both the driver and any passengers; perform a 'patdown' of a driver and any

[4] See, however, *Arizona v Gant*, 556 US 332, 343-344, 351 (2009), in which the United States Supreme Court curtailed application of *Belton*, 453 US at 460, and "adopted a new, two-part rule under which an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains 'evidence relevant to the crime of arrest.'" *Davis (Willie) v United States*, 564 US 229, 234-235 (2011) (citations omitted).

passengers on reasonable suspicion that they may be armed and dangerous; conduct a '*Terry*[5] patdown' of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon; and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest." *Knowles v Iowa*, 525 US 113, 118 (1998) (internal citations omitted).

"To justify a patdown of the driver or a passenger during a traffic stop . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v Johnson (Lemon)*, 555 US 323, 327 (2009).

Warrantless searches of automobiles are permissible upon a showing of probable cause. Courts have justified the automobile exception to the warrant requirement in two ways. Some courts have found that a defendant has a lower expectation of privacy with regard to an automobile than he or she has in a dwelling. See *Chambers (Frank) v Maroney*, 399 US 42, 48 (1970). Other courts have used the justification that the mobility of an automobile requires that the police have the flexibility to search the vehicle without a warrant. See *Carroll v United States*, 267 US 132, 153 (1925).

2. Standing

> "Under the Fourth Amendment, a search occurs when an individual has a reasonable expectation of privacy in the area examined. Thus, before a person may attack the propriety of a search and seizure of property and receive the panoply of Fourth Amendment safeguards, that search or seizure must have infringed upon an interest of the person which the Fourth Amendment was designed to protect. This initial inquiry regarding standing depends upon whether, in light of the totality of the circumstances, the defendant had an expectation of privacy in the object of the search and seizure, and whether that expectation is one that society is prepared to recognize as reasonable.
>
> * * *
>
> "Fourth Amendment rights are personal in nature and may not be asserted vicariously, but rather

[5] *Terry (John) v Ohio*, 392 US 1 (1968).

> only 'at the instance of one whose own protection was infringed by the search and seizure.'" *People v Armendarez*, 188 Mich App 61, 70-71 (1991) (internal citations omitted).

The police can search a passenger's personal belongings inside an automobile that they have probable cause to believe the belongings contain contraband. *Wyoming v Houghton*, 526 US 295, 302 (1999).

A passenger in a vehicle stopped by the police is seized for purposes of the Fourth Amendment and may properly challenge the constitutionality of the traffic stop. *Brendlin v California*, 551 US 249, 251 (2008). According to the *Brendlin* Court, the time of the passenger's formal arrest did not constitute the time at which the passenger was seized; rather, the passenger was seized at the moment the car in which he was riding came to a stop on the side of the road. *Id.* at 263. However, "when the stop of a vehicle is legal, a passenger with no property or possessory interest in the vehicle does not have standing to contest the search of the vehicle." *People v Earl (Ronald)*, 297 Mich App 104, 108 (2012), aff'd on other grounds 495 Mich 33 (2014) (because the defendant did not assert a proprietary or possessory interest in the vehicle in which he was a passenger, he lacked standing to contest the search of the vehicle and the seizure of evidence during the search; "[t]he mere fact that [the] defendant was engaged to the owner-driver [did] not endow him with an ownership interest in the vehicle or a reasonable expectation of privacy in it[]").

"A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Johnson (Lemon)*, 555 US at 333. "An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Id.* In *Johnson (Lemon)*, 555 US at 334, a policewoman "was not constitutionally required to give [the defendant, who was a backseat passenger,] an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her."

See also *People v Corr*, 287 Mich App 499, 507 (2010), where the Court of Appeals found that "it was reasonable, for the

officer[s'] safety as well [as] for [the] defendant[-passenger]'s safety, for the officers to command [the] defendant to remain in the vehicle while they completed their noninvestigatory duties at the traffic stop, particularly considering that [the] defendant was intoxicated and aggressive toward the officers during the stop, bystanders had arrived on the scene, and the weather conditions were dangerous." The Court noted that under the circumstances, the officers needed to maintain control over the scene even though the driver of the car— the defendant's son—had been arrested and secured in the police car. *Id.* at 507, citing *Johnson (Lemon)*, 555 US 323. The Court concluded that "the officers' commands to stay in the vehicle, which resulted in [the] defendant's detention beyond the time of the driver's arrest but before the officers had completed their duties at the scene, to be lawful." *Corr*, 287 Mich App at 508. The Court further held that "by ordering [the] defendant to stay in the vehicle, the officers were merely attempting to keep [the] defendant safe and maintain order and control over the scene so they could perform their noninvestigatory police functions." *Id.*

3. Probable Cause to Search an Automobile

An exception to the warrant requirement exists for searches of automobiles, but the exception only applies to searches supported by probable cause. *Levine (Brian)*, 461 Mich at 179. The exception was established because of the mobility of vehicles and because of the reduced expectation of privacy regarding automobiles. *Carter (Deborah)*, 250 Mich App at 515, 517.

Under the automobile exception to the warrant requirement, police may search a vehicle without a warrant if there is probable cause to believe that the vehicle contains evidence of a crime. *United States v Ross (Albert Jr)*, 456 US 798, 799 (1982).

As long as the initial seizure (in this case, a traffic stop) was lawful and police conduct did not prolong the seizure beyond the time reasonably required to process the traffic stop information, an individual's constitutional protection from unreasonable searches and seizures is not implicated. *Illinois v Caballes*, 543 US 405, 407 (2005). However, "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez v United States*, 575 US ___, ___ (2015). "A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e]

mission' of issuing a ticket for the violation." *Id*. at ___ (quoting *Caballes*, 543 US at 407, and holding that "police [may not] routinely . . . extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff[]").

Because a defendant has no legitimate interest in possessing contraband, *id*. at 408, the police may search a vehicle without a warrant if they have probable cause to believe that the vehicle contains contraband, *Pennsylvania v Labron*, 518 US 938, 940 (1996). If there is probable cause to believe that contraband is present in the vehicle, an occupant may be temporarily detained during the search of the vehicle. *Michigan v Summers*, 452 US 692, 702-703 (1981).

To "determine if the 'alert' of a drug-detection dog during a traffic stop provides probable cause to search a vehicle[,]" "[t]he court should allow the parties to make their best case, consistent with the usual rules of criminal procedure[,] . . . [a]nd . . . should then evaluate the proffered evidence to decide what all the circumstances demonstrate." *Florida v Harris*, 568 US ___, ___, ___ (2013). "If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause." *Id*. at ___.[6] "If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence." *Id*. at ___. "The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Id*. at ___. "A sniff is up to snuff when it meets that test." *Id*. at ___.

An initial traffic stop occasioned by a defendant's traffic violation is based on probable cause, and is therefore reasonable. *People v Williams (John Lavell)*, 472 Mich 308, 314 (2005). "A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period." *Id*. at 315. "[W]hen a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised." *Id*. There is no Fourth Amendment violation where an

[6] "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to . . . presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search." *Harris*, 568 US at ___ (2013).

officer asks reasonable questions to ascertain additional information about the underlying offense and the circumstances leading to its commission. *Id*. at 316. "Implicit in the authority to ask these questions is the authority to ask follow-up questions when the initial answers given are suspicious." *Id*. When a defendant then voluntarily consents to a search of his or her vehicle, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id*. at 318.

The following rules are applicable with respect to stopping, searching, and seizing motor vehicles and their contents:

- Reasonableness is the test that is to be applied for both stopping and searching moving motor vehicles;
- Reasonableness is to be determined from the facts and circumstances of each case;
- Fewer foundation facts are necessary to support a finding of reasonableness when a moving vehicle, rather than a house, is involved;
- A stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search are conducted by the police. *People v Whalen*, 390 Mich 672, 682 (1973). See also *United States v Arvizu*, 534 US 266, 273 (2002) (Fourth Amendment protections are satisfied if the police action is supported by reasonable suspicion to believe that criminal activity may be afoot).

4. Searching a Container Located in an Automobile

"If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross (Albert Jr)*, 456 US at 825. That is, "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *California v Acevedo*, 500 US 565, 580 (1991). Further, the police may "open and search any container placed or found in an automobile, as long as they have the requisite probable cause with regard to such a container, even if such probable cause focuses specifically on the container and arises before the container is placed in the automobile." *People v Bullock*, 440 Mich 15, 24 (1991).

Thus, all containers large enough to hold the object of the search may be opened without a warrant during an automobile search. *United States v Johns*, 469 US 478, 484 (1985). And, if the container may be searched at the scene, it may also be seized and searched without a warrant shortly thereafter, at the police station. *Id.* at 485.

In the context of automobile searches, a computer may be considered a container of the data stored in the computer's memory. *People v Dagwan*, 269 Mich App 338, 345 (2005).

The search of a passenger's backpack did not violate her constitutional right to be free of unreasonable searches and seizures, where the driver consented to a search of the vehicle following a lawful traffic stop and, under those circumstances, the police were authorized to search the entire passenger compartment, including the passenger's backpack. *People v Labelle*, 478 Mich 891 (2007).

5. Searching an Automobile Incident to Arrest

"Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v Gant*, 556 US 332, 351 (2009). "When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Id.* at 351. In *Gant*, 556 US at 335-336, the defendant was arrested for driving with a suspended license. After the police handcuffed the defendant and locked him in the back of a patrol car, they searched his car and found drugs in a jacket on the backseat. *Id.* The United States Supreme Court held that the search was improper because *Belton* "does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." *Gant*, 556 US at 335. Further, "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Id.* at 335. "Because [the] police could not reasonably have believed either that [the defendant] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search [] was unreasonable." *Id.* at 344.

Subject to the limitations and qualifications set out in *Gant*, 556 US at 335, see also *Belton*, 453 US at 460 (when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous search incident to that arrest, search the passenger compartment of that automobile, and examine the contents of any container found within the passenger compartment whether it is open or closed because the lawful custodial arrest justifies the infringement of any privacy interest), and *Thornton v United States*, 541 US 615, 622-624 (2004) (a police officer may lawfully search an individual's vehicle incident to that individual's arrest, even when the officer's first contact with the arrestee occurs after the individual has gotten out of the vehicle).

Where an officer received information that the defendant was driving erratically, was confused, and was taking OxyContin for pain following surgery, there was "reason[] to believe that [the defendant's] vehicle might contain evidence of . . . 'the offense of arrest[]'" within the meaning of *Gant*, 556 US at 351, and the officer therefore lawfully searched the defendant's vehicle for evidence of narcotics or other drugs after arresting him for drunk driving and placing him in a police car. *People v Tavernier*, 295 Mich App 582, 586-587 (2012).

Where police searched an automobile in objectively reasonable reliance on *Belton*, 453 US 454, and other binding appellate precedent, the exclusionary rule did not apply to evidence obtained in that search, even though the search was subsequently rendered unconstitutional under *Gant*, 556 US at 351. *Davis (Willie) v United States*, 564 US 229, 239-241 (2011).[7] In *Davis*, 564 US at 235, officers conducted a routine traffic stop that resulted in the arrests of the driver and a passenger. After securing the occupants in police vehicles, the officers searched the driver's vehicle and discovered a revolver in the passenger's jacket pocket; the passenger was subsequently convicted of possession of a firearm by a convicted felon. *Id*. While the passenger's appeal was pending, the United States Supreme Court decided *Gant*, 556 US 332. *Davis*, 564 US at 236. The *Davis* Court held that although the search incident to arrest was unconstitutional under *Gant*, "the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity[;]'" accordingly, the Court concluded that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Davis*, 564 US at 231, 241 (citation omitted).

[7] See Section 9.7(B) for additional discussion of *Davis*, 564 US 229.

See also *People v Mungo (On Second Remand)*, 295 Mich App 537, 544, 548, 556 (2012) (holding that, under *Davis*, 564 US 229, the exclusionary rule did not apply to evidence discovered in the defendant's car during a search conducted after a passenger was arrested based on outstanding traffic warrants and after the passenger and the defendant were secured in police vehicles; although the search was rendered impermissible under the United States Supreme Court's subsequent decision in *Gant*, 556 US at 351, the good-faith exception to the exclusionary rule applied because the officer who conducted the search "had a good-faith basis to rely on *Belton*[, 453 US at 460,] . . . [which] authorized a search incident to an arrest of [any] recent occupant of a vehicle[]").

C. Search or Seizure of Containers or Personal Effects

Rules regarding the search or seizure of containers or personal effects apply both to those items that are in the possession of the suspect as well as those that are not.

Acevedo, 500 US at 580, "interpret[ed] *Carroll*[, 267 US 132,] as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."

The following are possible bases for a warrantless search of containers and other personal effects:

- Search of the object incident to the arrest of its possessor on the ground that it is within his or her "immediate control." *Chimel v California*, 395 US 752, 762-763 (1969).

- Inventory of the object subsequent to the arrest of its possessor so long as the inventory search is conducted according to established policy. *Colorado v Bertine*, 479 US 367, 374 (1987). See also *People v Toohey*, 438 Mich 265, 280 (1991) ("the police are not required to pursue less intrusive alternatives when their decisions are in accordance with standardized procedures regarding impoundment").

- Reasonable search of the object for reasons unrelated to the obtaining of evidence of a crime. See *United States v Dunavan*, 485 F2d 201, 204-205 (CA 6, 1973), where the search was not a pretext but rather was done as a matter of the police performing their general duties owed to the public, e.g., rendering emergency life-saving assistance.

- Search following a "controlled delivery" of the object by police or a police agent or suspect. Where the police know

> that an object containing contraband has been delivered to a suspect, they may search the object upon its receipt by the suspect. See *United States v DeBerry*, 487 F2d 448, 450-451 (CA 2, 1973).

However, police must generally secure a warrant before conducting a search of the information on a cell phone seized from an individual who has been arrested following a traffic stop. *Riley v California*, 573 US ___, ___ (2014) (noting that "[t]reating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter[,]" and the cell phone–container analogy "crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen[]").

D. Searches That Take Place in a School

Searches that take place in schools may be properly conducted based on a level of suspicion less than probable cause. Courts have justified searches of students based on reasonable suspicion. The child's interest in privacy is balanced against the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. *New Jersey v TLO*, 469 US 325, 341-343 (1985).

"[A] school search 'will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction[.]'" *Safford Unified School Dist #1 et al. v Redding*, 557 US 364, 370 (2009), quoting *TLO*, 469 US at 342. In *Safford*, 557 US at 368, "a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school . . . [b]ecause there were no reasons to suspect the drugs presented a danger or were concealed in her underwear[.]" That is, "the content of the suspicion failed to match the degree of intrusion." *Id*. at 375.

E. Searches That Take Place in an Airport

An airport screening search is constitutionally reasonable provided that it is not more extensive or intensive than necessary, in light of current technology, to detect the presence of weapons and/or explosives, and that it is confined in good faith to those purposes. *United States v Aukai*, 497 F3d 955, 962 (2007).

F. Searches That Take Place at Border Crossings

Border searches are considered reasonable based on the single fact that the person or item is entering the country from the outside. *United States v Ramsey*, 431 US 606, 620 (1977).

G. Searches of Parolees or Probationers

The search of a parolee or probationer may be justified on a showing of less than probable cause. The justification for this has often been that the state's interest in administering the criminal justice system requires that the state have greater flexibility in monitoring the activities of those persons on parole or probation. *Griffin (Joseph) v Wisconsin*, 483 US 868, 873-875 (1987) (authorizing probation officers to search probationers when they are suspected of criminal activity). See also *United States v Knights*, 534 US 112, 122 (2001) (permitting a search based on a probation condition and reasonable suspicion).

The United States Supreme Court has held that a suspicionless search or seizure conducted solely on the basis of an individual's status as a probationer or parolee does not violate the Fourth Amendment's protection against unreasonable searches and seizures. *Samson v California*, 547 US 843, 849-850, 857 (2006). The *Samson* case involved a California statute authorizing law enforcement officers to search a parolee—without a warrant and without suspicion of criminal conduct—solely on the basis of the person's status as a parolee. *Id.* at 857. The question to be decided by the *Samson* Court was "[w]hether a condition of [a parolee's] release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Id.* at 847. The Court concluded that under the totality of the circumstances and in light of the legitimate government interests furthered by monitoring parolee activity, the suspicionless search of a parolee does not impermissibly intrude on the parolee's already diminished expectation of privacy. *Id.* at 852, 857.[8]

The defendant's probationer status at the time of a warrantless search of his mother's apartment and the seizure of incriminating evidence therefrom did not permit officers to conduct the search based only on reasonable suspicion that criminal activity was occurring; *Knights*, 534 US 112, was distinguishable "because the prosecution did not submit evidence regarding the conditions of

[8] See also MCL 791.236(19), providing that a parole order must "require the parolee to provide written consent to submit to a search of his or her person or property upon demand by a peace officer or parole officer."

[the] defendant's probation in the trial court." *People v Mahdi*, ___ Mich App ___, ___ (2016) (holding that "[w]ithout the probation conditions, there [was] insufficient evidence in the record to conclude that the officers had reasonable suspicion that a probationer *subject to a search condition* was engaged in criminal activity[]").

A parolee living in a community residential home[9] while "physically connected . . . to a device that monitored his every movement and made him obtain approval before leaving the walls of [the] home," is treated as a prisoner, not as a parolee. *United States v Smith (Rickey)*, 526 F3d 306, 309 (CA 6, 2008). Accordingly, the police have as much freedom to enter and search that parolee's community residential home as they do to enter and search a defendant's prison cell; just as with an incarcerated offender, a community-resident prisoner has no legitimate expectation of privacy from unannounced searches, with or without suspicion. *Id.* at 309.

H. Searches That Take Place in Prison or Jail

In *Hudson (Ted) v Palmer*, 468 US 517, 525-526 (1984), the United States Supreme Court held that Fourth Amendment protections do not apply to a prison cell. The correctional facility's interest in security outweighs a prisoner's already lowered expectation of privacy. *People v Herndon*, 246 Mich App 371, 397 (2001).

The Fourth Amendment is not violated when correctional officials require a detainee, "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history[,]" to undergo a visual strip search before being admitted to a jail's general population. *Florence v Board of Chosen Freeholders of County of Burlington*, 566 US ___, ___ (2012).

The collection and analysis of an arrestee's DNA according to Combined DNA Index System (CODIS) procedures "[a]s part of a routine booking procedure for serious offenses[]" did not violate the Fourth Amendment where the DNA sample was used to identify the arrestee as the perpetrator of an earlier unsolved rape. *Maryland v King*, 569 US ___, ___, ___ (2013). "When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is

[9] "'Community residential home' means a location where electronic monitoring of prisoner presence is provided by the [D]epartment [of Corrections] 7 days per week, 24 hours per day . . . ." MCL 791.265a(9)(b).

reasonable under the Fourth Amendment." *Id*. at ___, ___ (noting that "a detainee has a reduced expectation of privacy[]" and that "[b]y comparison to [the] substantial government interest [in identifying arrestees] and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one[]").

I. The Use of Roadblocks/Checkpoints

The United States Supreme Court has held that the use of roadblocks to enforce regulations concerning the use of vehicles, including the use of checkpoints to check driver's licenses and vehicle registrations, to make safety inspections of vehicles, to check sobriety, or to inspect cargo trucks or similar containers is permissible. *Michigan Dep't of State Police v Sitz*, 496 US 444, 455 (1990). However, the Michigan Supreme Court has held that the Michigan Constitution provides greater protection against warrantless seizures than does the federal constitution, and that the use of sobriety checkpoints violates Const 1963, art 1, § 11. *Sitz v Dep't of State Police*, 443 Mich 744, 746-747 (1993).

9.5 Search and Seizure Issues—Was a Warrant Required?

There is a strong preference that searches and seizures be made pursuant to a search warrant. *United States v Ventresca*, 380 US 102, 106 (1965).

A. Search Warrants

1. Probable Cause

Under both the state and federal constitutions, unreasonable searches and seizures are prohibited. US Const, Am IV; Const 1963, art 1, § 11. Both constitutions require that search warrants shall be issued only upon probable cause supported by oath or affirmation. The issuance of search warrants is governed by statute. MCL 780.651, MCL 780.652, MCL 780.653, and MCL 780.654.

"The passage of time is a valid consideration in deciding whether probable cause exists. The measure of the staleness of information in support of a search warrant rests on the totality of the circumstances, including the criminal [defendant], the thing to be seized, the place to be searched, and the character of the crime." *People v Brown (Craig)*, 279 Mich App 116, 128 (2008). The search of a defendant's urine was constitutional

where, despite the defendant's contention that the search warrant authorizing the search was stale because there was no evidence that he recently used steroids, a reasonably cautious person could have concluded that there was a substantial basis for a finding of probable cause, based on the defendant's knowledge, use, and likely possession of steroids. *Id.* at 128-129.

In determining whether information is stale, the court should consider the following factors: (1) the character of the crime (is it a chance encounter or recurring conduct?); (2) the criminal (is he or she "nomadic or entrenched?"); (3) the thing to be seized (is it "perishable and easily transferrable or of enduring utility to its holder?"); and (4) the placed to be searched (is it a "mere criminal forum of convenience or [a] secure operational base?"). *United States v Frechette*, 583 F3d 374, 378 (CA 6, 2009). In *Frechette*, 583 F3d at 378-379, the court applied the above-listed factors to conclude that 16-month-old evidence that the defendant subscribed to a child pornography website was not stale, because the crime of child pornography is not fleeting; the defendant lived in the same house for the time period at issue; child pornography images can have an infinite life span; and the place to be searched was the defendant's home.

2. Affidavit/"*Franks*" Hearing[10]

The affidavit in support of a search warrant may be based on information supplied to the complainant by a named or unnamed person. MCL 780.653. If the person is named, the affidavit must contain affirmative allegations from which the judge or district court magistrate may conclude that the person spoke with personal knowledge of the information. *Id.* If the person is unnamed, the affidavit must include affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable. *Id.* The affidavit must be read in a commonsense and realistic manner. *People v Whitfield*, 461 Mich 441, 444 (2000).

"*Franks v Delaware*, 438 US 154, 155-156 (1978), requires that if false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause." *People v Stumpf*, 196 Mich App 218, 224 (1992).

[10] *Franks v Delaware*, 438 US 154 (1978).

"Determining that a defendant has Fourth Amendment standing is a prerequisite to granting a motion for a *Franks* hearing." *United States v Mastromatteo*, 538 F3d 535, 544 (CA 6, 2008). Standing is determined by examining whether the defendant is able to establish a legitimate expectation of privacy in the area to be searched or the items to be seized. *Id.* at 544. "A defendant's standing is determined independently from his co-defendant's standing with regard to the same items and places that are searched." *Id.* In *Mastromatteo*, the defendant lacked standing to challenge the search at issue because, unlike his codefendant, he was unable to demonstrate that he had a legitimate expectation of privacy in the place that was searched. *Id.*

"In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause." *Stumpf*, 196 Mich App at 224.

"At a *Franks* hearing, evidence may be suppressed only upon a showing that false material essential to probable cause was knowingly or recklessly included. Both the [prosecution] and the defendant may present evidence." *People v Reid*, 420 Mich 326, 336 (1984).

Exclusion of evidence is not necessarily the remedy for noncompliance with the statutory affidavit requirements for obtaining a valid search warrant. *People v Hawkins*, 468 Mich 488, 500, 510-512 (2003) (Court of Appeals erred in holding that suppression of the evidence was required as a remedy for a violation of the affidavit requirements for an unnamed person in MCL 780.653(b)). See *People v Mullen*, 282 Mich App 14, 16 (2008), where the Michigan Court of Appeals found that despite a police officer's intentional or reckless omission of material information from the affidavit, as well as his intentional or reckless inclusion of false information, probable cause still existed to issue a search warrant. In *Mullen*, 282 Mich App at 16-19, the defendant was stopped and arrested for operating a motor vehicle while intoxicated. The arresting police officer filed an affidavit seeking a search warrant to test the defendant's blood alcohol content. *Id.* at 19. The trial court determined that the officer both included false information in, and omitted material information from, the affidavit. *Id.* at 23. For example, although the officer failed to properly conduct a few of the field sobriety tests, the officer indicated that the

defendant performed poorly on the tests. *Id.* at 20. In addition, the officer failed to indicate that the defendant had a piece of paper in his mouth a few minutes before taking a preliminary breath test (PBT). *Id.* at 20, 23. The Michigan Court of Appeals agreed with the trial court's factual determinations, but disagreed with its decision to suppress the evidence because

> "the evidence presented . . . did not establish that the 0.15 PBT test result was significantly unreliable as to preclude the reasonable belief by a police officer or a magistrate that defendant's blood might contain evidence of intoxication. Given the absence of any basis to significantly call into question the 0.15 PBT result, and given the other circumstantial evidence that defendant was intoxicated, we find that the circuit court erred by determining that a reasonable magistrate would not have found probable cause to issue a search warrant." *Mullen*, 282 Mich App at 28.

Information received from a fellow officer may be used as the basis for a warrant affidavit. *People v Mackey*, 121 Mich App 748, 753 (1982). When one police officer receives information from another, the law assumes the source is credible and the magistrate may likewise consider the source credible. *Id.* at 754. However, this does not relieve the affiant of the obligation to inform the magistrate of the fact that the information was received from a fellow officer and the reason or reasons for finding the information reliable. *Id.* Crime victims and identified citizens are also presumptively reliable. *People v Powell (Adie)*, 201 Mich App 516, 521-523 (1993).

As long as an informant's statement is reasonably corroborated by other matters within a police officer's knowledge, the officer may rely on information received through an informant, as opposed to information received through his or her direct observations. *United States v Williams (David)*, 544 F3d 683, 690 (CA 6, 2008).

It is unnecessary to determine for purposes of MCL 780.653 whether an anonymous informant had personal knowledge of the information contained in the affidavit on which a search warrant is based when the affidavit contains additional information sufficient in itself to support a finding of probable cause. *People v Keller*, 479 Mich 467, 477 (2007). In *Keller*, 479 Mich at 477, the information contained in the affidavit supported the magistrate's conclusion that it was fairly probable that contraband would be found in the defendants' home because the affidavit was based in part on the small

amount of marijuana discovered in the defendants' trash. Although the evidence discovered in the defendants' trash did not support the anonymous informant's allegation that the defendants were engaged in drug trafficking, the evidence from the defendants' trash adequately established the probable cause necessary to justify a search of the defendants' home for additional contraband. *Id*. at 483. In other words, even though the anonymous tip prompted the initial investigation into the defendants' possible illegal activity, the marijuana alone supports the probable cause necessary to issue a search warrant and "the statutory requirement that an anonymous tip bear indicia of reliability does not come into play." *Id*.

When the police act in reasonable and good faith reliance on a search warrant, the item seized may not be suppressed if the warrant is later declared invalid. *People v Goldston*, 470 Mich 523, 526 (2004), relying on *United States v Leon*, 468 US 897 (1984), which adopted a good faith exception to the exclusionary rule and specifically held that the exclusionary rule does not bar the admission of evidence seized in reasonable, good faith reliance on a search warrant ultimately found to have been defective.

3. Description

The Fourth Amendment requires that a search warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." US Const, Am IV. "A search warrant shall be directed to the sheriff or any peace officer, commanding the sheriff or peace officer to search the house, building, or other location or place, where the person, property, or thing for which the sheriff or peace officer is required to search is believed to be concealed. Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized." MCL 780.654(1).

The test for determining the sufficiency of the description of the place to be searched is:

> (1) whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort; and
>
> (2) whether there is any reasonable probability that another premises might be mistakenly searched. *People v McGhee (Larry Arnold)*, 255 Mich App 623, 626 (2003).

The affidavit or warrant request must state a nexus between the place to be searched and the evidence sought, and the belief that the items sought will be found at the search location must be supported by more than mere suspicion. *Williams (David)*, 544 F3d at 686. "A magistrate may infer a nexus between a suspect and his [or her] residence, depending upon 'the type of crime being investigated, the nature of [the] things to be seized, the extent of an opportunity to conceal the evidence elsewhere and the normal inferences that may be drawn as to likely hiding places.'" *Id.* at 687, quoting *United States v Savoca*, 761 F2d 292, 298 (CA 6, 1985).

"[A]n issuing judge may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking." *Williams (David)*, 544 F3d at 687.

MCL 780.652(1) states that "[a] warrant may be issued to search for and seize any property or other thing that is 1 or more of the following:

> "(a) Stolen or embezzled in violation of a law of this state.
>
> (b) Designed and intended for use, or that is or has been used, as the means of committing a crime.
>
> (c) Possessed, controlled, or used wholly or partially in violation of a law of this state.
>
> (d) Evidence of crime or criminal conduct.
>
> (e) Contraband.
>
> (f) The body or person of a human being or of an animal that may be the victim of a crime.
>
> (g) The object of a search warrant under another law of this state providing for the search warrant. If there is a conflict between this act and another search warrant law, this act controls."

MCL 780.652(2) states that "[a] warrant may be issued to search for and seize a person who is the subject of either of the following:

> "(a) An arrest warrant for the apprehension of a person charged with a crime.
>
> (b) A bench warrant issued in a criminal case."

"[T]he purpose of the particularization requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure. . . . The degree of specificity required depends on the circumstances and types of items involved." *People v Zuccarini*, 172 Mich App 11, 15 (1988) (internal citations omitted). See *People v Martin (Bobby)*, 271 Mich App 280, 304-305 (2006), for an example of warrants that described with sufficient particularity the items to be seized ("[t]he search warrants authorized the search for equipment or written documentation used in the reproduction or storage of the activities and day-to-day operations of the bar . . . further qualified by the reference to the drug trafficking and prostitution activities that were thought to take place there").

A search warrant authorizing the seizure of "any evidence of homicide" met the particularity requirement because the executing officers were limited to searching only for "items that might reasonably be considered 'evidence of homicide,'" and because "[a] general description, such as 'evidence of homicide,' is not overly broad if probable cause exists to allow such breadth." *People v Unger*, 278 Mich App 210, 245-246 (2008), relying on *Zuccarini*, 172 Mich App 11, and *Martin (Bobby)*, 271 Mich App 280.

To determine whether a warrant is constitutional in its scope, a court must determine whether the search warrant is supported by valid portions of the affidavit on which the warrant is based. *Keller*, 479 Mich at 478. To properly evaluate the defendant's claim that the warrant was unconstitutional because it was overbroad, the *Keller* Court relied on federal case law[11] involving the severability of invalid portions from an affidavit to determine whether the remaining valid portions of the affidavit were sufficient to support the warrant's issuance. *Id.* at 478 n 30. According to the *Keller* Court:

> "[T]here is a 'multiple-step analysis to determine whether severability is applicable.' [*United States v Sells*, 463 F3d 1148, 1151 (CA 10, 2006).] First the Court must divide the warrant into categories. Then, the Court must evaluate the constitutionality of each category. If only some categories are constitutional, the Court must determine if the valid categories are distinguishable from the invalid ones and whether the valid categories

[11] *United States v Sells*, 463 F3d 1148, 1150 n 1 (CA 10, 2006).

> 'make up the great part of the warrant.' [*Sells*, 463 F3d at 1151.] Here, the warrant authorizes the seizure of three categories of evidence: marijuana; distribution evidence, such as currency and packaging paraphernalia; and possession evidence, such as proof of residency. Of these three categories, the only one that is arguably invalid is the distribution evidence. If it were invalid, that category would be severable from the others.
>
> While all three categories are related to marijuana crimes, the distribution evidence relates to a distinct crime. Furthermore, when determining whether a valid portion constitutes the greater part of a warrant, 'merely counting parts, without any evaluation of the practical effect of those parts, is an improperly "hypertechnical" interpretation of the search authorized by the warrant.' [*Sells*, 463 F3d at 1160.] Instead, a court should 'evaluate the relative scope and invasiveness of the valid and invalid parts of the warrant.' [*Sells*, 463 F3d at 1160.] In this case, the authorized search for marijuana permitted police officers to search the entire house and to investigate containers in which marijuana might be found. Hence, the scope of the search authorized by the valid portion of the search [warrant] was extremely broad and allowed police officers to search in almost every place which the authorization to search for distribution evidence permitted. For this reason, the valid portion of the warrant, in our judgment, formed the greater part of the search warrant. Therefore, even if the warrant is overbroad, the distribution category is severable." *Keller*, 479 Mich at 478-480.

4. Execution

Although an affidavit becomes part of the "copy of the warrant" that must be left pursuant to MCL 780.655, failure to comply with that statutory requirement does not require suppression of evidence where the defendant has the opportunity to challenge probable cause and the requirement is merely procedural. *People v Garvin (Demar)*, 235 Mich App 90, 99-100 (1999). See also *People v Sobczak-Obetts*, 463 Mich 687, 710-712 (2001) (nothing in the language of MCL 780.655 provides any basis to infer that it was the Legislature's intent that the drastic remedy of exclusion be applied to a violation of the statute).

5. Anticipatory Search Warrants

"'An anticipatory search warrant is a warrant based upon an affidavit showing probable cause that at some future time, but not presently, certain evidence of a crime will be located at a specified place.'" *People v Kaslowski*, 239 Mich App 320, 324 (2000), quoting *People v Brake*, 208 Mich App 233, 244 (1994). A magistrate issuing such a warrant "should take care to require independent evidence establishing probable cause that the contraband will be located at the premises at the time of the search." *Kaslowski*, 239 Mich App at 325. Further, although not required, the magistrate should protect against premature execution of the warrant by listing the conditions governing its execution. *Id*.

Anticipatory search warrants are constitutional. *United States v Grubbs*, 547 US 90, 94-95 (2006). "They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed." *Id.* at 96. Further, the condition triggering execution of the warrant need not be stated in the warrant; the Fourth Amendment's "particularity requirement" demands only that "the place to be searched" and "the persons or things to be seized" be set out in a warrant. *Id*. at 97-98.

6. Pen Register Warrants

Pen register warrants are requests for telephone records under federal law. In Michigan, the requests are addressed to the circuit court because 18 USC 3127(2)(B) requires that "a court of general criminal jurisdiction of a State authorized by the law of that State" issue the order authorizing the pen register. If the application for the warrant is properly made, i.e., it complies with 18 USC 3122, the court shall enter the order. 18 USC 3123(a). 18 USC 3123(b) covers the contents of the order. The application and order are in a standard form. The requirements are not as stringent as those for a search warrant. There is no Michigan statute that addresses the issuance of pen register warrants.

7. Standard of Review

The propriety of a search warrant is determined by whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *People v Russo*, 439 Mich 584, 603 (1992).

"[A] search warrant and the underlying affidavit are to be read in a common-sense and realistic manner. Affording deference to the magistrate's decision simply requires that reviewing courts insure that there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Russo*, 439 Mich at 604, quoting *Illinois v Gates (Lance)*, 462 US 213, 238 (1983).

"Review of the sufficiency of evidence supporting [a] probable cause determination is limited to the information contained in the four corners of the affidavit." *Ellison v Balinski*, 625 F3d 953, 958 (CA 6, 2010) (42 USC 1983 claim). A reviewing court may only consider the information available to the magistrate and on which the magistrate relied in issuing the warrant. *People v Sloan*, 450 Mich 160, 168-169 (1995), overruled on other grounds by *Hawkins*, 468 Mich 488. A reviewing court should confirm that the magistrate's decision was based on actual facts rather than on unsupported assertions of the affiant. *Sloan*, 450 Mich at 168-169.

When a warrant was issued on the basis of an affidavit later challenged by the defendant, the reviewing court must give great deference to the magistrate's determination of probable cause. *Keller*, 479 Mich at 476-477. De novo review of an affidavit's sufficiency is not appropriate after the warrant supported by the affidavit has already been issued and executed. *Id.* at 474.

B. Exceptions to the Warrant Requirement

Warrantless searches are permitted under specific circumstances. Exceptions to the warrant requirement include:

1. Exigent Circumstances, Emergency Doctrine, Hot Pursuit, and Community Caretaking

The exigent circumstances exception is a recognized exception to the Fourth Amendment warrant requirement. *People v Cartwright*, 454 Mich 550, 558-559 (1997).

Pursuant to the exigent circumstances exception, a police officer may enter a dwelling without a warrant if the officer possesses probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. *In re Forfeiture of $176,598*, 443 Mich 261, 271 (1993). The police must further establish the existence of an actual

emergency—the exigent circumstances—on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. *Id.* at 271.

A police officer's warrantless entry into a defendant's home may be justified under the exigent circumstances doctrine when the officer is responding to a home security alarm and the officer's decision to enter the premises is reasonable under the totality of the circumstances. *United States v Brown (Dois)*, 449 F3d 741, 748-750 (CA 6, 2006). According to the *Brown (Dois)* Court:

> "In this case, [the officer] responded to a burglar alarm that he knew had been triggered twice in a relatively short period of time and arrived within just a few minutes of the first activation. He was not met by a resident of the house, but by the neighbor who directed him to the basement door. The sounding alarm, the lack of response from the house, and the absence of a car in the driveway, made it less likely that this was an accidental activation. Investigating, [the officer] found the front door secured but the basement door in the back standing ajar. While [the officer] did not find a broken window or pry marks on the open door, it was objectively reasonable for him to believe that this was not a false alarm but, rather, that the system had recently been triggered by unauthorized entry through the open basement door. These circumstances, including the recently activated basement door alarm and evidence of a possible home invasion through that same door, establish probable cause to believe a burglary was in progress and justified the warrantless entry into the basement." *Brown (Dois)*, 449 F3d at 748-749.

To justify the warrantless entry of a residence, the officer must articulate specific and objective facts that reveal an actual emergency amounting to more than a mere possibility of an immediate risk of the destruction or removal of evidence. *People v Blasius*, 435 Mich 573, 593-594, 598 (1990).

A police officer's conduct before the exigency must be reasonable to justify a warrantless search under exigent circumstances. *Kentucky v King*, 563 US 452, 462 (2011). In *King*, 563 US at 455-456, police officers pursued a suspect into an apartment building and, fearing the destruction of evidence

because of sudden movement inside, eventually entered into one of two apartments where they thought the suspect was hiding. Inside, the officers found drugs and drug paraphernalia, but not the suspect (he was in the other apartment). *Id.* at 456-457. The United States Supreme Court concluded:

> "[T]he exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent destruction of the evidence is reasonable and thus allowed." *King*, 563 US at 462.

The *King* Court went on to reject other requirements used by some courts when examining whether exigent circumstances existed at the time of the search. *King*, 563 US at 463-469. Courts need not evaluate (1) an officer's motive; (2) whether it was reasonably foreseeable that the officer's tactics would create the exigent circumstances; (3) the officer's failure to seek a warrant after establishing sufficient probable cause to search the premises; (4) whether the course of an officer's investigation was "'contrary to standard or good law enforcement practices (or to the policies or practices of their jurisdictions)[;]'" or (5) whether officers "'engage[d] in conduct that would cause a reasonable person to believe that entry [was] imminent and inevitable.'" *Id.* at 463-469, quoting *United States v Gould*, 364 F3d 578, 591 (CA 5, 2004) (other citations omitted).

Because a police officer "might reasonably have believed that he was confronted with an emergency[]" and that failure to take immediate action might have resulted in the destruction of evidence, the warrantless collection of blood from a defendant arrested for criminal drunk driving was upheld. *Schmerber v California*, 384 US 757, 770-771 (1966) (noting that "where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant[]").

However, "the natural metabolization of alcohol in the bloodstream [does not] present[] a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *Missouri v McNeely*, 569 US ___, ___ (2013). Whether the exigency exception applies to the nonconsensual collection of

blood requires a case-by-case review of the totality of the circumstances as to whether there has been a "showing [of] exigent circumstances that make securing a warrant impractical in a particular case." *Id*. at ___, ___. "[F]actors present in an ordinary traffic stop, such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search[; t]he relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case." *Id*. at ___. "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id*. at ___, ___ (noting the absence of "any . . . factors that would suggest [the arresting officer] faced an emergency or unusual delay in securing a warrant[]").

The emergency aid exception justified the warrantless entry of the defendant's parents' home, where officers, looking through a window in the front door to the house, saw a motionless person slumped over the kitchen table in close proximity to a rifle and ammunition. *People v Tierney*, 266 Mich App 687, 704-705 (2005). Based on these specific and articulable facts, officers had a reasonable belief that the person slumped over the table may have needed emergency medical assistance. *Id.* at 704-705.

Where "officers were confronted with ongoing violence occurring within [a] home" during their investigation of a neighbor's early morning complaint about a loud party, exigent circumstances justified the officers' warrantless entry. *Brigham City*, *Utah v Stuart*, 547 US 398, 405-407 (2006). In *Brigham City*, 547 US at 406, the police officers were responding to a "loud party" complaint when they heard people shouting inside the residence at the address to which they responded. The officers walked down the driveway to further investigate and saw two juveniles drinking beer in the backyard of the residence. *Id*. Through a screen door and some windows, the officers observed a physical altercation in progress in the kitchen. *Id*. The officers saw one of the adults spitting blood in the kitchen sink after a juvenile punched him in the face, and when the other adults attempted to restrain the juvenile using force enough to move the refrigerator against which the juvenile was pinned, one of the officers opened the screen door

and announced their presence. *Id*. at 401. The officers' presence went unnoticed until one of them walked into the kitchen and repeated the announcement. *Id*. The individuals in the kitchen eventually realized that police officers were present and stopped struggling with the juvenile. *Id*.

A law enforcement officer's warrantless entry into a home is permitted "when [the officer] ha[s] an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." *Brigham City*, 547 US at 400. The defendants in *Brigham City* argued that evidence discovered as a result of the officers' warrantless entry should be suppressed because "the officers were more interested in making arrests than quelling violence." *Id.* at 404. The United States Supreme Court disagreed and explained that whether an officer's subjective motivation for a warrantless entry is to provide emergency assistance to an injured person or to seize evidence and effectuate an arrest is irrelevant to a determination of reasonableness. *Id*. at 404-405. If an officer's action is justified under an objective view of the circumstances, the action is reasonable for Fourth Amendment purposes, regardless of the officer's state of mind. *Id*.

The emergency aid exception to the search warrant requirement justified the warrantless entry of a defendant's home when, after responding to a complaint of a disturbance, the police saw in the driveway a vehicle with blood on the hood and its front end smashed, blood on clothes inside the vehicle, damaged fenceposts in the yard, three broken house windows, a locked back door, and a blockaded front door, where the defendant, who was inside the home screaming and throwing things, ignored the police officers' questions about whether he needed medical help for the cut on his hand and refused to respond to the officers' knock on the door. *Michigan v Fisher (Jeremy)*, 558 US 45, 45-50 (2009). The United States Supreme Court analyzed the facts under *Brigham City*, 547 US 398:

> "A straightforward application of the emergency aid exception, as in *Brigham City*, dictates that the officer's entry was reasonable. Just as in *Brigham City*, the police officers here were responding to a report of a disturbance. Just as in *Brigham City*, when they arrived on the scene they encountered a tumultuous situation in the house—and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City*, the officers could see violent behavior inside. Although [the police] did not see punches thrown,

> as did the officers in *Brigham City*, they did see [the defendant] screaming and throwing things. It would be objectively reasonable to believe that [the defendant's] projectiles might have a human target (perhaps a spouse or a child), or that [the defendant] would hurt himself in the course of his rage. In short, we find it as plain here as we did in *Brigham City* that the officer's entry was reasonable under the Fourth Amendment." *Fisher (Jeremy)*, 558 US at 48.

The Court held that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception[,]" and reiterated that "the test . . . is not what [the officer] believed, but whether there was 'an objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger[.]" *Fisher (Jeremy)*, 558 US at 49, quoting *Brigham City*, 547 US at 406. The Court reversed the Michigan Court of Appeals, holding that "[i]t was error for the Michigan Court of Appeals to replace that objective inquiry into appearances with its hindsight determination that there was in fact no emergency." *Fisher (Jeremy)*, 558 US at 49. The Court held that "[i]t sufficed to invoke the emergency aid exception that it was reasonable to believe that [the defendant] had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that [the defendant] was about to hurt, or had already hurt, someone else." *Id*.

The emergency aid exception to the search warrant requirement justified the warrantless entry of a defendant's home when, after responding to a complaint of a disturbance, a police officer first heard a male voice shouting from inside the home, then encountered the defendant, who acted irate and who shouted profanities at the officer, even after being informed that his teenage daughter was suspected of being in danger. *Schreiber v Moe*, 596 F3d 323, 329-330 (CA 6, 2010) (in the context of a 42 USC §1983 action). According to the officer, he could not see the girl before entering the home—his inability to see her made it reasonable for him to investigate to verify that she was safe. *Schreiber*, 596 F3d at 330-331. Even if the officer could see the girl as the defendant claimed, she was crying and hurt and her "visibly distraught demeanor would have led a reasonable police officer to believe that the girl was in distress and was consistent with the 911 caller's conclusion that [the girl] was 'getting beat.'" *Id*. The United States Court of Appeals for the Sixth Circuit noted that "[p]reventing imminent or ongoing physical abuse within a home qualifi[ed] as an exigent circumstance[,]" and concluded that "no

reasonable jury would dispute that [the officer] had an 'objectively reasonable basis for believing' that [the girl] was at risk of imminent injury." *Id.* at 330, citing *Michigan v Fisher (Jeremy)*, 558 US 45 (2009). The Court conceded that "this case lacks some of the more outward manifestations of violence that often support a finding of exigency[,]" such as "signs of blood, . . . broken objects, . . . or gunfire." *Id.* at 331 (internal citations omitted). However, in this case, as in *Fisher (Jeremy)*, 558 US, "'[i]t sufficed to invoke the emergency aid exception that it was reasonable to believe that . . . [the defendant] was about to hurt, or had already hurt, [his daughter].'" *Schreiber*, 596 F3d at 331, quoting *Fisher (Jeremy)*, 558 US at 49.

Where a police officer was dispatched to a domestic violence incident possibly involving weapons, a warrantless entry and search of the premises was permissible under both the exigent circumstances and emergency aid exceptions. *People v Beuschlein*, 245 Mich App 744, 746, 757-758 (2001).

The emergency aid exception justified a warrantless entry where "police were alerted by a phone call that something may have been amiss in [the] defendant's home, as the door was wide open and blowing in the wind[]" and where "[n]o one came to the open door[]" when "[t]he officers knocked on the door, rang the doorbell, and repeatedly announced their presence[;]" because the officers "suspected a home invasion" rather than drug activity, they were justified in entering the home "to secure the premises and locate any [victims or suspects] inside[.]"[12] *People v Lemons (Cory)*, 299 Mich App 541, 546-548 (2013) (noting that "[t]he emergency-aid exception is not an inquiry into hindsight[]" and that "there was a very real possibility that someone could have been inside who needed police assistance[]").[13]

As part of his or her "community caretaking" function, a police officer may enter a dwelling without a warrant where it is reasonably believed that a person inside is in need of medical assistance; the entry must be limited to the reason for its

[12] "Alternatively, [the] police also could be exercising their community caretaking function when securing a house whose door was wide open and blowing in the wind." *People v Lemons (Cory)*, 299 Mich App 541, 546 n 1, 549 n 2 (2013) (noting, however, that "'when the police are investigating a situation in which they reasonably believe someone is in need of immediate aid, their actions should be governed by the emergency aid doctrine, regardless of whether these actions can also be classified as community caretaking activities[]'") (quoting *People v Davis (Harriet)*, 442 Mich 1, 25 (1993)).

[13] The *Lemons (Cory)* Court additionally held that "even if the officers' behavior fell short of satisfying the criteria set forth in the emergency-aid exception," the exclusionary rule did not apply to the drug evidence that was discovered following the warrantless entry because "[t]he police officers were acting in good faith" when they "entered the residence because they believed people could be inside and were in need of immediate aid." *Lemons (Cory)*, 299 Mich App at 549-550.

justification, and the officer must be motivated primarily by a perceived need to render assistance and may do no more than is reasonably necessary to determine whether assistance is required and render it. *People v Davis (Harriet)*, 442 Mich 1, 20-26 (1993).[14]

"[T]he community caretaking exception to the warrant requirement applies when a firefighter, responding to an emergency call involving a threat to life or property, reasonably enters a private residence in order to abate what is reasonably believed to be an imminent threat of fire inside." *People v Slaughter*, 489 Mich 302, 316-317 (2011). In *Slaughter*, 489 Mich at 306-308, a firefighter responded to a 911 call from a townhouse resident reporting that water was flowing over her electrical box and behind a wall that adjoined the defendant's townhouse; when the firefighter entered the defendant's basement "to shut off [his] water and to assess whether any additional measures needed to be taken to prevent a fire," the firefighter observed, in plain view, grow lights and marijuana plants, which were later seized pursuant to a search warrant. The Michigan Supreme Court held that warrantless entry is permissible where "a firefighter's entry into a private residence [is] an exercise of community caretaking functions, and not an exercise of investigative functions," and where the firefighter, "acting in good faith, . . . 'possess[es] specific and articulable facts' leading [him or her] to the conclusion that [his or her] actions [are] necessary to abate an imminent threat of fire inside the private residence." *Id*. at 317, 320, quoting *Davis (Harriet)*, 442 Mich at 25. Thus, because "the responding firefighter[] believed that there existed the imminent threat of an electrical fire in [the] defendant's residence[,] . . . reasonably believed that the danger posed an imminent threat to property or life, and . . . acted reasonably in abating that threat[,]" the lower courts erred in suppressing the marijuana that was discovered in plain view during the entry. *Slaughter*, 489 Mich at 328-329.

The community caretaking exception applied to the warrantless entry of the defendant's home by police officers while performing "a welfare check after [the] defendant's neighbor . . . called police with concerns about [the] defendant's well-being[,]" despite "a lack of direct evidence definitively showing that [he] was present and in actual need

[14] However, "when the police are investigating a situation in which they reasonably believe someone is in need of immediate aid, their actions should be governed by the emergency aid doctrine, regardless of whether these actions can also be classified as community caretaking activities." *Davis (Harriet)*, 442 Mich at 25.

of aid or assistance." *People v Hill (Eric)*, 299 Mich App 402, 407, 409 (2013). In *Hill (Eric)*, 299 Mich App at 407, the defendant's neighbor informed the officers that she had not seen or heard from the defendant, and his vehicle had not left his property, for several days, and "that the interior lights in [his] house had been on for a while[.]" One of the officers "noticed that an interior house light was turned on, that there were six to eight pieces of mail in the mailbox, . . . that a phonebook was sitting on the front porch, and that [the] defendant's car, which was cold and covered with some leaves, was sitting in the driveway." *Id*. After knocking on the defendant's doors and windows, yelling out, and asking a dispatcher to make a phone call to the defendant's home, the officers "made [a decision] to enter the house and search for [the] defendant for purposes of a welfare check." *Id*. at 407-408. After entering, the officers opened a bedroom closet and discovered marijuana plants under a grow light. *Id*. at 408. The Court of Appeals held that the community caretaking exception applied to the warrantless entry and that the district court erred in granting the defendant's motion to suppress the marijuana evidence in his prosecution for manufacture of marijuana. *Id*. at 404-405, 409-410. "Given the reasonable conclusion that [the] defendant might have been in the home . . . , and considering the lack of response to the police officers' aggressive efforts to communicate, it was reasonable to conclude that [the] defendant was not only present but in need of attention, aid, or some kind of assistance." *Id*. at 410.[15]

2. Search Incident to Arrest

Once there is a custodial arrest, a full search of the person requires no additional justification. *United States v Robinson*, 414 US 218, 235 (1973). The Fourth Amendment is not violated where the police make an arrest based on probable cause and conduct a search incident to the arrest, even if the arrest is prohibited by state law. *Virginia v Moore (David)*, 553 US 164, 176 (2008) (police arrested the defendant for an "unarrestable" offense under state law). "[O]fficers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence." *Id*. at 176. This rule covers any "lawful arrest," i.e., "an arrest based on

[15] The *Hill (Eric)* Court additionally held that, "even if a constitutional violation by the officers had occurred on the basis of a lack of criteria sufficient to justify invocation of the community-caretaker exception," exclusion of the marijuana was inappropriate where "the police, having at least some indicia of need, enter[ed] a home in a good-faith effort to check on the welfare of a citizen[;]" suppression of the evidence, rather than deterring police misconduct, "would only deprive citizens of helpful and beneficial police action." *Hill (Eric)*, 299 Mich App at 411, 414-415.

probable cause." *Id*. at 177. While some states have taken "lawful" to mean in "compliance with state law," the United States Supreme Court intends "lawful" to mean in "compliance with constitutional constraints." *Id*., citing *Robinson*, 414 US 218.

Additionally, the Fourth Amendment is not violated when correctional officials require a detainee, "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history[,]" to undergo a visual strip search before being admitted to a jail's general population. *Florence v Board of Chosen Freeholders of County of Burlington*, 566 US ___, ___ (2012).

Where law enforcement officers have "probable cause to arrest [a] defendant, the fact that [the] defendant was searched immediately *before* his [or her] arrest does not make the search incident to arrest invalid." *People v Nguyen*, 305 Mich App 740, 757 (2014) (citing *People v Labelle*, 478 Mich 891, 891 (2007), and concluding that, "[b]ecause a search incident to an arrest may occur whenever there is probable cause to arrest, even if the arrest has not been made at the time the search is conducted, the police [are] not required to arrest [the] defendant before conducting the search incident to arrest[]") (emphasis supplied; additional citations omitted).

The collection and analysis of an arrestee's DNA according to Combined DNA Index System (CODIS) procedures "[a]s part of a routine booking procedure for serious offenses[]" did not violate the Fourth Amendment where the DNA sample was used to identify the arrestee as the perpetrator of an earlier unsolved rape. *Maryland v King*, 569 US ___, ___, ___ (2013). "When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *Id*. at ___, ___ (noting that "a detainee has a reduced expectation of privacy[]" and that "[b]y comparison to [the] substantial government interest [in identifying arrestees] and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one[]").

"[A] warrant is generally required before . . . a search[of information on a cell phone], even when [the] cell phone is seized incident to arrest." *Riley v California*, 573 US ___, ___ (2014). When a search is of digital data there are "no comparable risks" to the concerns that underlie the search

incident to arrest exception to the warrant requirement—harm to officers and the destruction of evidence; moreover, cell phones "place vast quantities of personal information literally in the hands of individuals[, and a] search of [such information] bears little resemblance to the type of brief physical search" that was previously sanctioned by the Court. *Id*. at ___ (noting, however, that "other case-specific exceptions[, such as the exigent circumstances exception,] may still justify a warrantless search of a particular phone[]").

"[T]he Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving[,]" and a state may criminally prosecute a driver for refusing a warrantless breath test;[16] "[t]he impact of breath tests on privacy is slight, and the need for [blood alcohol concentration (BAC)] testing is great." *Birchfield v North Dakota*, 579 US ___, ___ (2016). However, "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, . . . a blood test[] may [not] be administered as a search incident to a lawful arrest for drunk driving[,]" and "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id*. at ___ (concluding that one of the three petitioners in the case "was threatened with an unlawful search" under a state law making it a crime to refuse a warrantless blood draw, and that "the search he refused [could not] be justified as a search incident to his arrest or on the basis of implied consent[]") (emphasis added).[17]

3. Inventory Search

After a custodial arrest, the police may search any property belonging to the suspect that is impounded at the time of arrest; this is commonly referred to as an inventory search.

The decision to impound a car must be based on an established set of departmental procedures followed by all officers. *People*

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[16] Note that Michigan does not currently criminalize an individual's refusal to submit to a preliminary chemical breath analysis (PBT); refusal to submit is a civil infraction. See MCL 257.625a(2)(d).

[17] However, although "the natural metabolization of alcohol in the bloodstream [does not] present[] a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases[,]" *Missouri v McNeely*, 569 US ___, ___ (2013), "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not[,]" *Birchfield*, 579 US at ___, citing *McNeely*, 569 US at ___. See MCL 257.625d(1). "[C]onsistent with general Fourth Amendment principles . . . exigency in this context must be determined case by case based on the totality of the circumstances." *McNeely*, 569 US at ___. See Section 9.5(B)(1) for discussion of the exigent circumstances exception to the warrant requirement. See Section 2.24 for discussion of implied consent laws.

v Toohey, 438 Mich 265, 267, 291 (1991). An impoundment and subsequent inventory search is undertaken as part of the caretaking functions performed by the police. *Id.* at 284-285. Impoundment must not be used as a pretext for conducting a criminal investigation. *Id*. at 285.

In order for a vehicle inventory search to be valid, it must be shown that it was conducted in accordance with reasonable procedures established to safeguard impounded vehicles and their contents. *People v Long (David Kerk)*, 419 Mich 636, 650 (1984). Where no such procedures are present or where a police officer acts in a manner contrary to established procedures, the inventory search is unlawful. *Id.* at 648.

Police officers may only open closed containers pursuant to an inventory search if established departmental policies authorize such an action. See *Florida v Wells*, 495 US 1, 4-5 (1990) (absent a policy with respect to the opening of closed containers encountered during an inventory search, such a search is not sufficiently regulated to satisfy the Fourth Amendment).

4. Investigatory Stop—*Terry*[18] Stop

Police officers may make a valid investigatory stop (a *Terry* stop) if they have reasonable suspicion that crime is afoot. *People v Champion (Kenneth)*, 452 Mich 92, 98 (1996). Reasonable suspicion is more than a hunch, but less than the level of suspicion required for probable cause, *id.* at 98, and must be based on commonsense judgments and inferences about human behavior, *Illinois v Wardlow*, 528 US 119, 125 (2000). During an investigatory stop, "[a] police officer may perform a limited patdown search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons." *People v Custer*, 465 Mich 319, 328 (2001). "*Terry* strictly limits the permissible scope of a patdown search to that reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be used to assault an officer." *Champion (Kenneth)*, 452 Mich at 99. The officer may seize any contraband which is immediately apparent if he or she has probable cause to believe the object is contraband. *Id*. at 100-101. "It is the totality of the circumstances in a given case that determine whether a patdown search is constitutional." *Custer*, 465 Mich at 328.

[18] *Terry (John) v Ohio*, 392 US 1 (1968).

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. *People v Jenkins (Shawn)*, 472 Mich 26, 32-33 (2005). An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. *Id.* at 35. Evidence discovered as a result of these legal detentions is properly seized at the time the individual citizen is seized. *Id.* at 34-35.

A police officer does not need probable cause or an articulable suspicion to conduct a computer check of a vehicle's license plate number. *People v Jones (Calvin)*, 260 Mich App 424, 427-428 (2004). An investigatory stop is justified if a computer check reveals that the vehicle's registered owner is subject to arrest and no visible evidence contradicts the inference that the vehicle's driver is also the registered owner. *Id.* at 427-428. As long as the investigatory stop was proper and the subsequent arrest was warranted, the search of the driver's person and vehicle does not violate the Fourth Amendment, and any evidence discovered during the warrantless search was lawfully obtained. *Id.* at 430.

A *Terry* stop need not be based upon probable cause; rather, an officer may "stop and frisk" a defendant based upon a reasonable suspicion supported by articulable facts that criminal activity might be afoot. *Terry (John)*, 392 US at 30. See *People v Dunbar*, 264 Mich App 240, 245-250 (2004), overruled on other grounds by *People v Jackson (Harvey)*, 483 Mich 271 (2009) (contraband was properly seized when it was discovered after an officer lawfully stopped the defendant based on information received from a reliable confidential informant). See also *People v Steele (James)*, 292 Mich App 308, 310-313 (2011), where a loss prevention officer trained to recognize the precursors for methamphetamine and who had provided reliable information on more than ten prior occasions, provided the police with information that the defendant purchased packages of Sudafed and a gallon of fuel (known precursors to the manufacture methamphetamine) and a description of the defendant's vehicle. This information, considered with the arresting officer's training and experience regarding methamphetamine manufacture, constituted "a solid basis upon which [the arresting officer] had a reasonable suspicion of criminal activity to justify the *Terry* [*v Ohio*, 392 US 1 (1968)] stop." *Steele (James)*, 292 Mich App at 315-316.

See also *United States v Long (Richard)*, 464 F3d 569, 573-576 (CA 6, 2006) (contraband was properly seized when it was

discovered after an officer lawfully stopped the defendant based on information received from an anonymous caller, where the police knew the caller's address and the police pulled up in front of the caller's house while the 911 call was still ongoing), and *People v Horton (Lajamille)*, 283 Mich App 105, 113 (2009) (reasonable suspicion that a person has engaged or is engaging in criminal activity may properly be based on an in-person tip from a citizen who declines to identify him- or herself, where the tipster provides the police with sufficiently detailed information).[19]

"'[A]n anonymous tip *alone* seldom demonstrates [an] informant's basis of knowledge or veracity.'" *Navarette v California*, 572 US ___, ___ (2014), quoting *Alabama v White*, 496 US 325, 329 (1990) (emphasis added). However, where, under the totality of the circumstances, an anonymous tip bears "adequate indicia of reliability" and "creates reasonable suspicion that 'criminal activity may be afoot[,]'" an investigative stop may be justified. *Navarette*, 572 US at ___, ___, quoting *Terry*, 392 US at 30.

"When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized." *Jenkins (Shawn)*, 472 Mich at 33. "A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he [or she] was not free to leave." *Id.* at 32.

In determining whether a *Terry* stop is reasonable, the court must examine both the character of the official intrusion, as well as its justification. *People v Chambers (Allan)*, 195 Mich App 118, 121 (1992). The question that must be asked "in assessing whether a detention is too long in duration to be justified as an investigatory stop is whether the police were diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain those stopped." *Id.* at 123.

When officers make stops for traffic violations, the Fourth Amendment does not require the officers to expressly inform the individuals stopped that they are free to leave before requesting consent to search the individuals or their vehicles. *Ohio v Robinette*, 519 US 33, 39-40 (1996).

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[19] In *Horton (Lajamille)*, 283 Mich App at 107, police properly detained the defendant where the police received in-person information from a citizen, who declined to identify himself, that a black male, approximately 30 years of age and who "seemed to be pretty nervous and upset," was driving a burgundy Chevrolet Caprice at a gas station one mile away, and was waving an "uzi type weapon" with a long clip.

a. Traffic Stop

"A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment." *Heien v North Carolina*, 574 US ___, ___ (2014) (citation omitted). Generally, an officer's decision to stop an automobile is reasonable when there is probable cause to believe that the driver violated a traffic law. *Whren v United States*, 517 US 806, 810 (1996). The constitutional reasonableness of traffic stops does not depend on the actual motivations of the police officers involved. *Id.* at 813. A traffic stop is permissible when an officer has "'reasonable suspicion[,]'" meaning that the officer has "'a particularized and objective basis for suspecting the particular person stopped' of breaking the law." *Heien*, 574 US at ___, quoting *Navarette v California*, 572 US ___, ___ (2014). "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Heien*, ___ US at ___, quoting *Riley v California*, 573 US ___, ___ (2014) (quotation marks omitted).

"To be reasonable is not to be perfect," and "searches and seizures based on mistakes of fact can be reasonable[]" if the mistake of fact itself is reasonable. *Heien*, 574 US at ___ (citations omitted). Further, "reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition[]" so long as the mistake of law is "objectively reasonable[.]" *Id.* at ___ (holding that because it was "objectively reasonable for an officer . . . to think that [the petitioner's] faulty right brake light was a violation of [state] law[,] . . . there was reasonable suspicion justifying [a traffic] stop[,]" even though "a court later determined that a single working brake light was all the law required[]").

The issue in *Whren*, 517 US at 808, was the legality of actions taken by plainclothes officers patrolling in an unmarked car. The officers noticed a vehicle of teenagers in a known drug area displaying peculiar behavior. *Id.* at 808. The car suddenly turned without signaling "and sped off at an 'unreasonable' speed." *Id.* The officers pulled over the car and approached it, at which time they observed plastic bags of crack cocaine in the defendant's hands. *Id.* at 809. The officers had probable cause to believe that the traffic code was violated; accordingly, the traffic stop was reasonable under the Fourth Amendment, and evidence of the subsequently discovered drugs was admissible. *Id.* at 819.

"To justify a patdown of [a] driver or a passenger during a traffic stop, . . . just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v Johnson (Lemon)*, 555 US 323, 327 (2009). In *Johnson (Lemon)*, 555 US at 327, the defendant was a backseat passenger in a car stopped for a vehicular violation. While obtaining preliminary information from the defendant, an officer noticed that the defendant's clothing, as well as a police scanner in his pocket, suggested that he was affiliated with a gang. *Id*. at 328. Because she wished to obtain "intelligence about the gang [the defendant] might be in," the officer asked the defendant to get out of the vehicle so that she could question him away from the front-seat passenger. *Id*. at 328. Based on her suspicions that the defendant might be armed, the officer patted him down for safety reasons when he got out of the car. *Id*. The officer felt a gun during the patdown, and she handcuffed the defendant when he started to struggle. *Id*. The United States Supreme Court rejected the state appellate court's conclusion that "once [the officer] undertook to question [the defendant] on a matter unrelated to the traffic stop, *i.e.*, [his] gang affiliation, patdown authority ceased to exist, absent reasonable suspicion that [he] had engaged, or was about to engage, in criminal activity." *Id*. at 332-334. Rather, "[t]he temporary seizure of driver and passengers [during a lawful roadside stop] ordinarily continues, and remains reasonable, for the duration of the stop[,]" and "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop[] . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Id*. at 333. "The police need not have, in addition [to the vehicular violation], cause to believe any occupant of the vehicle is involved in criminal activity." *Id*. at 327. Accordingly, the officer "was not constitutionally required to give [the defendant] an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her." *Id*. at 334.

Police officers may stop a vehicle if they have reasonable suspicion that the vehicle was involved in criminal activity, even if the officers do not possess reasonable suspicion that the driver or owner of the vehicle was engaged in that conduct. *United States v Marxen*, 410 F3d

326, 332 (CA 6, 2005). Because a traffic stop under these circumstances is lawful, any evidence seized as a result of the stop is lawfully obtained, even if the items seized are unrelated to the criminal activity that prompted the traffic stop. *Id*. at 327, 332.

In *Marxen*, 410 F3d at 327, the defendant's vehicle was identified as the car used by suspects in an armed robbery. Although the defendant did not match the description of either of the suspects and police had not observed the defendant interact with either of the suspects during their post-robbery surveillance of the defendant, the investigative traffic stop that occurred eleven days after the robbery did not violate the defendant's constitutional rights. *Id*. at 327. During the stop, which was based solely on the fact that the vehicle's description and license plate matched that of the car used in the robbery, police officers noticed a marijuana pipe and a bag of marijuana in plain view in the defendant's car. *Id*. Because the stop was lawful, the seizure of the unlawful items—seen by officers who were lawfully in a position to see them—was also proper. *Id*. at 332.

"[F]ewer foundational facts are necessary to justify an investigative stop of a moving vehicle based on a citizen tip of erratic driving." *People v Barbarich*, 291 Mich App 468, 479 (2011). "[W]hile the quantity of the tip's information must be sufficient to identify the vehicle and to support an inference of a traffic violation, less is required as to a tip's reliability; as to the latter, it will suffice if law enforcement corroborates the tip's innocent details." *Id*. at 479-480. In *Barbarich*, 291 Mich App at 470-471, a police officer stopped the defendant's vehicle on the basis of an unnamed citizen informant mouthing the words "Almost hit me" while pointing at the defendant's vehicle. The Court of Appeals held that "sufficient indicia of reliability supported the citizen's tip and [the officer] was justified in conducting the investigatory stop." *Id*. at 482. Specifically, "[t]he tip provided sufficient information to accurately identify the vehicle and to create an inference that a crime or civil infraction had occurred; and, the tip was also sufficiently reliable, based on the [citizen's] contemporaneous observations." *Id*. In sum, "[u]nder the totality of the circumstances, [the officer] had a reasonable articulable suspicion that justified an investigatory stop of [the] defendant's vehicle." *Id*.

"[A] reliable tip alleging [certain] dangerous [driving] behaviors . . . generally [will] justify a traffic stop on suspicion of drunk driving." *Navarette v California*, 572 US ___, ___ (2014) (such behaviors include weaving, crossing the center line and nearly causing head-on collisions, and driving in the median) (citations omitted). "Under the totality of the circumstances, . . . [a 911 call bore] indicia of reliability . . . sufficient to provide [an] officer with reasonable suspicion that the driver of [a] reported vehicle had run another vehicle off the road[, making] it reasonable under the circumstances for the officer to execute a traffic stop[]" on the basis of suspected intoxication. *Navarette*, 572 US at ___, ___. In *Navarette*, 572 US at ___, "[a]fter a 911 caller reported that a [truck] had run her off the road, a police officer located the vehicle she identified during the call and executed a traffic stop." Turning first to "[t]he initial question . . . whether the 911 call was sufficiently reliable[,]" the Court held that the caller's apparent "eyewitness knowledge of the alleged dangerous driving[]" based on her specific description of the truck and license plate number, together with the facts that she used the 911 system and that the tip was "contemporaneous with the observation of criminal activity[,]" provided "adequate indicia of reliability for the officer to credit the caller's account[]" and to "proceed[] from the premise that the truck had, in fact, caused the caller's car to be dangerously diverted from the highway." *Id.* at ___-___. Furthermore, the caller's "report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving" because the reported conduct, unlike "a minor traffic infraction . . . [or] a conclusory allegation of drunk or reckless driving[,] . . . [bore] too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness." *Id.* at ___, ___ (quoting *United States v Sokolow*, 490 US 1, 11 (1989), and further concluding that "the absence of additional suspicious conduct, [during the five-minute period] after the vehicle was first spotted by [the] officer, [did not] dispel the reasonable suspicion of drunk driving[;]" rather, "[o]nce reasonable suspicion of drunk driving arises, '[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques[]'").

However, "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."

Rodriguez v United States, 575 US ___, ___ (2015). "A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Id*. at ___ (quoting *Illinois v Caballes*, 543 US 405, 407 (2005), and holding that "police [may not] routinely . . . extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff[]").

"A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period." *People v Williams (John Lavell)*, 472 Mich 308, 315 (2005); see also *People v Simmons (Michael)*, ___ Mich App ___, ___ (2016). "The determination whether a traffic stop is reasonable must necessarily take into account the evolving circumstances with which the officer is faced[,]" and "when a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised." *Williams (John Lavell)*, 472 Mich at 315 (citations omitted).

Furthermore, where the initial traffic stop is justified and the officer's questions do not exceed the scope of the stop and do not unreasonably extend the time of the detention, a defendant's consent to search a vehicle is valid. *Williams (John Lavell)*, 472 Mich at 310. Under those circumstances, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id.* at 318.

In *Williams (John Lavell)*, 472 Mich at 310, the defendant was stopped by a Michigan State Police trooper for speeding. After the defendant produced his driver's license, the trooper asked where he and his two passengers were going. *Id.* at 310. The defendant's answer raised the trooper's suspicion because it was implausible. *Id*. at 310-311. Answers the defendant and the two passengers gave to the trooper were inconsistent and served only to increase his suspicions. *Id*. at 311. At one point during the encounter, the defendant admitted to a previous arrest "for a marijuana-related offense." *Id*. Following the five- to eight-minute detention, the trooper asked for and received the defendant's consent to search the vehicle. *Id*. A canine unit arrived within three minutes, and the dog indicated that narcotics were

present in the vehicle's backseat. *Id*. No drugs were found there, and the defendant consented to a search of the vehicle's trunk. *Id*. When the defendant later withdrew his consent, the trooper obtained a warrant, searched the trunk, and discovered marijuana and cocaine. *Id*. at 311-312. The *Williams* (*John Lavell)* Court conducted "a fact-intensive inquiry" pursuant to the standards set out in *Terry (John)*, 392 US 1. *Williams (John Lavell)*, 472 Mich at 314. According to the *Terry* standard,

> "the reasonableness of a search or seizure depends on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Williams (John Lavell)*, 472 Mich at 314, quoting *Terry (John)*, 392 US at 20.

The Court explained that a law enforcement officer is permitted to detain a driver stopped for a traffic violation in order to question the driver about his or her destination and travel plans. *Williams (John Lavell)*, 472 Mich at 316. The officer's authority to ask questions extends to follow-up questions prompted by a driver's suspicious or implausible answers to questions posed by the officer. *Id*. at 316.

"[A] computer check is a routine and generally accepted practice by the police during a traffic stop." *People v Simmons (Michael)*, ___ Mich App ___, ___ (2016), citing *People v Davis (Marcus)*, 250 Mich App 357, 366 (2002). "[A] review of Michigan cases demonstrates a recognition that the running of [Law Enforcement Information Network (LEIN)] checks of vehicle drivers is a routine and accepted practice by the police in this state." *Davis (Marcus)*, 250 Mich App at 366-368 (holding that the amount of time it took for an officer to run a LEIN check during a traffic stop was "a minimal invasion in light of the substantial governmental interest in arresting citizens wanted on outstanding warrants[]" and did not unreasonably extend the stop) (citations omitted); see also *Simmons (Michael)*, ___ Mich App at ___.

b. Evidence Seized Without a Warrant During Investigatory Stops

- Plain Feel Exception

The plain feel exception to the warrant requirement allows the warrantless seizure of an object felt during a legitimate patdown search for weapons when the identity of the object is immediately apparent and the officer has probable cause to believe that the object is contraband. *Champion (Kenneth)*, 452 Mich at 100-101.

In *Champion (Kenneth)*, 452 Mich at 95, a police officer conducting a patdown search for weapons felt a pill bottle in the defendant's pants. Based on the officer's law enforcement experience with drugs, he knew that controlled substances were often carried in pill bottles. *Id.* at 95. Believing that the pill bottle contained controlled substances, the officer removed it, opened it, and found that it contained cocaine. *Id*. Because the patdown did not exceed the scope of *Terry (John)*, 392 US 1, and because there was probable cause to believe that the pill bottle felt during the patdown contained contraband, the plain feel exception to the warrant requirement authorized removal of the pill bottle from the defendant's pants. *Champion (Kenneth)*, 452 Mich at 114-115.

In *Custer*, 465 Mich at 331, a police officer conducting a patdown search felt an 2 x 3 inch object in the defendant's pocket. Based on the officer's law enforcement experience with drugs, he knew that acid was often carried on similarly-sized sheets of cardboard. *Id.* at 331. Because the officer had probable cause to believe that the object felt during the patdown was contraband, the plain feel exception to the warrant requirement authorized removal of the object from the defendant's pants. *Id*. at 332. Even though the object ultimately retrieved was not contraband, the seizure was still lawful. *Id*.

In *Bond v United States*, 529 US 334, 335 (2000), the United States Supreme Court was protective of the privacy of bags and soft luggage that passengers carry with them on buses and trains, finding that police could not manipulate carry-on luggage placed in an overhead bin.

- Plain Smell Exception

Where a police officer detected the odor of marijuana emanating from a car he had stopped for a traffic violation, the odor alone provided justification to search the car without a warrant. *People v Kazmierczak*, 461 Mich 411, 424 (2000).

5. Detention Incident to Execution of Search Warrant

Officers executing a valid search warrant may "detain the occupants of the premises while a proper search is conducted." *Michigan v Summers*, 452 US 692, 704-705 (1981) (noting that "[i]f the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home[,]" and concluding that "[b]ecause it was lawful to require [the] respondent to re-enter and to remain in the house until evidence establishing probable cause to arrest him was found, his arrest and the search incident thereto were constitutionally permissible[]"). "The categorical authority to detain [an occupant] incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched[,]" and "the decision to detain must be acted upon at the scene of the search and not at a later time in a more remote place." *Bailey v United States*, 568 US ___, ___ (2013). "[*Summers*, 452 US 692, does not] justif[y] the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant." *Bailey*, 568 US at ___.

Detention of a person in the immediate vicinity of premises on which a search warrant is being executed "does not require law enforcement to have particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers[;] . . . [rather, t]he rule announced in *Summers*[, 452 US 692,] allows detention incident to the execution of a search warrant 'because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial.'" *Bailey*, 568 US at ___ (quoting *Muehler v Mena*, 544 US 93, 98 (2005), and holding that where the defendant was observed leaving a residence as a search unit prepared to execute a search warrant there, *Summers*, 452 US 692, did not permit officers to "stop[] and detain[the defendant approximately one mile] away from the premises to be searched when the only justification for the detention was to ensure the safety and efficacy of the search[;]" in such a situation, "[i]f officers elect to defer [a] detention until the suspect or departing occupant leaves the immediate vicinity[of the premises to be searched], the lawfulness of detention is controlled by other standards, including[] . . .

a brief stop for questioning based on reasonable suspicion under *Terry* [*(John) v Ohio*, 392 US 1 (1968),] or an arrest based on probable cause[]").

6. Consent

There is no need for a search warrant where the defendant consents to the search. What amounts to consent differs in relation to the person granting it.

- **Consent by defendant:**

When a defendant voluntarily consents to a warrantless search or seizure, there is no Fourth Amendment violation. *People v Chism*, 390 Mich 104, 123 (1973). To justify a warrantless search or seizure on the basis of consent, the prosecution must show by clear and positive evidence that the defendant consented to the search and seizure. *People v Kaigler*, 368 Mich 281, 294 (1962). According to the *Kaigler* Court:

"[C]onsent must be prove[n] by clear and positive testimony and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given." *Kaigler*, 368 Mich at 294. "[T]here is no requirement that consent must be verbally given." *United States v Hinojosa*, 606 F3d 875, 882 (CA 6, 2010). "Consent to a search 'may be in the form of words, gesture, or conduct.'" *United States v Carter*, 378 F3d 584, 587 (CA 6, 2004), quoting *United States v Griffin*, 530 F2d 739, 742 (CA 7, 1976).

There are "basic principles governing the scope of searches authorized by consent." *People v Dagwan*, 269 Mich App 338, 343 (2005). "First, the party granting consent to a search may limit its scope or may revoke consent after granting it." *Id.* at 343. "Thus, because consent flows from its grantor, '[a] suspect may of course delimit as he [or she] chooses the scope of the search to which he [or she] consents.'" *Id.*, quoting *Florida v Jimeno*, 500 US 248, 252 (1991). "Second, the constitutional standard for determining the scope of a consent to search 'is that of "objective reasonableness"—what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *Dagwan*, 269 Mich App at 343, quoting *Jimeno*, 500 US at 251. "The *Jimeno* Court also observed, '[t]he scope of a search is generally defined by its expressed object.'" *Dagwan*, 269 Mich App at 343, quoting *Jimeno*, 500 US at 251.

Where the traffic stop and resulting detention were reasonable, no Fourth Amendment violation occurred and no inquiry was

needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that [the] defendant was involved with narcotics." *Williams (John Lavell)*, 472 Mich at 318. Consequently, the defendant's consent to search his vehicle under the circumstances was valid and the evidence obtained was properly admitted against the defendant at trial. *Id.* at 318-319.

Whether consent was in fact voluntary in a particular case or was given in submission to an express or implied assertion of authority is a question of fact to be determined in light of all the circumstances. *Schneckloth v Bustamonte*, 412 US 218, 227 (1973).

Consent given by a suspect who is not in custody may be valid even if given after a request to speak to an attorney. *People v Marsack*, 231 Mich App 364, 376 (1998).

The Fourth Amendment does not require police to inform detainees that they are free to go before a consent to search may be deemed voluntary. *Robinette*, 519 US at 35.

Another exception to the Fourth Amendment warrant requirement is where an individual has agreed to submit to warrantless searches as a condition of probation. *United States v Knights*, 534 US 112, 119-120 (2001). Under those circumstances, the police only need reasonable suspicion of a possible criminal act to search the probationer's property. *Id.* at 121. See also *Griffin (Joseph) v Wisconsin*, 483 US 868, 872-873 (1987) (authorizing probation officers to search probationers when they are suspected of criminal activity).

- **Consent by third person**:

"[P]olice officers may search jointly occupied premises if one of the occupants[20] consents." *Fernandez v California*, 571 US ___, ___ (2014), citing *United States v Matlock*, 415 US 164 (1974). "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Matlock*, 415 US at 171. See also *Illinois v Rodriguez*, 497 US 177, 181 (1990) (addressing "common authority" and holding that a

[20] The United States Supreme Court "use[s] the terms 'occupant,' 'resident,' and 'tenant' interchangeably to refer to persons having 'common authority' over premises within the meaning of [*United States v Matlock*, 415 US 164, 171, 172 n 7 (1974)]." *Fernandez v California*, 571 US ___, ___ n 1 (2014).

person who has equal possession or control of the premises searched may also consent to a search). "[P]olice officers' belief in a third party's ability to consent to a search must be reasonable under the circumstances; a good-faith belief is not the controlling criterion." *People v Goforth*, 222 Mich App 306, 312 (1997). Police need not "make a further inquiry regarding a third party's ability to validly consent to a search unless the circumstances are such as to cause a reasonable person to question the consenting party's power or control over the premises or property." *Id.* at 312.

In *Georgia v Randolph*, 547 US 103 (2006), the United States Supreme Court "recognized a narrow exception" to the rule of *Matlock*, 415 US 164, that "consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search[.]" *Fernandez*, 571 US at ___, ___. In *Randolph*, 547 US at 122-123, the Court held that a warrantless search of a shared dwelling, conducted pursuant to the consent of one co-occupant when a second co-occupant is present and expressly refuses to consent to the search, is unreasonable and invalid as to the co-occupant who refused consent. Stated another way, "[a] co-occupant . . . can invalidate the consent given by another occupant if he [or she] is present on the premises and expressly objects to the search." *City of Westland v Kodlowski*, 298 Mich App 647, 667 (2012), vacated in part and reversed in part on other grounds 495 Mich 871 (2013).

However, the holding of *Randolph*, 547 US 103, is "limited to situations in which the objecting occupant is physically present[,]" and it does not apply "if the objecting occupant is absent when another occupant consents." *Fernandez*, 571 US at ___, ___. Moreover, "an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason[,]" even if the absent occupant "objected to the search while he [or she] was still present." *Id.* at ___ (holding that "consent . . . provided by an abused woman well after [the petitioner] had been removed [by police officers] from the apartment they shared[]" was sufficient to justify a warrantless search of the apartment, even though the petitioner had "appeared at the door" and objected to the officers' entry before he was placed under arrest and taken to the police station).

The seizure of a wallet, keys, and a cell phone from the defendant's mother's apartment "fell outside the scope of [the mother's] consent[]" where "[t]he testimony establishe[d] that a reasonable person would have believed that the scope of the search pertained [only] to illegal drugs hidden in the apartment." *People v Mahdi*, ___ Mich App ___, ___ (2016).

"'[T]he scope of a search is generally defined by its expressed object[,]'" and the mother's "consent to search her apartment for the limited purpose of uncovering illegal drugs did not constitute consent to seize *any* item." *Id.* at ___, quoting *Dagwan*, 269 Mich App at 343 (internal quotation marks omitted).

"While a co-occupant may invalidate another co-occupant's consent in cases where the police are entering to search for evidence, a co-occupant's withdrawal of his [or her] consent to the presence of the police does not preclude officers from continuing to investigate cases of potential domestic violence." *Kodlowski*, 298 Mich App at 667-669 (holding that "[the] defendant's decision to revoke his consent [to search] did not render the officers' presence unlawful[,]" since "the officers were present to respond to a domestic dispute[]" and therefore "had an obligation to investigate potential domestic violence[]").

When a defendant is arrested and a cotenant consents to an officer's entry into the home the cotenant shares with the defendant, the defendant's invocation of his right to counsel and his right to remain silent did not constitute an objection to the officer's entry for purposes of suppressing incriminating evidence against the defendant observed by the officer while in the home. *People v Lapworth*, 273 Mich App 424, 425 (2006). According to the Court,

> "[E]ven if we were to regard an invocation of rights following *Miranda* warnings as a tacit objection to consent to search, a tacit objection is insufficient under *Randolph*[, 547 US 103].
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> "The officer's authority to enter the premises is not based on defendant's consent, but on his roommate's consent. And, under *Randolph*, that consent is sufficient authority unless defendant expressly objected, which he did not." *Lapworth*, 273 Mich App at 428.

Where the defendant was permitted to use a third-party's personal computer, which was located in a residence separate from the defendant's, the third-party's consent to search the computer was valid, even though the defendant's e-mail account was password protected. *Brown (Craig)*, 279 Mich App at 132-134.

Where the driver of a vehicle consents to its search following a valid traffic stop, a police officer's search of the passenger's backpack was found to be valid. *People v Labelle*, 478 Mich 891 (2007). Because the stop of the vehicle was legal, the passenger lacked standing to challenge the search of the vehicle. *Id.* at 892. Additionally, "the defendant did not assert a possessory or proprietary interest in the backpack before it was searched but, rather, left the backpack in a car she knew was about to be searched." *Id.*

- **Consent obtained by reference to search warrant:**

There is no consent if police say or suggest that they have a search warrant if they do not, in fact, have one.

> "In *Bumper v North Carolina* [, 391 US 543 (1968)], the United States Supreme Court made clear that where a person 'permits' a search in the face of an assertion by the police that they have a warrant, there is no consent that can support the validity of the search.
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> * * *
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> "[T]he defendant testified that [the police officer] displayed a search warrant form in his folder when he confronted the defendant. The defendant also testified that he believed the officers had a warrant and allowed them to enter for that reason. The circuit judge ultimately found that testimony believable, relying particularly on the specificity of the defendant's testimony by contrast to that of the officers. Such factual determinations by trial judges are to be sustained unless clearly erroneous." *People v Farrow*, 461 Mich 202, 207-208 (1999).

7. Special Needs, Inspections, Border Searches, and Regulatory Searches

Certain searches do not have to be accompanied by a warrant so long as the need to search outweighs the invasion that the search entails. A warrant is not required under the governmental "special needs" or regulatory exception to the warrant requirement as long as the search satisfies reasonable legislative or administrative standards. *People v Chowdhury*, 285 Mich App 509, 517, 522 (2009) (ordinance permitting police to conduct warrantless preliminary breath tests (PBTs) on minors found unconstitutional; the special needs exception was

inapplicable because the police were merely attempting to detect evidence of ordinary criminal wrongdoing). Likewise, inspections, border searches, and regulatory searches must be based upon reasonable standards. See *United States v Brignoni-Ponce*, 422 US 873, 884 (1975) ("[e]xcept at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country"). See also *Camara v Municipal Court*, 387 US 523, 528-539 (1967) (administrative searches by municipal health and safety inspectors constitute significant intrusions upon protected Fourth Amendment interests, and lack traditional safeguards when conducted without warrant procedure; "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant"), and *People v Beydoun*, 283 Mich App 314, 316, 323-324 (2009) (exemption from the warrant requirement applies to properly conducted administrative inspections of pervasively regulated industries, e.g., tobacco products).

8. Objects in Plain View

To prevent generalized searches, the law prohibits police officers from seizing items not listed in a search warrant unless an exception to the warrant requirement exists. One such exception is the plain view doctrine. In *Minnesota v Dickerson*, 508 US 366, 375 (1993), the United States Supreme Court defined that doctrine as follows:

> "[I]f police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officer has a lawful right of access to the object, they may seize it without a warrant. If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—i.e., if 'its incriminating character [is not] "immediately apparent,"'—the plain-view doctrine cannot justify its seizure." (internal citations omitted.)

See *Horton (Terry) v California*, 496 US 128, 137 (1990) (in addition to requirements that the item be in plain view and its character be immediately apparent, the officer must also be lawfully located in a place from which the object can be plainly seen, and he or she must have a lawful right of access (e.g.,

officer cannot be trespassing) to the object itself); *People v Galloway*, 259 Mich App 634, 638-642 (2003) (marijuana plants growing in a shed behind the defendant's house were inadmissible at trial because although the plants were in plain view from the officer's vantage point in the defendant's backyard, the officer's entry into the backyard was unlawful).

In *Arizona v Hicks (James)*, 480 US 321, 325-329 (1987), the United States Supreme Court addressed a situation in which the plain view doctrine did not justify an object's seizure. Specifically, the Court held invalid police officers' seizure of stolen stereo equipment while executing a search warrant for other evidence. *Id*. at 325-329. Although the police were lawfully on the premises, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment in order to read its serial numbers. *Id*. The Court reasoned that the subsequent seizure of the equipment could not be justified by the plain view doctrine because the incriminating character of the stereo equipment was not immediately apparent. *Id*. Rather, the officers had to engage in further investigation to determine if possession of the equipment was unlawful. *Id*. See also *People v Mahdi*, ___ Mich App ___, ___ (2016) (police officers conducting a warrantless search of the defendant's mother's apartment "were not entitled to seize [a] wallet, keys, and [a] cell phone under the plain view exception to the warrant requirement because the incriminating character of the items seized was not immediately apparent[]" and "further investigation was necessary in order to establish a connection between the items and the suspected criminal activity[;]" "the officers were required to conduct further investigation in order to determine that" the wallet and keys were linked to the defendant and were incriminating, and one of the officers "conducted further investigation of the phone by searching through text messages, and even responding to text messages, in order to locate evidence connecting [the] defendant with drug sales[]"). Cf. *People v Fletcher*, 260 Mich App 531, 550-551 (2004) (documents not listed in a search warrant were properly seized because their incriminating nature was immediately apparent to the officer—in a homicide investigation, the documents provided evidence of the defendant's illicit affair with a woman who was not the defendant's wife).

The Michigan Supreme Court has similarly defined the plain view doctrine. In *People v Secrest*, 413 Mich 521, 523 (1982), police officers executing a search warrant for weapons in the defendant's apartment seized photographs of the defendant which were used against him at his trial. In ruling that the

plain view doctrine did not authorize seizure of the photographs, the Court stated:

> "There must be something incriminating about the evidence the police inadvertently come upon; indeed, some courts have added the incriminating nature must be 'immediately apparent'. . . .
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> ". . . [W]e fear we would come too quickly to what Justice Stewart described [in his concurring opinion in *Stanley v Georgia*, 394 US 557, 569 (1969)] as 'the general searches and unrestrained seizures that had been a hated hallmark of colonial rule'. The warrant in this case directed the officers to search for a weapon and for ammunition. Either can be quite small. If the police can, while scouring a house look for these objects, seize as being in plain view items which only later serve to connect the defendant to a crime, then they are effectively operating under a general warrant." *Secrest*, 413 Mich at 528-529.

9. Protective Sweep

When an arrestee is taken into physical custody pursuant to a lawful arrest, it is reasonable for the police to search him or her for "weapons, instruments of escape, and evidence of crime." *People v Houstina*, 216 Mich App 70, 75 (1996). The police may also search the area within the arrestee's immediate reach. *Id.* at 75.

The area within the arrestee's immediate control is defined as "the area from which the arrestee might gain possession of a weapon or destructible evidence." *People v Jackson (Karl)*, 123 Mich App 423, 426 (1983), citing *Chimel v California*, 395 US 752, 763 (1969). However, "the scope of the search must be strictly tied to, and justified by, the circumstances that rendered its initiation permissible." *Houstina*, 216 Mich App at 75.

10. "Open Fields"

A search of an open field need not be accompanied by a warrant.

"[A]n open field is neither a 'house' nor an 'effect,' and, therefore, 'the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.' . . . '[T]he term "open fields" may include any unoccupied or undeveloped area outside of

the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech.'" *United States v Dunn*, 480 US 294, 303-304 (1987), quoting *Oliver (Ray) v United States*, 466 US 170, 177, 180 n 11 (1984).

Curtilage questions should be resolved by employing the *Dunn* factors: (1) "the proximity of the area claimed to be curtilage to the home"; (2) "whether the area is included within an enclosure surrounding the home"; (3) "the nature of the uses to which the area is put"; and (4) "the steps taken by the resident to protect the area from observation by people passing by." *Dunn*, 480 US at 301.

11. Knock and Talk

Inculpatory evidence obtained after police officers refused a defendant's request that they leave the defendant's home is inadmissible as fruit of the poisonous tree. *People v Bolduc*, 263 Mich App 430, 443-445 (2004). In *Bolduc*, 263 Mich App at 433, the defendant opened his door to two law enforcement officers and allowed them to enter his home. The defendant denied possessing marijuana, refused to consent to a search of his home, and asked the officers to leave. *Id*. at 434. Instead of leaving, however, one of the officers began questioning the defendant about a bulge in the defendant's pocket. *Id*. The defendant explained that the bulge was $6,500 from a sale he made earlier that day at the defendant's used car lot. *Id*. The defendant offered to confirm the source of the money by taking the officers to the car lot to verify the sale. *Id*. The defendant was unable to prove that the sum of money in his pocket was the result of a sales transaction. *Id*. The defendant eventually admitted to possessing marijuana and took the officers back to his house where the defendant turned over nine bags of marijuana to the officers. *Id*.

Under these circumstances, the Court of Appeals ruled that the police officers exceeded the constitutional limits of a properly conducted "knock and talk" interaction with the defendant and, in doing so, created a coercive environment in which the defendant's subsequent cooperation could not be considered voluntary. *Bolduc*, 263 Mich App at 441-443. Applying the standard test to the facts in *Bolduc*, the Court concluded that under the totality of circumstances—the knock and talk encounter occurred inside the defendant's home where no real retreat was possible beyond the verbal and physical indication given by the defendant that he wished the officers to leave—a reasonable person would not have felt free to ignore the police

officers' presence and go about his business. *Id.* at 443. According to the Court:

> "By failing to leave [the] defendant's home when requested to do so, the police officers suggested that they were in control of the situation and would not accept [the] defendant's exercise of the right to preclude them from further activity at the home.
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> * * *
>
> Unlike in a street encounter, a person such as defendant does not have the option of testing whether he is actually confined by the police by simply walking away. Where was [the] defendant to go to avoid the intrusion of the police upon his own property? At that point, [the] defendant had done everything that was reasonably possible for him to convey the message that the police were no longer welcome in his home." *Id.* at 441-443.

Although the inculpatory evidence was obtained after the coercive knock and talk incident inside the defendant's home, the coercion tainted any evidence obtained as a result of the officers' initial visit to the defendant's home. *Bolduc*, 263 Mich App at 444. The incriminating evidence obtained during the defendant's later "cooperation" with the officers "ensued from the police officers' improper conduct in failing to leave when requested [and was] properly suppressed as the fruit of the illegal seizure . . . ." *Id.* at 444. The Court reiterated the constitutional considerations present in such an encounter:

> "In sum, while the police are free to employ the knock and talk procedure, [*People v*] *Frohriep*, [247 Mich App 692 (2001)], they have no right to remain in a home without consent, absent some other particularized legal justification. A person is seized for purposes of the Fourth Amendment when the police fail to promptly leave the person's house following the person's request that they do so, absent a legal basis for the police to remain without the person's consent." *Bolduc*, 263 Mich App at 444-445.

Where police officers knocked on a defendant's door and asked him repeatedly to step outside but did not threaten to compel his exit, did not touch him until after he stepped out of the house, and did not draw their weapons or otherwise make a

show of force, the officers did not constructively enter the defendant's home in violation of his Fourth Amendment right to privacy. *People v Gillam (Willie)*, 479 Mich 253, 255-256, 266 (2007). Consequently, when the police arrested the defendant and entered his home, at his request, to retrieve his coat and shoes, evidence discovered in plain view was admissible against the defendant at trial. *Id.* at 257-259, 266.

In reaching its conclusion, the Michigan Supreme Court reviewed cases from the Third, Sixth, Ninth, and Tenth federal circuit courts of appeals,[21] all of which are courts that recognize the doctrine of constructive entry (where a suspect leaves his or her home not because of law enforcement's unlawful physical entry into the home but as a result of coercive police conduct). *Gillam*, 479 Mich at 261. In a Sixth Circuit case in which the defendant established a case of constructive entry, the circumstances involved "siege tactics" like "encircling of the suspect's house with nine officers and several patrol cars, the strategic blocking of the suspect's car with one of the patrol cars, and the use of floodlights and a bullhorn in the dark of night to summon the suspect from the home . . . ." *Id.* at 262, citing *United States v Morgan*, 743 F2d 1158, 1161, 1164 (CA 6, 1984). In contrast to *Morgan*, the *Gillam* Court noted that "the actions of the officers in the instant case, according to defendant himself, merely involved knocking on his front door and asking him to step outside." *Gillam*, 479 Mich at 262.

Also of note, according to the *Gillam* Court, was the defendant's initial refusal to leave his home because he was tethered and prohibited from leaving his home. *Gillam*, 479 Mich at 256. With regard to the tether, the Court explained that although the defendant's tether complicated a review of the situation, "[the tether] alone d[id] not lead to a presumption that defendant's will was overborne by a show of police force." *Id.* at 266. Instead, the Court reasoned that "armed with a court order [to remain in the apartment], defendant should have felt reasonably confident in refusing police requests that he leave the apartment." *Id.*

After its review of the federal case law, the Michigan Supreme Court declined to recognize the doctrine of constructive entry and stated that "even if [it] recognize[d] the [] doctrine, [the] defendant in this case would fail to establish that police

[21] *Sharrar v Felsing*, 128 F3d 810, 819 (CA 3, 1997); *United States v Morgan*, 743 F2d 1158, 1166 (CA 6, 1984); *United States v Al-Azzawy*, 784 F2d 890, 893 (CA 9, 1985); *United States v Maez*, 872 F2d 1444, 1450 (CA 10, 1989). The United States Supreme Court has not yet addressed the issue. *Gillam*, 479 Mich at 261.

constructively entered his home in violation of his Fourth Amendment right to privacy." *Gillam*, 479 Mich at 266. According to the Court, the defendant's arrest was legal and the trial court wrongly suppressed the evidence discovered in the defendant's home. *Id.* at 266.

Where police officers were unlawfully in a position in the defendant's backyard because of a misuse of the "knock and talk" tactic, the marijuana plants growing in a shed behind the defendant's house were inadmissible because the vantage point from which the officers saw the plants was unlawfully obtained. *Galloway*, 259 Mich App at 639-642.

9.6 Search and Seizure Issues—Was There Probable Cause?

In making a probable cause determination, the issuing magistrate must examine the totality of the circumstances faced by the officer at the time the search was made. *Illinois v Gates*, 462 US 213, 238-239 (1983). The magistrate must make a practical, commonsense decision whether, given all the circumstances set out in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* at 238-239. The reviewing court's duty is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id.*

9.7 Search and Seizure Issues—Is Exclusion the Remedy if a Violation is Found?

"In the 20th century, . . . the exclusionary rule—the rule that often requires trial courts to exclude unlawfully seized evidence in a criminal trial—became the principal judicial remedy to deter Fourth Amendment violations." *Utah v Strieff*, 579 US ___, ___ (2016), citing *Mapp v Ohio*, 367 US 643, 655 (1961). "[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and[] . . . 'evidence later discovered and found to be derivative of an illegality,' the so-called '"fruit of the poisonous tree."'" *Strieff*, 579 US at ___ (citation omitted).

However, a Fourth Amendment violation does not necessarily require the exclusion of evidence obtained as a result of the violation. *People v Manning*, 243 Mich App 615, 637 (2000). "[T]he significant costs of [the exclusionary] rule have led [the United States Supreme Court] to deem it 'applicable only . . . where its deterrence benefits outweigh its substantial social costs.'" *Strieff*, 579 US at ___, quoting *Hudson v Michigan*, 547 US 586, 591 (2006) (alterations in original). Accordingly, there are exceptions

to the exclusionary rule and situations in which the exclusionary rule does not apply. *People v Hellstrom*, 264 Mich App 187, 193-194 n 3 (2004).

A. Exceptions Involving the Causal Relationship Between the Unconstitutional Act and the Discovery of the Evidence

"Three of [the] exceptions [to the exclusionary rule] involve the causal relationship between the unconstitutional act and the discovery of evidence." *Strieff*, 579 US at ___. These exceptions are the inevitable discovery doctrine, the independent source doctrine, and the attenuation doctrine. *Id*. at ___ (citations omitted).

1. Inevitable Discovery Doctrine

"[T]he inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source." *Strieff*, 579 US at ___, citing *Nix v Williams (Robert)*, 467 US 431, 443-444 (1984). The inevitable discovery exception permits the admission of tainted evidence when the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been revealed in the absence of police misconduct. *People v Stevens (Eugene)*, 460 Mich 626, 637 (1999). Whether the inevitable discovery doctrine applies requires an analysis of three basic questions:

- Are the legal means of discovery truly independent of the unlawful conduct that first led to the evidence's discovery?

- Are both the use of the legal means and the discovery of the evidence at issue by that means truly inevitable?

- Does application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken Fourth Amendment protection? *Stevens (Eugene)*, 460 Mich at 638, citing *United States v Silvestri*, 787 F2d 736, 744 (CA 1, 1986).

In *Stevens (Eugene)*, 460 Mich at 642-643, 647, the Supreme Court held that the inevitable discovery exception to the exclusionary rule was applicable where "the police were acting under a valid search warrant and within the scope of that search warrant," and "[e]ven though the method of entry into the dwelling violated the knock-and-announce principles." The Court also noted that "[t]here are both state and federal

sanctions for such violations that serve as deterrents for police misconduct that are less severe than the exclusion of the evidence," and that "exclusion of the evidence w[ould] put the prosecution in a worse position than if the police misconduct had not occurred." *Id.* at 647.

See also *People v Vasquez (After Remand)*, 461 Mich 235, 241-242 (1999) (evidence was admissible pursuant to the inevitable discovery doctrine because it would have been discovered during the execution of a valid search warrant without regard to whether police violated the knock and announce statute); *People v Mahdi*, ___ Mich App ___, ___ (2016) ("the inevitable discovery doctrine [did] not apply to the seizure of [a] cell phone, wallet, and set of keys[]" from the defendant's mother's apartment where, "[e]ven assuming that the officers had probable cause to obtain a warrant for [these items], the officers were not in the process of obtaining a warrant when they seized the items[]").

The inevitable discovery doctrine cannot be used as an exception to the warrant requirement merely because probable cause existed to obtain a search warrant even though one was not obtained before the search took place. *People v Hyde*, 285 Mich App 428, 442, 445 (2009). In *Hyde*, 285 Mich App at 433, the defendant gave a blood sample following a traffic stop, and the blood test revealed that his blood alcohol content exceeded the legal limit. The defendant moved to suppress his blood sample and the blood test results on the basis that his consent was coerced because the police incorrectly informed him that he was required to provide his blood under the informed consent statute, MCL 257.625c, even though he fell under an exception and was considered not to have given consent to a blood test because he had diabetes. *Hyde*, 285 Mich App at 435, 440-441. The trial court denied the defendant's motion to suppress, holding that his bodily alcohol content would have been inevitably discovered by the police had they obtained a warrant, or by the defendant had he consented to a breath or urine test. *Id.* at 435, 442. The Court of Appeals rejected the trial court's rationale that the evidence would have been inevitably discovered through a search warrant, holding that "[t]o allow a warrantless search merely because probable cause exists would allow the inevitable discovery doctrine to act as a warrant exception that engulfs the warrant requirement. Even in the context of a good-faith error, we reject the notion that a post hoc probable cause analysis can preclude the constitutional requirement that a neutral and detached magistrate issue the warrant. Such an approach diminishes the

Fourth Amendment and is an incentive for improper or careless police practices." *Id*. at 445-446.

2. Independent Source Doctrine

"[T]he independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Strieff*, 579 US at ___, citing *Murray v United States*, 487 US 533, 537 (1988). See also *Nix*, 467 US at 443 ("[t]he independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation[]").

"The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Nix*, 467 US at 443 (internal citations omitted).

Evidence seized from a dwelling pursuant to a valid search warrant issued after an officer's unlawful entry into that dwelling is admissible when probable cause for the warrant's issuance is based on information independent of the illegal entry. *People v Smith (Steven)*, 191 Mich App 644, 646 (1991). According to the United States Supreme Court:

"[A]n illegal entry by police officers upon private premises d[oes] not require suppression of evidence subsequently discovered at those premises pursuant to a search warrant that had been obtained on the basis of information wholly unconnected with the initial entry." *Segura v United States*, 468 US 796, 805 (1984).

3. Attenuation Doctrine

"In some cases, . . . the link between the unconstitutional [police] conduct and the discovery of the evidence is too attenuated to justify suppression." *Strieff*, 579 US at ___. "Evidence is admissible [under the attenuation doctrine] when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the

constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Id.* at ___, quoting *Hudson*, 547 US at 593.

In determining whether there "was a sufficient intervening event to break the causal chain between the" unconstitutional police conduct and the discovery of the evidence, "[t]he three factors articulated in *Brown v Illinois*, 422 US 590 (1975), guide [the] analysis." *Strieff*, 579 US at ___.

> "First, [the court should] look to the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. . . . Second, [the court should] consider 'the presence of intervening circumstances.' . . . Third, and 'particularly' significant, [the court should] examine 'the purpose and flagrancy of the official misconduct.'" *Strieff*, 579 US at ___, quoting *Brown*, 422 US at 603-604; see also *People v Reese (Richard)*, 281 Mich App 290, 299 (2008).

"The first factor, temporal proximity[,] . . . [does not] favor[] attenuation unless 'substantial time' elapses between an unlawful act and when the evidence is obtained." *Strieff*, 579 US at ___ (citation omitted). The third factor, on the other hand, "favor[s] exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Id.* at ___.

"The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions[, a]nd . . . [application of the doctrine] is not limited to independent acts by the defendant." *Strieff*, 579 US at ___ (rejecting the Utah Supreme Court's conclusion that the doctrine applied "only 'to circumstances involving an independent act of a defendant's "free will" in confessing to a crime or consenting to a search[,]'" and holding that the doctrine was applicable in a case in which "the intervening circumstance that the State relie[d] on [was] the discovery of a valid, pre-existing, and untainted arrest warrant[]").

In *Strieff*, 579 US at ___, the United States Supreme Court held that the attenuation doctrine applied "when an officer [made] an unconstitutional investigatory stop; learn[ed] during that stop that the suspect [was] subject to a valid arrest warrant; and proceed[ed] to arrest the suspect and seize incriminating

evidence during a search incident to that arrest." Applying the three factors set out in *Brown*, 422 US at 603-604, the Court explained:

> "[T]he evidence discovered on [the defendant's] person was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to [the defendant's] arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for [the defendant's] arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling [the officer] to arrest [the defendant]. And, it is especially significant that there is no evidence that [the officer's] illegal stop reflected flagrantly unlawful police misconduct." *Strieff*, 579 US at ___ (noting that the warrant "was entirely unconnected with the stop[,]" that the officer "was at most negligent[]" in stopping the defendant, and that "there [was] no indication that [the] unlawful stop was part of any systemic or recurrent police misconduct[]").

In a case that predated *Strieff*, 579 US ___, the Michigan Court of Appeals similarly held that, barring any egregious conduct on the part of the officers making the arrest, "discovery of an outstanding arrest warrant can dissipate or attenuate the taint of an initial illegal stop or arrest." *Reese (Richard)*, 281 Mich App at 303, 305. The Court noted that "whether the discovery of a preexisting warrant dissipates or attenuates the illegality of the initial stop or arrest will usually depend on two main points: '(1) what evidence did the police obtain from the initial illegal stop *before* they discovered the outstanding arrest warrant, and (2) whether that initial illegal stop was a manifestation of flagrant police misconduct—i.e., conduct that was obviously illegal, or that was particularly egregious, or that was done for the purpose of abridging the defendant's rights.'" *Id*. at 303-304, quoting *McBath v Alaska*, 108 P3d 241, 248 (Alas, 2005).

"Purposeful and flagrant misconduct exists where: '(1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his [or her] conduct was likely unconstitutional' but engaged in it anyway, or where '(2) the misconduct was investigatory in design and purpose and

executed "in the hope that something might turn up."'" *Reese (Richard)*, 281 Mich App at 304, quoting *United States v Simpson*, 439 F3d 490, 496 (CA 8, 2006), quoting *Brown*, 422 US at 605. "But where the police only discover the defendant's identity as a result of the initial illegal stop or arrest, and the police misconduct was not particularly egregious or the result of bad faith, the discovery of a preexisting arrest warrant will constitute an intervening circumstance that dissipates the taint of the initial illegal stop or arrest." *Reese (Richard)*, 281 Mich App at 304. Accordingly, "evidence that is discovered in a subsequent search incident to the lawful arrest need not be suppressed." *Id.*

In *Reese (Richard)*, 281 Mich App at 293, the defendant was illegally arrested for loitering. The police subsequently discovered that the defendant had an outstanding misdemeanor warrant and conducted an inventory search of his car, which yielded drugs. *Id.* at 293. "Because the officers' initial misconduct—the arrest for loitering—was not particularly egregious or motivated by bad faith and only yielded [the defendant's] identity, the subsequent discovery of the preexisting arrest warrant was not tainted by the illegality of that arrest. As such, the discovery of the preexisting warrant constituted an intervening circumstance that broke the causal connection between the illegal arrest and the discovery of the [drug] evidence. Because the search was independently justified as a search incident to the lawful arrest on the warrant, [the defendant] was not entitled to have the [drug] evidence suppressed." *Id.* at 305.

B. Good Faith Doctrine

"When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' [i.e., 'good faith'] on the subsequently invalidated search warrant." *Herring v United States*, 555 US 135, 142 (2009), quoting *United States v Leon*, 468 US 897, 922 n 23 (1984). The "'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Herring*, 555 US at 145, quoting *Leon*, 468 US at 922 n 23.

Michigan has adopted the good faith exception to the exclusionary rule. *People v Goldston*, 470 Mich 523, 526 (2004). "The primary benefit [and purpose] of the exclusionary rule is that it deters official misconduct by removing incentives to engage in unreasonable searches and seizures." *Id.* at 529, citing *Leon*, 468 US at 906.

In *Goldston*, 470 Mich at 526, the police observed the defendant dressed as a fireman collecting money on a street corner, allegedly to donate to firefighters in New York following the September 11, 2001, terrorist attacks. The police confiscated the donations from the defendant and obtained a search warrant for his house that authorized, among other things, the seizure of any police and fire equipment. *Id.* at 526-527. The search yielded additional firefighter paraphernalia, a firearm, and drugs. *Id*. at 527. The trial court granted the defendant's motion to suppress the evidence on the basis that the affidavit did not establish probable cause for the issuance of the warrant because the search warrant affidavit did not connect the place to be searched with the defendant, and did not state the date that the police observed the defendant soliciting money. *Id*. The Supreme Court applied the good faith exception to the exclusionary rule and concluded that although the warrant was later determined to be deficient, excluding the evidence obtained in good faith reliance on the warrant would not further the purpose of the exclusionary rule. *Id*. at 542-543.

In *Herring*, 555 US 135, the United States Supreme Court reviewed several cases in which it held that the exclusionary rule did not apply under the circumstances present in those cases:

- "[T]he exclusionary rule did not apply when a warrant was invalid because a judge forgot to make 'clerical corrections' to it." *Herring*, 555 US at 142, quoting *Massachusetts v Sheppard (Osborne)*, 468 US 981, 991 (1984).

- The exclusionary rule did not apply "to warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional." *Herring*, 555 US at 142, citing *Illinois v Krull*, 480 US 340, 349-350 (1987).

- The exclusionary rule did not apply "to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding." *Herring*, 555 US at 142, citing *Arizona v Evans*, 514 US 1 (1995).

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 US at 144. In *Herring*, 555 US at 135, the police arrested the defendant on a warrant listed in the database of a neighboring county. A search incident to arrest yielded drugs and a gun. *Id*. It was subsequently discovered that the warrant had been recalled but that the recall information was never entered into the database. *Id*. The defendant moved to suppress the evidence on the basis that his initial arrest was illegal. *Id*. The United States Supreme Court held that the exclusionary rule was not applicable to

bar the admission of the evidence, because the police error arose "from nonrecurring and attenuated negligence . . . far removed from the core concerns that led [the Court] to adopt the [exclusionary] rule in the first place." *Id.* at 144.

"[E]ven if a constitutional violation by [police] officers had occurred on the basis of a lack of criteria sufficient to justify invocation of the community-caretaker exception[to the warrant requirement]," the exclusion of marijuana evidence discovered after a warrantless entry into the defendant's home was inappropriate where "the police, having at least some indicia of need, enter[ed] [the] home in a good-faith effort to check on the welfare of a citizen[;]" suppression of the evidence, rather than deterring police misconduct, "would only deprive citizens of helpful and beneficial police action." *People v Hill (Eric)*, 299 Mich App 402, 411, 414 (2013). See also *People v Lemons (Cory)*, 299 Mich App 541, 549-550 (2013) ("even if [police] officers' behavior fell short of satisfying the criteria set forth in the emergency-aid exception," the exclusionary rule did not apply to drug evidence that was discovered following their warrantless entry into the defendant's home; the officers, who were responding to a report that the front door of the home was open and blowing in the wind, "were acting in good faith" when they "entered the residence because they believed people could be inside and were in need of immediate aid[]").

"[A]n officer's good faith reliance on case law that is later overturned may form a proper basis to avoid the operation of the exclusionary rule." *People v Short*, 289 Mich App 538, 540 (2010) (trial court correctly denied the defendant's motion to suppress evidence of weapons found in his car following a search incident to arrest, where even though the search was unconstitutional under the retroactive application of a new United States Supreme Court decision,[22] the police officers conducting the search acted reasonably and in good faith based on a long-standing line of case law under which the search was constitutional[23]).

"[T]he good-faith exception to an improperly issued search warrant [may] apply [even when] the police officer who supplied the underlying affidavit for the search warrant also executed the warrant." *People v Adams (Shawn)*, 485 Mich 1039 (2010). In *Adams (Shawn)*, 485 Mich at 1039, there was "no evidence that the officer provided an affidavit so lacking in indicia of probable cause as to render his subsequent official belief in its existence entirely unreasonable." The Supreme Court held that because "[t]he evidence show[ed] that the officer executed the warrant with a

[22] *Arizona v Gant*, 556 US 332 (2009).

[23] See *New York v Belton*, 453 US 454 (1981), and its progeny.

good-faith belief that it was properly issued[,]" the Court of Appeals erred in relying on *United States v Leon*, 468 US 897 (1984), to rule that the good-faith exception was inapplicable. *Adams (Shawn)*, 485 Mich at 1039.

"The mere fact of an illegal arrest does not per se require the suppression of evidence." *People v Corr*, 287 Mich App 499, 508 (2010). "'It is only when an "unlawful detention has been employed as a tool to procure *any* type of evidence from a detainee" that the evidence is suppressed under the exclusionary rule.'" *Id.* at 508-509, quoting *People v Kelly*, 231 Mich App 627, 634 (1998), quoting *People v Mallory*, 421 Mich 229, 240-241, 243 n 8 (1984). In *Corr*, 287 Mich App at 509, "the officers detained [the] defendant to maintain control of the scene and protect their safety as well as [the] defendant's safety while they finished performing their duties at the scene." "[T]here [wa]s no indication . . . that the officers exploited the detention to obtain evidence, acted in bad faith, or that the detention was employed as a tool to procure evidence from [the] defendant." *Id.* Additionally, "the evidence at issue (the officers' testimony) was obtained when [the] defendant, subsequent to the detention, illegally assaulted, battered, resisted, or obstructed the officers' performance of their duties." *Id.* The Court specifically declined to adopt a rule that "permits a suspect to avoid prosecution for crimes committed when illegally detained[.]" *Id.*

"[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." *Davis (Willie) v United States*, 564 US 229, 249-250 (2011). In *Davis*, 564 US at 235-236, officers conducted a search that was legal under then-current case law, and before appeal, the United States Supreme Court distinguished that precedent, making the *Davis* search unlawful. The *Davis* Court stated that the exclusionary rule is not meant to deter a police officer from acting in good faith or from following existing law; thus, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id.* at 241.[24] See also *People v Mungo (On Second Remand)*, 295 Mich App 537, 552-553, 556 (2012) (applying *Davis*, 564 US 229, and holding that because police acted in good-faith reliance on then-current United States Supreme Court precedent in conducting a search of the defendant's car incident to a passenger's arrest, the exclusionary rule did not apply to evidence discovered in that search, even though the search was rendered unconstitutional under a subsequently-issued United States Supreme Court decision).

[24] See Section 3.20(B)(5) for additional discussion of *Davis*, 564 US 229.

C. Statutory Violations

The plain language used in a statute or court rule determines whether the exclusion of evidence is the intended remedy for a violation of that statute or court rule. *People v Hawkins*, 468 Mich 488, 507 (2003). See also *People v Anstey*, 476 Mich 436, 448 (2006), where the Michigan Supreme Court ruled that suppression of the evidence was not the appropriate remedy for a statutory violation (MCL 257.625a(6)(d)) because "there [wa]s no indication in the statute that the Legislature intended such a remedy and no constitutional rights were violated." According to the Court, when suppression of the evidence is not authorized for a statutory violation, "the court may instruct the jury that the defendant's statutory right was violated and [] the jury may decide what significance to attach to th[at] fact."

The exclusionary rule does not apply to violations of Michigan's knock and announce statute. *Hudson (Booker) v Michigan*, 547 US 586, 599-600 (2006). MCL 780.656, Michigan's knock and announce statute, provides:

> "The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant."

Because violation of the knock and announce statute is unrelated to the seizure of a person's property pursuant to a valid search warrant, the exclusionary rule is not the proper remedy for the statutory violation. *Hudson (Booker)*, 547 US at 594. When a statute does not authorize exclusion of the evidence obtained as a result of a statutory violation, a jury instruction regarding the statutory violation may be an appropriate remedy. *Anstey*, 476 Mich at 448.

Generally, unless there is "a causal relationship between the violation and the seizing of the evidence," suppression of the evidence is not required. *Vasquez*, 461 Mich at 241.

9.8 Search and Seizure Issues—Standard of Review

A trial court's findings of fact regarding a motion to suppress are reviewed for clear error, and questions of law relevant to the issue of suppression are reviewed de novo. *People v Sobczak-Obetts*, 463 Mich 687, 694 (2001).

The application of the exclusionary rule to a Fourth Amendment violation is a question of law that is reviewed de novo. *People v Custer*, 465 Mich 319, 326 (2001).

In warrantless search and seizure cases, appellate courts should apply a de novo standard of judicial review concerning reasonable suspicion to stop and probable cause to search. *Ornelas v United States*, 517 US 690, 699 (1996).

Chapter 10: Trial

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10.1 Jury Trial or Jury Waiver

A. Right to a Jury Trial

In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury. MCL 763.2; US Const, Am VI; Const 1963, art 1, § 14; Const 1963, art 1, § 20. The right to a public trial is not absolute, however, and "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller v Georgia*, 467 US 39, 45 (1984). "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48. "A trial court, in its discretion and under extraordinary circumstances, may order the exclusion of the public from a criminal trial for a limited purpose and duration where the specific circumstances may be seen to endanger the due process right to a fair trial." 1B Gillespie Michigan Criminal Law & Procedure, § 20:143. See, e.g., *People v Kline*, 197 Mich App 165, 169 (1992) ("[t]he age of an alleged victim, the nature of an alleged offense, and the potential for harm to the victim are appropriate factors to consider in weighing an accused's right to a public trial against the government's interest in protecting a victim from undue harm").

"Issues of fact shall be tried by a jury drawn, returned, examined on voir dire, and empaneled in the manner provided by law for the trial of issues of fact in civil cases." MCL 768.8.

B. Waiver of a Jury Trial

"The accused may waive any trial by jury . . . ." MCL 768.8. A defendant's waiver of the right to a jury trial requires the consent of the prosecutor and the court's approval. MCL 763.3; MCR 6.401; MCR 6.402. Before accepting a defendant's waiver, the defendant must have been arraigned on the information (or have waived arraignment), properly advised of the right to a jury trial, and offered the opportunity to consult with an attorney. MCR 6.402(A); MCR 6.402(B). In a court where arraignments have been eliminated under MCR 6.113(E),[1] the court may not accept a defendant's waiver of trial by jury until the defendant has been provided with a copy of the information[2] and offered an opportunity to consult with an

[1] A circuit court may eliminate arraignments for defendants represented by counsel, subject to the requirements in MCR 6.113(E).

attorney. MCR 6.402(A). See SCAO Model Local Administrative Order 26—Elimination of Circuit Court Arraignments.[3]

Committee Tip:

Before proceeding to trial (or before taking a plea), it is imperative to confirm, on the record, that the defendant has been given a copy of the information.

MCR 6.402(B) requires the court to make a verbatim record of the waiver proceeding. Before accepting a waiver of the right to a jury trial, the court must:

- Advise the defendant of his or her constitutional right to a jury trial.
- Determine whether the defendant has had an opportunity to consult with an attorney.
- Address the defendant personally to determine whether the defendant understands his or her right to a jury trial and is voluntarily giving up that right and opting to be tried by the court.

Compliance with the procedures set out in MCR 6.402(B) creates a presumption that the waiver was knowing, voluntary, and intelligent. *People v Mosly*, 259 Mich App 90, 96 (2003).

MCL 763.3(1) states that, except in cases of minor offenses,[4] a defendant's waiver of a jury trial and his or her election to be tried by the court *must be in writing*, signed by the defendant, filed in the case, and made part of the record. Here is an example of a written waiver:

"I, [name of defendant], defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending.

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[2] Note that a defendant in a court in which arraignment has been eliminated under MCR 6.113(E) must also, within 21 days after the filing of the information, be provided with any notice of intent to seek an enhanced sentence under MCL 769.13. MCR 6.112(F); MCR 6.113(E).

[3] Available at http://courts.mi.gov/Administration/SCAO/Resources/LAOs/LAO26-model.rtf.

[4] A "minor offense" is defined in the Code of Criminal Procedure as "a misdemeanor or ordinance violation for which the maximum permissible imprisonment does not exceed 92 days and the maximum permissible fine does not exceed $1,000.00." MCL 761.1(k).

I fully understand that under the laws of this state I have a constitutional right to a trial by jury." MCL 763.3(1).

MCR 6.402, the court rule governing a defendant's waiver of a jury trial, *does not require the defendant to sign a written waiver form*. "The waiver procedure set forth in [MCR 6.402](B) differs from [MCL 763.3] . . . because it eliminates the written waiver requirement and replaces it with an oral waiver procedure consistent with the waiver procedure applicable at plea proceedings." 1989 Staff Comment to MCR 6.402.

Because "[t]he statutory procedure is superseded by the court rule procedure[,]" a defendant does not have to sign a written waiver form to effect a valid waiver of his or her right to a jury trial. 1989 Staff Comment to MCR 6.402. See MCR 6.001(E) ("[t]he rules in this chapter supersede . . . any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter").

However, in the absence of a written waiver form, the court is required to make a verbatim record of the waiver proceeding showing that the defendant knew of the right, the defendant's waiver of the right was voluntary, and the defendant was offered an opportunity to consult with counsel. MCR 6.402(A); MCR 6.402(B). Where defense counsel signed a written waiver form on the defendant's behalf, the defendant objected to the fact that he had waived his right to a jury trial, and no record evidence existed that the defendant was fully informed about his right to a jury trial and voluntarily waived that right, the Court concluded that the defendant did not validly waive his right to a jury trial. *People v Cook*, 285 Mich App 420, 422-424 (2009).

The court has discretion to permit a defendant to withdraw the defendant's waiver of a jury trial, but the request to withdraw must not be made for the purpose of delay or judge shopping. *People v Wagner*, 114 Mich App 541, 558-559 (1982).

It is inappropriate for a trial court to give a defendant a "waiver break" in exchange for waiving his or her right to a jury trial, because a decision to drop, or plea bargain, any charges lies with one or both of the parties, not with the court. *People v Ellis (Tyrone)*, 468 Mich 25, 27-28 (2003). Where the defendant waived his right to a jury trial based on his defense counsel's sound advice that if he waived a jury trial, he would receive a sentence concession, the defendant's waiver was considered to be "informed," as opposed to "'coerced.'" *People v Godbold*, 230 Mich App 508, 513-514 (1998).

C. Standard of Review

The trial court's determination that a defendant validly waived his or her right to a jury trial is reviewed for clear error. *People v Taylor (Willie)*, 245 Mich App 293, 305 n 2 (2001). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Hesch*, 278 Mich App 188, 192 (2008).

A trial court's failure to comply with the procedural mandates of MCR 6.402(B) does not require automatic reversal "if the record establishes that defendant nonetheless understood that he had a right to a trial by jury and voluntarily chose to waive that right." *Mosly*, 259 Mich App at 96. However, a constitutionally invalid jury waiver is a structural error requiring automatic reversal. *People v Cook*, 285 Mich App 420, 427 (2009).

The trial court's decision on a defendant's motion to withdraw a jury waiver is reviewed for an abuse of discretion. *Wagner*, 114 Mich App at 558-559. An abuse of discretion occurs where the decision results in an outcome falling outside of the principled range of outcomes. *People v Carnicom*, 272 Mich App 614, 617 (2006).

10.2 Bench Trial

A. Is Disqualification An Issue?

When a defendant opts for a bench trial, the trial judge should make a record of the court's prior involvement with the case and consider reassignment if the court is too familiar with the file. See MCR 2.003. Consider obtaining express approval of the parties to proceed if the court has had prior involvement with the case. Examples of various situations involving disqualification include:

- Where the trial court acknowledged personal animus toward the defendant, it should have disqualified itself. *People v Lobsinger*, 64 Mich App 284, 290-291 (1975).

- Where, during the codefendant's bench trial, the trial judge expressed his belief that the defendant committed the offense, the judge should have disqualified himself from subsequently hearing the defendant's case. *People v Gibson (On Remand)*, 90 Mich App 792, 796-798 (1979).

- Where the trial court had knowledge that a prosecution witness passed a polygraph test, it

> should have been disqualified from ruling on the defendant's motion for a new trial. *People v Hale*, 72 Mich App 484, 486 (1976).

A trial court may consider disqualification when it has heard the factual basis for an aborted guilty plea. *People v Cocuzza*, 413 Mich 78, 79-80 (1982).

A trial court is not automatically disqualified from hearing a defendant's second bench trial after a reversal on appeal. *People v Upshaw*, 172 Mich App 386, 388-389 (1988).

Reversal is not required where the trial court accepted the defendant's guilty plea and sentenced him or her in a previous case. *People v McLeod*, 107 Mich App 710, 714-715 (1981).

B. Pretrial Motions in a Bench Trial

Unless required to do so by a different court rule, the trial court is not required to explain its reasoning and state its findings of fact on pretrial motions, but doing so is helpful for appellate review. MCR 2.517(A)(4); *People v Shields*, 200 Mich App 554, 558 (1993).

C. Evidentiary Issues in a Bench Trial

Generally, during a bench trial the court should consider only the evidence set out in the record and should not rely on its own specialized knowledge in reaching a verdict. *People v Simon*, 189 Mich App 565, 567-568 (1991). It is error requiring reversal for the trial judge during a bench trial to refer to the preliminary examination transcript, except as provided by MCL 768.26 (authorizes the prosecution's use of a preliminary examination transcript when a witness is unavailable at trial). *People v Ramsey*, 385 Mich 221, 225 (1971). It is also error requiring reversal for the trial judge to view the crime scene without giving counsel and the parties an opportunity to be present. *People v Eglar*, 19 Mich App 563, 565 (1969).

D. Court View

"On application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred." MCR 2.507(D).[5]

[5] "The provisions of the rules of civil procedure apply to [criminal] cases . . ., except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, or (3) when a statute or court rule provides a like or different procedure." MCR 6.006(D).

E. Motion for Acquittal

"[A]fter the prosecutor has rested the prosecution's case-in-chief, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact." MCR 6.419(D).

The motion "is in the nature of a jury trial motion for a directed verdict and in both jury and nonjury trials is governed by the rule that the prosecutor has the burden of producing in his [or her] case in chief some evidence as to each element of the crime charged to warrant putting the defendant to his defense." *People v DeClerk*, 400 Mich 10, 17 (1977).

F. Decision

At the conclusion of the case, the trial court must "find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 6.403. Additionally, "[t]he court must state its findings and conclusions on the record or in a written opinion made a part of the record." *Id*. The requirement that a trial judge articulate the reasons for a decision in its factual findings applies to criminal cases as well as civil cases. *People v Jackson (Robert)*, 390 Mich 621, 627 (1973). A trial court's articulation of the law it applied to the facts of the case is designed to aid appellate review. *People v Johnson (Gary) (On Rehearing)*, 208 Mich App 137, 141 (1994). Findings are sufficient if it appears that the court was aware of the issues and correctly applied the law. *People v Smith (Kerry)*, 211 Mich App 233, 235 (1995).

A trial judge sitting as the trier of fact may not enter an inconsistent verdict. *People v Walker (Alonzo)*, 461 Mich 908 (1999) (trial court's dismissal of a felony-firearm charge while convicting the defendant of malicious destruction of property, which destruction was the product of a firearm discharge, was held to be patently inconsistent). Jury verdicts "need not necessarily be consistent." *People v Vaughn (Marcus)*, 409 Mich 463, 465-466 (1980).

When rendering a decision after a bench trial, it is recommended that the judge cover the following:[6]

- Applicable statutes, if any;

[6] A checklist is contained in the Appendix.

- Applicable jury instructions (including elements of the offense and any lesser offenses);
- Burden of proof;
- Any presumptions that may apply;
- Findings of fact sufficient to show an appellate court that the trial judge was aware of the issues and correctly applied the appropriate law;
- Conclusions of law; and
- Entry of the appropriate judgment.

G. Standard of Review

A trial court's findings of fact are reviewed for clear error by the appellate court. MCR 2.613(C). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id*.

When reviewing a challenge to the sufficiency of the evidence in a bench trial, the evidence presented is viewed in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Vaughn (Kevin)*, 186 Mich App 376, 379 (1990).[7] The trier of fact may make reasonable inferences from evidence in the record but may not make inferences completely unsupported by any direct or circumstantial evidence. *Id*. at 379-380.

10.3 Jury Selection

A defendant is entitled to a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *Duncan (Gary) v Louisiana*, 391 US 145, 154 (1968). The process by which potential jurors are selected and brought to court is governed by MCL 600.1301 *et seq*. Generally, the process should be random and result in potential juries that reflect a cross-section of the community. MCR 2.511(A).[8]

[7] "[T]he standard for reviewing the sufficiency of the evidence in criminal jury trials is also applicable to criminal bench trials." *People v Traughber*, 432 Mich 208, 225 (1989).

[8] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

The selection process is described in MCR 2.511(A). MCR 2.511(A)(4) authorizes "any other fair and impartial method directed by the court or agreed to by the parties." An example is where the parties agree to have 14 potential jurors seated in the jury box, and seven potential jurors seated in the front row near the jury box. The attorneys are then permitted to question all 21 potential jurors, so that the attorneys are aware of the possible replacements if any of the original jurors are excused.

Defendant is entitled to a jury which contains a representative cross-section of the community. *Taylor (Billy) v Louisiana*, 419 US 522, 528 (1975). "A fair-cross-section claim under the Sixth Amendment requires a defendant to make a prima facie case as set forth by the United States Supreme Court in *Duren v Missouri*[, 439 US 357 (1979)]. Namely, a defendant must show:

> "'(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.'"[9] *People v Bryant (Ramon)*, 491 Mich 575, 581-582 (2012), quoting *Duren*, 439 US at 364.

The first prong requires a showing of the exclusion of a constitutionally cognizable group. *People v Hubbard (After Remand)*, 217 Mich App 459, 473 (1996), overruled in part on other grounds *People v Harris (James)*, 495 Mich 120, 123 (2014). See *People v Jackson (Kevin) (On Reconsideration)*, ___ Mich App ___, ___ (2015) (holding that "[the] defendant . . . failed to establish a prima facie case for violation of the Sixth Amendment's fair-cross-section requirement with regard to education level or ties to law enforcement[]" where he "provide[d] no evidence that persons possessing a certain degree of education or ties to law enforcement, or lacking the same, [were] members of a 'distinctive' group in the . . . community[]") (citations omitted).

The second prong requires a showing that the number of members of the cognizable group is not fair and reasonable in relation to the number of group members in the relevant community. *Hubbard*, 217 Mich App at 473-474. The United States Supreme Court has not specified a preferred method of measuring underrepresentation. *People v Smith (Diapolis)*, 463 Mich 199, 203 (2000), aff'd sub nom *Berghuis v Smith (Diapolis)*, 559 US 314 (2010). The lower federal courts have applied three different methods known as (1) the absolute disparity test, (2) the comparative disparity test, and (3) the standard deviation test. *Id*. The Court in *Smith* (*Diapolis)*

[9] See Section 10.4(C).

indicated that all three approaches should be considered and that no individual method should be used to the exclusion of the others. *Id*. at 204. See *Bryant (Ramon)*, 491 Mich at 603-615, for a detailed analysis of all three methods of determining whether representation of a distinctive group in the jury venire is fair and reasonable.

"[W]hen applying all the relevant tests for evaluating the representation data, a court must examine the composition of jury pools or venires over time using the most reliable data available to determine whether representation of a distinct group is fair and reasonable." *Bryant (Ramon)*, 491 Mich at 583. In *Bryant (Ramon)*, 491 Mich at 587-588, an erroneous setting in the computer program used by Kent County for summoning jurors resulted, over a 15-month period, in jury questionnaires being sent disproportionately to zip codes with smaller African-American populations. The defendant, who was convicted by a jury during this period, raised a fair-cross-section claim, arguing that the jury-selection method had resulted in the underrepresentation of African-Americans appearing for jury duty. *Id*. at 585. The Court of Appeals agreed and granted the defendant a new trial. *People v Bryant (Ramon)*, 289 Mich App 260 (2010). The Michigan Supreme Court reversed, holding that "[the] defendant did not establish that the representation of African-Americans was not fair and reasonable under [the] second prong of the *Duren*[, 439 US at 364,] test[.]" *Bryant (Ramon)*, 491 Mich at 619. Noting that "*Duren* explicitly requires courts to consider the representation of a distinct group in *venires*[,]" the Court held that "the Court of Appeals wrongly relied on misleading representation data by considering the representation of African–Americans *only* in [the] defendant's venire[,]" and that "[t]he use of [an] inadequate sample from only [the] defendant's venire caused the tests evaluating the degree of any underrepresentation to produce skewed and exaggerated results." *Id*. at 582.

Additionally, the *Bryant (Ramon)* Court concluded that "the Court of Appeals misapplied" the holding in *Smith (Diapolis)*, 463 Mich 199, "that an evaluation of the second [*Duren*] prong requires courts to employ a case-by-case approach that considers *all* the relevant statistical tests for evaluating the data regarding representation of a distinct group without using any one individual method *exclusive* of the others." Instead, "the Court of Appeals, using a skewed result from the comparative-disparity test, elevated this test above the others in precisely the situation in which its use is most criticized—distorting the degree of underrepresentation when the population of the distinct group is small." *Bryant (Ramon)*, 289 Mich App at 583. After "consider[ing] the results of these tests using the most reliable data set, which included the composition of jury pools or venires over a three-month period," the Court concluded that the defendant "failed to show that the representation of African-Americans in the venires at issue was not fair and reasonable." *Id*. at 583, 615.[10]

The third prong requires a showing that the underrepresentation of the cognizable group is systematic, meaning that it results from some circumstances inherent in the particular selection process. A showing of one or two incidences of disproportionate panels is not sufficient to show a systematic exclusion of group members. *Hubbard*, 217 Mich App at 481.

A. Number of Jurors

The number of jurors is set by Michigan's Constitution (Const 1963, art 1, § 20), by statute (MCL 600.8355 and MCL 768.18), and by court rule (MCR 6.410(A) and MCR 6.620(A)). MCL 768.18 authorizes a trial judge in a felony case to impanel a jury of not more than 14 members. By agreement on the record, a jury of less than 12 can be utilized. MCR 6.410(A); *People v Champion (Michael)*, 442 Mich 874 (1993) (reversal not required where the defendant stipulated to a jury of 11 members). In misdemeanor cases, the jury must consist of six people. MCL 600.8355; MCR 6.620(A). However, the judge may impanel seven or more potential jurors and retain the alternate jurors during deliberations. MCR 6.620(A).

Following the procedure outlined in MCR 6.410(A), the parties, with the court's consent, can agree to have the case decided by a specified number of jurors less than 12 at any time before a verdict is returned. If the parties indicate their willingness to stipulate to a jury of less than 12 members, the court must advise the defendant of his or her right to have the case decided by a jury of 12. MCR 6.410(A). The court must make a verbatim record that the defendant understands the right and if the defendant makes a valid waiver of the right to be tried by a jury of 12, the court may accept the parties' stipulation and proceed. *Id*. The court may refuse to accept the parties' stipulation even when the defendant validly waived the right. *Id*. If the court refuses to accept the parties' stipulation to a jury of less than 12 members, it must state its reasons for doing so on the record. *Id*.

B. Identity of Jurors

The attorneys must be given a reasonable opportunity to examine the jurors' questionnaires before being called on to challenge for cause. MCR 2.510(C)(2).[11]

[10] However, see *Ambrose v Booker*, 684 F3d 638, 641, 645-649 (CA 6, 2012) (holding that three federal habeas petitioners, who were convicted by jury in Kent County during the period in which the computer program for summoning jurors contained an error, had established cause to excuse their procedural defaults, because "the factual basis for the claim—the computer glitch—was not reasonably available to counsel, and [the] petitioners could not have known that minorities were underrepresented in the *jury pool* by looking at the *venire panel*[]").

The press has a qualified right of postverdict access to juror names and addresses, subject to the court's consideration of jurors' concerns about safety and privacy. *In re Juror Names*, 233 Mich App 604, 630 (1999). Access can be denied if the court determines that the jurors' safety concerns are legitimate and reasonable. *Id.* at 630 n 9.

10.4 Voir Dire

Voir dire is the process by which litigants may question prospective jurors so that challenges may be intelligently exercised. *People v Harrell*, 398 Mich 384, 388 (1976). The court has broad discretion to limit or preclude voir dire by the attorneys. *Id.* at 388. "The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." *People v Sawyer (Thomas)*, 215 Mich App 183, 186 (1996). MCR 6.412(C) states:

> "(1) *Scope and Purpose*. The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process.
>
> (2) *Conduct of the Examination*. The court may conduct the examination of prospective jurors[12] or permit the lawyers to do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors."

"When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, the court shall discharge him or her from further attendance and service as a juror." MCR 2.511(C)[13]; see also MCL 600.1337.

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[11] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

[12] A checklist of questions the court may wish to ask prospective jurors is included in the Appendix.

[13] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

A trial court's discretion over the voir dire process is not unlimited. For example, a trial court may not restrict the scope of voir dire to the degree that the parties are unable to develop a factual basis for the intelligent exercise of their peremptory challenges. *People v Tyburski (Leonard)*, 196 Mich App 576, 581 (1992), aff'd 445 Mich 606 (1994). In *Tyburski (Leonard)*, 196 Mich App at 609, the defendant was denied a fair trial because the trial court "fail[ed] to conduct a sufficiently probing voir dire in order to uncover potential juror bias."

A trial court may refuse to ask prospective jurors specific questions submitted by counsel as long as the voir dire conducted by the court is sufficient to seat an impartial jury. *Sawyer (Thomas)*, 215 Mich App at 191.

MCR 2.511(F) prohibits discrimination in the jury selection process:

> "(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.
>
> (2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection."

When information potentially affecting a juror's ability to act impartially is discovered after the jury has been sworn and the juror is allowed to remain on the jury, the defendant *may be* entitled to relief on appeal if the defendant can establish that the juror's presence on the jury resulted in actual prejudice. *People v Miller (Michael)*, 482 Mich 540, 561 (2008); *People v Daoust*, 228 Mich App 1, 9 (1998). "[T]he proper inquiry is whether the defendant was denied his [or her] right to an impartial jury. If he [or she] was not, there is no need for a new trial." *Miller (Michael)*, 482 Mich at 561. ("To the extent that in *Daoust* the Court of Appeals broadly state[d] in dicta that a new trial is *always* required whenever a juror would have been excusable for cause, *Daoust* is wrong and is overruled." *Id.*)

In *Miller (Michael)*, 482 Mich at 561, the Michigan Supreme Court held that "[t]he trial court did not clearly err in finding that [the] defendant failed to establish that he was actually prejudiced by the presence of a convicted felon on his jury, and, thus, the trial court did not abuse its discretion when it denied [the] defendant's motion for a new trial." See MCL 600.1354(1) ("[f]ailure to comply with the provisions of [the Revised Judicature Act] shall not . . . affect the validity of a jury verdict unless the party . . . demonstrates actual prejudice . . . "). The *Miller (Michael)* Court emphasized that although a defendant has a constitutional right to an impartial jury, he or she does not have a

constitutional right to a jury free of convicted felons. *Miller (Michael)*, 482 Mich at 547. The right to a jury free of convicted felons is a statutory right granted by MCL 600.1307a(1)(e). *Miller (Michael)*, 482 Mich at 544-545, 547-578. Violation of this statutory right requires a new trial only if the violation actually prejudiced the defendant's right to an impartial jury. *Id.* at 548.

Access to juror personal history questionnaires is governed by MCR 2.510(C)(2) and the court's local administrative order. Juror qualifications questionnaires are confidential. MCL 600.1315.

A. Challenges for Cause

Juror qualification is governed by both statute and court rule. MCL 600.1307a; MCR 2.511(D)(1).[14]

Jurors are presumed to be qualified, competent, and impartial. *People v Walker (Jefforey)*, 162 Mich App 60, 63 (1987). The burden of proving the existence of a disqualification is on the party alleging it. *People v Collins (Charles)*, 166 Mich 4, 9 (1911).

To qualify as a juror, an individual must "[n]ot have been convicted of a felony." MCL 600.1307a(1)(e).

A prospective juror is subject to challenge for cause on any ground set out in MCR 2.511(D), or for any other reason recognized by law. MCR 6.412(D).

"It is grounds for a challenge for cause that the person: (1) is not qualified to be a juror; (2) is biased for or against a party or attorney; (3) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be; (4) has opinions or conscientious scruples that would improperly influence the person's verdict; (5) has been subpoenaed as a witness in the action; (6) has already sat on a trial of the same issue; (7) has served as a grand or petit juror in a criminal case based on the same transaction; (8) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys; (9) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney; (10) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution; (11) has a financial interest other than that of a taxpayer in the outcome

[14] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

of the action; (12) is interested in a question like the issue to be tried." MCR 2.511(D).

"If a party shows that a prospective juror comes within one of the categories enumerated in [MCR 2.511(D)], then the trial court is without discretion to retain that juror, who must be excused for cause." *Walker (Jefforey)*, 162 Mich App at 64. "Otherwise, the decision to excuse for cause is within the discretion of the trial court." *Id.* at 64.

A defendant is not entitled to relief where, even if the trial court erred in denying the defendant's challenge to a prospective juror for cause, the defendant failed to exhaust his or her peremptory challenges. *People v Legrone*, 205 Mich App 77, 81-82 (1994).

"A juror who expresses an opinion referring to some circumstance of the case which is not positive in character, but swears he can render an impartial verdict, may not be challenged for cause." *People v Roupe*, 150 Mich App 469, 474 (1986); MCL 768.10. See also *People v Jendrzejewski*, 455 Mich 495, 515 (1997) (the defendant was not deprived of a fair trial where two jurors that were actually seated had formed an earlier opinion).

"A four-part test is used to determine whether an error in refusing a challenge for cause merits reversal. There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable." *People v Lee*, 212 Mich App 228, 248-249 (1995).

B. Peremptory Challenges

1. Generally

There is no constitutional right to exercise peremptory challenges. *Daoust*, 228 Mich App at 7. "The right to exercise peremptory challenges in state court is determined by state law[,]" and "the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution." *Rivera v Illinois*, 556 US 148, 152, 158 (2009) (Illinois state court's erroneous denial of the defendant's peremptory challenge did not require automatic reversal of the defendant's first-degree murder conviction where all of the ultimately seated jurors were qualified and unbiased). The Court further stated, "[i]f a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the

loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." *Id.* at 157. A defendant is not denied an impartial jury simply because he or she cannot make the most effective use of his or her peremptory challenges (e.g., where a defendant uses up his or her peremptory challenges to excuse particular jurors to the exclusion of dismissing other potentially prejudiced jurors). *Daoust*, 228 Mich App at 7.

A party may exercise a peremptory challenge, even of a juror that was previously "passed," at any time until the jury is sworn in. *People v Goode*, 78 Mich App 781, 785-786 (1977).

2. Misdemeanor Cases

In a case cognizable by the district court, "[e]ach defendant is entitled to three peremptory challenges. The prosecutor is entitled to the same number of peremptory challenges as a defendant being tried alone, or, in the case of jointly tried defendants, the total number of peremptory challenges to which all the defendants are entitled." MCR 6.620(B).

A party may be granted an increased number of peremptory challenges upon a showing of good cause. MCR 6.620(B). "The additional challenges granted by the court need not be equal for each party." *Id.*

3. Felony Cases

A juror who is peremptorily challenged is excused without cause. MCR 2.511(E)(1).[15] In a criminal case where the offense is not punishable by life imprisonment, a defendant tried alone is entitled to five peremptory challenges. MCR 6.412(E)(1); MCL 768.12(1). Similarly, if two or more defendants are being jointly tried for an offense not punishable by life imprisonment, each defendant is entitled to five peremptory challenges. MCR 6.412(E)(1). The prosecutor is entitled to five peremptory challenges when a defendant is tried alone, and when two or more defendants are tried together, the prosecutor is entitled to the total number of challenges to which all the defendants are entitled. MCR 6.412(E)(1); MCL 768.12(1). On motion and a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges; it is unnecessary for the additional

[15] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

challenges granted by the court to be equal for each party. MCR 6.412(E)(2); MCL 768.12(2).

If the offense charged is punishable by life imprisonment, a defendant being tried alone is entitled to 12 peremptory challenges. MCR 6.412(E)(1); MCL 768.13(1). In cases where two or more defendants are being tried jointly for offenses punishable by life imprisonment, the number of peremptory challenges varies with the number of defendants being tried. See MCR 6.412(E)(1) and MCL 768.13(1)(a)—MCL 768.13(1)(d). A defendant may be granted an increased number of peremptory challenges for good cause, and where more than one defendant is being tried, the number of additional challenges granted by the court may result in an unequal number of challenges allowed each defendant. MCR 6.412(E)(2); MCL 768.13(3). The prosecutor is permitted 12 peremptory challenges in cases involving a single defendant and an offense punishable by life imprisonment. If multiple defendants are being tried jointly for an offense punishable by life imprisonment, the prosecutor is entitled to the total number of challenges allowed all defendants being tried. MCR 6.412(E)(1); MCL 768.13(2).

Peremptory challenges must be exercised as follows:

> "(a) First the plaintiff and then the defendant may exercise one or more peremptory challenges until each party successively waives further peremptory challenges or all the challenges have been exercised, at which point jury selection is complete.
>
> "(b) A 'pass' is not counted as a challenge but is a waiver of further challenge to the panel as constituted at that time.
>
> "(c) If a party has exhausted all peremptory challenges and another party has remaining challenges, that party may continue to exercise their remaining peremptory challenges until such challenges are exhausted." MCR 2.511(E)(3).

C. Discrimination During Voir Dire

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination during voir dire. *Batson v Kentucky*, 476 US 79 (1986). The Sixth Amendment also requires that a jury venire be drawn from a fair cross-section of the community. *Berghuis v Smith (Diapolis)*, 559 US 314, 319 (2010). MCR 2.511(F)(1)[16] states that no person shall be subjected to discrimination during voir dire on the

basis of race, color, religion, national origin, or sex. MCR 2.511(F)(2) states that discrimination during voir dire on the basis of those factors for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of those characteristics is not an excuse or justification for a violation of the rule.

In *Batson*, 476 US at 96-98, the United States Supreme Court set out a three-step process for determining the constitutional propriety of a peremptory challenge. The Michigan Supreme Court explained the process in *People v Knight*, 473 Mich 324, 336 (2005), habeas corpus gtd *Rice v White*, 660 F3d 242 (CA 6, 2011)[17]:

> "First, the opponent of the peremptory challenge must make a prima facie showing of discrimination.[18] To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he [or she] is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant considerations raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race." *Knight*, 473 Mich at 336 (internal citations omitted).
>
> Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike.[19] *Batson's* second step does not demand an explanation that is persuasive,

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[16] See MCR 6.412(A), which states in part that "[e]xcept as otherwise provided by the rules in . . . subchapter [6.400], MCR 2.510 and [MCR]2.511 govern the procedure for selecting and impaneling the jury."

[17] In *Knight*, 473 Mich at 352, the Michigan Supreme Court held that *Batson,* 476 US 79, was not violated in the jury selection at the joint trial of the two defendants, Jerome Knight and Gregory Rice. In *Rice*, 660 F3d at 253, 257-260, the Sixth Circuit Court of Appeals affirmed the federal district court's grant of a conditional writ of habeas corpus to codefendant Rice and vacated his conviction under 28 USC 2254(d)(2), holding that "the Michigan Supreme Court's adjudication of [Rice's] *Batson* claim was based on the court's unreasonable factual determination that the trial judge did not discredit the prosecutor's proffered race-neutral reasons for the exercise of her peremptory strikes." However, the legal principles cited by *Knight*, 473 Mich at 335-348, were not implicated by the Sixth Circuit's decision in *Rice*, 660 F3d 242, and they remain good law. See *Rice*, 660 F3d at 253-254 (reiterating the *Batson* process detailed in *Knight*, 473 Mich at 335-338).

[18] In the first *Batson* step, the opponent of the challenge is not required to actually prove discrimination. *Knight*, 473 Mich at 336. As long as the sum of the proffered facts gives rise to an inference of discriminatory purpose, the first *Batson* step is satisfied. *Knight*, 473 Mich at 336-337.

[19] The state must "demonstrate that 'a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group.'" *Smith (D) v Berghuis*, 543 F3d 326, 344 (CA 6, 2008), quoting *Duren v Missouri*, 439 US 357, 367-368 (1979).

> or even plausible. Rather, the issue is whether the proponent's explanation is facially valid as a matter of law. A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Knight*, 473 Mich at 337 (internal citations and quotations omitted).
>
> Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext[20] and whether the opponent of the challenge has proved purposeful discrimination. It must be noted, however, that if the proponent of the challenge offers a race-neutral explanation and the trial court rules on the ultimate question of purposeful discrimination, the first *Batson* step (whether the opponent of the challenge made a prima facie showing) becomes moot." *Knight*, 473 Mich at 337-338 (internal citations omitted).

Under *Batson's* third prong, the prosecution's pretextual explanation gives rise to an inference of discriminatory intent. *Snyder v Louisiana*, 552 US 472, 484-485 (2008). At that stage, the trial court plays a pivotal role in evaluating the prosecutor's credibility; it must consider "not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Id.* at 477. A *Batson* claim will survive if a peremptory strike that was substantially motivated by discriminatory intent could not be sustained based on the prosecution showing anything less than that the motivating factor was not determinative. *Snyder*, 552 US at 485.

In *Snyder*, the trial court allowed the prosecutor to strike a black juror for the race-neutral reasons that the juror looked nervous, and that, because of a student-teaching obligation, the juror might return a lesser guilty verdict (which would obviate the need for a penalty phase) in order to fulfill his jury duty more quickly. *Snyder*, 552 US at 478. The United States Supreme Court held that the trial court clearly erred in overruling the defendant's *Batson* objection to the prosecutor's strike of that juror, specifically noting that "in light of the circumstances here—including absence of anything in the record showing that the trial judge credited the claim that [the juror] was nervous, the prosecution's description of both of its proffered

[20] "Pretext" is defined as "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." *Webster's Ninth New Collegiate Dictionary* (1988).

explanations as 'main concern[s],' and the adverse inference noted above [that the prosecutor declined to use a peremptory strike on a white juror with more pressing work and family obligations]—the record does not show that the prosecution would have pre-emptively challenged [the juror] based on his nervousness alone." *Snyder*, 552 US at 485.

"[A] judge, in ruling on an objection to a peremptory challenge under *Batson v Kentucky*, 476 US 79 (1986), [is not required to] reject a demeanor-based explanation for the challenge [even if] the judge [did not] personally observe[] and [does not] recall[] the aspect of the prospective juror's demeanor on which the explanation is based." *Thaler v Haynes*, 559 US 43, 44 (2010). In *Haynes*, 559 US at 44, two different judges presided over different stages of the jury selection process—when the attorneys individually questioned prospective jurors, and when the attorneys exercised peremptory challenges. When the prosecutor struck an African-American juror, the defendant's attorney raised a *Batson* objection. *Haynes*, 559 US at 44. "[The judge presiding over peremptory challenges] determined that [the defendant] made out a prima facie case under *Batson*, and the prosecutor then offered a race-neutral explanation that was based on [the juror's] demeanor during individual questioning [which the judge did not observe]." *Haynes*, 559 US at 44. "After considering the prosecutor's explanation and the arguments of defense counsel, [the judge presiding over peremptory challenges] stated that the prosecutor's reason for the strike was 'race-neutral' and denied the *Batson* objection without further explanation." *Haynes*, 559 US at 45. The United States Court of Appeals for the Fifth Circuit relied on *Batson* and *Snyder v Louisiana*, 552 US 472 (2008), to support its conclusion that the defendant was entitled to a new trial, reasoning that "a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor." *Haynes*, 559 US at 47. The United States Supreme Court disagreed, noting that even absent a judge's personal recollection of a juror's demeanor, he or she may accept a prosecutor's demeanor-based explanation in the face of a *Batson* challenge. *Haynes*, 559 US at 47-49.

However, "[e]ven if the trial court did not personally observe [the demeanor of a stricken juror], the court 'has a pivotal role' in evaluating whether the prosecutor's demeanor, and any pertinent surrounding circumstances, belie that a strike was race neutral[;]" the trial court must make a factual determination regarding a stricken juror's demeanor, and, in the absence of such findings, it cannot be presumed "'that the trial judge credited the prosecutor's assertion' that the juror[] reacted in a certain fashion." *People v*

Tennille, ___ Mich App ___, ___ (2016) (quoting *Snyder*, 552 US at 477, 479, and distinguishing *Haynes*, 559 US 43).

"[T]rial courts must meticulously follow *Batson's* three-step test," and the Michigan Supreme Court "strongly urge[s] [trial] courts to clearly articulate their findings and conclusions on the record." *Knight*, 473 Mich at 339. The best practice is to excuse the jury to conduct the *Batson* hearing. Also, in order to preserve the option of reseating a juror who was improperly struck, a court should not release the challenged juror until the challenge is addressed. *Knight*, 473 Mich at 347.

For the first *Batson* step, "[t]he trial court must first find the facts and then decide whether those facts constitute a prima facie case of discrimination under *Batson* and its progeny." *Knight*, 473 Mich at 342. "The first *Batson* step is a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review" on appeal. *Knight*, 473 Mich at 342.

For the second *Batson* step, the trial court must only be "concerned with whether the proffered reason violates the Equal Protection Clause as a matter of law." *Knight*, 473 Mich at 344. On appeal, the second *Batson* step is subject to de novo review. *Knight*, 473 Mich at 343-344.

For the third *Batson* step, the trial court must determine whether the opponent of the peremptory challenge satisfied the ultimate burden of proving purposeful discrimination. *Knight*, 473 Mich at 344-345. On appeal, the third *Batson* step is subject to review for clear error. *Knight*, 473 Mich at 344-345.

"[T]he trial court committed two serious *Batson* errors[]" when it "failed to afford defense counsel an opportunity to rebut the prosecutor's stated reason for dismissing [two African-American] jurors" and failed to make any "findings of fact regarding whether the prosecutor's justification for the strikes[, i.e., the jurors' show of disgust in reaction to another juror's assertions that he would give a police officer's testimony more credence than that of another witness,] seem[ed] credible under all of the relevant circumstances, including whether the jurors actually exhibited the expressions claimed and whether the averred reactions were the real reasons for the strikes." *Tennille*, ___ Mich App at ___. "The court made no effort to entertain argument from defense counsel regarding whether the [peremptory strikes were] racially motivated despite the prosecutor's articulation of a race-neutral ground[,]" but instead perfunctorily "stated that it 'accepted' the prosecutor's explanation as 'a valid race neutral reason' and denied the challenge[; t]his premature conclusion of the *Batson* inquiry reflects that the trial court misapprehended defense counsel's role in the *Batson* process

and overlooked the inalterable need for factual findings." *Tennille*, ___ Mich App at ___. Because "[the] record [did] not permit a conclusion that the prosecutor's stated reason for the strikes was nondiscriminatory," it was necessary to "remand to the trial court for an evidentiary hearing during which the trial court [was required to] conduct the third-step [*Batson*] analysis it omitted at [the] defendant's trial." *Tennille*, ___ Mich App at ___.

A prosecutor's use of a peremptory challenge to excuse the only black juror in a jury pool doe s not automatically constitute a prima facie showing of discrimination or discrimination as a matter of law; rather, "[t]he defendant must offer facts that *at least* give rise to an inference that the prosecutor had a discriminatory purpose for excluding the prospective juror." *People v Armstrong (Parys)*, 305 Mich App 230, 238-239 (2014) (citing *Johnson v California*, 545 US 162, 168 (2005), and *Knight*, 473 Mich at 336-337, and finding no constitutional violation where the excused juror had childcare issues which were detailed on the record, and, although no other prospective jurors were excused, none of them "expressed similar issues[]").

In order to ensure the equal protection rights of individual jurors, a trial court may sua sponte raise a *Batson* issue after observing a prima facie case of purposeful discrimination[21] through the use of peremptory challenges. *People v Bell (Marlon)*, 473 Mich 275, 285-287 (2005).

It is important to note the distinction between a *Batson* error and a denial of a peremptory challenge: a *Batson* error occurs when a juror is actually dismissed on the basis of race or gender, whereas a denial of a peremptory challenge on other grounds amounts to the denial of a statutory or court-rule-based right to exclude a certain number of jurors. *Bell (Marlon)*, 473 Mich at 293. A *Batson* error is of constitutional dimension, and is subject to automatic reversal, whereas an improper denial of a peremptory challenge is not of constitutional dimension, and is reviewed for a miscarriage of justice if it is preserved, or for plain error affecting substantial rights if it is unpreserved. *Bell (Marlon)*, 473 Mich at 293-295. *People v Miller (Dwjuan)*, 411 Mich 321 (1981), and *People v Schmitz*, 231 Mich App 521 (1998), are no longer binding to the extent that they hold that a violation of the right to a peremptory challenge requires automatic reversal. *Bell (Marlon)*, 473 Mich at 293.

[21] For example, a prima facie case of discrimination based on race is established where "(1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race." *People v Bell (Marlon)*, 473 Mich 275, 282-283 (2005).

D. Alternate Jurors and Removal or Substitution of a Juror at Trial

1. Alternate Jurors in Misdemeanor Cases

The court may impanel seven or more jurors in a criminal case cognizable by the district court. MCR 6.620(A). If more jurors than needed to decide the case remain on the panel when deliberations are set to begin, the names of all the jurors must be placed in a container and names drawn to reduce the number of jurors to the number required to decide the case. *Id.*

Alternate jurors may be retained during the jury panel's deliberations. If the court decides to retain the alternate jurors, it must advise the alternate jurors not to discuss the case with any person until the jury completes its deliberations and is discharged. MCR 6.620(A). "If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew." *Id.*

2. Alternate Jurors in Felony Cases

The court may direct that more than 12, but not more than 14, jurors be impaneled. MCR 6.411. If more jurors than needed to decide the case remain on the panel when deliberations are set to begin, the names of all the jurors must be placed in a container and names drawn to reduce the number of jurors to the number required to decide the case. MCL 768.18; MCR 6.411.

Alternate jurors may be retained during the jury panel's deliberations. If the court decides to retain the alternate jurors, it must advise the alternate jurors not to discuss the case with any person until the jury completes its deliberations and is discharged. MCR 6.411.

The court has the discretion to remove a juror during trial for possible bias. *People v Mason*, 96 Mich App 47, 49-50 (1980).

A trial court has discretion to replace a deliberating juror with an alternate juror. *People v Mahone*, 294 Mich App 208, 215-218 (2011) (trial court did not abuse its discretion in removing a juror during deliberations, and the defendant was not denied a fair trial by the juror's replacement with an alternate juror rather than the granting of a mistrial; the record showed that the removed juror was unable to continue deliberations due to physical and emotional stress, that the alternate juror complied with instructions not to discuss the case or review any media

about the case, and that the jury was properly instructed to begin deliberations anew as required by MCR 6.411); *People v Tate*, 244 Mich App 553, 559-560 (2001) (trial court excused a juror who developed a medical condition after deliberations had begun and replaced that juror with a dismissed alternate juror who had not acquired any extraneous information about the case). See also MCL 768.18 ("[s]hould any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12"). "[W]hile a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he has an equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate, a right that is protected by removing a juror unable or unwilling to cooperate." *Tate*, 244 Mich App at 562. Accordingly, "[r]emoval of a juror under Michigan law is therefore at the discretion of the trial court, weighing a defendant's fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate." *Id*. Once a juror is replaced, the judge must instruct the reconstituted jury to begin deliberations anew. *Id*. at 567; MCR 6.411.

E. Substitution of Judges

"It is far preferable that a single judge preside over all aspects of a trial." *People v McCline*, 442 Mich 127, 134 (1993). However, if a judge is substituted after voir dire, but before opening statements and the introduction of proofs, automatic reversal is not required; rather, prejudice must be shown to justify reversal. *Id*. at 134.

F. Sequestration of Jury

Sequestration of a jury is within the trial court's discretion. *People v Williams (Louis)*, 78 Mich App 737, 740 (1977); MCL 768.16; M Crim JI 2.15.

Where "[d]uring voir dire, each juror told the trial court that he or she would avoid being exposed to media coverage if selected as a juror," and "[d]uring [the 22 day] trial, the trial court instructed the jury not to talk about, read or listen to the media coverage regarding the crime or the trial," and "[t]he jurors were also instructed not to speak with anyone about the case while it was pending," the trial court did not abuse its discretion in not sequestering the jury. *People v Haggart*, 142 Mich App 330, 336-337 (1985).

G. Anonymous Jury

It is permissible to use juror numbers instead of names at trial. *People v Williams (John)*, 241 Mich App 519, 525 (2000). However, trial courts are strongly urged "to advise the jury venire that any use of numbers in lieu of jurors' names is simply for logistical purposes and they should not in any way consider it a negative toward the defendant." *People v Hanks*, 276 Mich App 91, 94 (2007). This is because the use of anonymous juries is potentially prejudicial, and should only be employed when jurors' safety or freedom from undue harassment is an issue. *Williams (John)*, 241 Mich App at 525. "The anonymity of the jury should be preserved in cases: (1) with very dangerous persons who were participants in large scale organized crime, and who participated in mob-style killings and had previously attempted to interfere with the judicial process; (2) where defendants have had a history of attempted jury tampering and serious criminal records; or (3) where there have been allegations of dangerous and unscrupulous conduct by the defendant, coupled with extensive pretrial publicity." *United States v Talley*, 164 F3d 989, 1001 (CA 6, 1999).

In the case of an anonymous jury, appropriate safeguards should be followed to ensure a fair trial. *Williams (John)*, 241 Mich App at 525. "In deciding to empanel an anonymous jury, the court must ensure that the defendant retains his or her right to an unbiased jury by conducting 'a voir dire designed to uncover bias as to issues in the cases and as to the defendant himself,' and by providing the jury a neutral and non-prejudicial reason for requiring that it be anonymous, so that jurors will refrain from inferring that anonymity was necessary due to the character of the defendant." *Talley*, 164 F3d at 1001-1002, quoting *United States v Paccione*, 949 F2d 1183, 1192 (CA 2, 1991).

To successfully challenge an anonymous jury, the record must reflect that withholding information precluded meaningful voir dire or that the defendant's presumption of innocence was compromised. *Williams (John)*, 241 Mich App at 523. For example, in *Hanks*, 276 Mich App at 94, the trial court's use of numbers rather than names when referring to jurors did not prevent the defendant from a meaningful examination of the jury and did not affect the defendant's presumption of innocence. Although the jurors' names were withheld, the jurors were anonymous only in the literal sense because "the juror questionnaires containing biographical information were provided to the parties, and . . . both parties conducted extensive voir dire." *Id.* at 94.

H. Standard of Review

Alleged violations of the proper jury selection process are reviewed de novo. *People v Fletcher*, 260 Mich App 531, 554 (2004).

Whether minorities have been systematically excluded from a jury venire and other alleged violations of the jury selection process are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 472 (1996), overruled in part on other grounds *People v Harris (James)*, 495 Mich 120, 123 (2014). In order to determine the proper standard of review of a trial court's *Batson* ruling, the appellate court must determine which step of the *Batson* challenge determination is being reviewed. In *Knight*, 473 Mich at 345, habeas corpus gtd *Rice*, 660 F3d at 257-260,[22] the Michigan Supreme Court clarified the standards of review for each stage as follows:

> "If the first [*Batson*] step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson's* second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error."

A judge's decision on the scope of voir dire is reviewed for an abuse of discretion. *People v Washington (Allan)*, 468 Mich 667, 674 (2003).

A judge's decision on whether to conduct a midtrial voir dire is reviewed for an abuse of discretion. *People v Adams (McConnell)*, 245 Mich App 226, 240 (2001).

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[22] In *Knight*, 473 Mich at 352, the Michigan Supreme Court held that *Batson*, 476 US 79, was not violated in the jury selection at the joint trial of the two defendants, Jerome Knight and Gregory Rice. In *Rice*, 660 F3d at 253, 257-260, the Sixth Circuit Court of Appeals affirmed the federal district court's grant of a conditional writ of habeas corpus to codefendant Rice and vacated his conviction under 28 USC 2254(d)(2), holding that "the Michigan Supreme Court's adjudication of [Rice's] *Batson* claim was based on the court's unreasonable factual determination that the trial judge did not discredit the prosecutor's proffered race-neutral reasons for the exercise of her peremptory strikes." However, the legal principles cited by *Knight*, 473 Mich at 335-348, were not implicated by the Sixth Circuit's decision in *Rice*, 660 F3d 242, and they remain good law. See *Rice*, 660 F3d at 253-254 (reiterating the *Batson* process detailed in *Knight*, 473 Mich at 335-338).

A trial court's ruling on a challenge for cause based on bias is reviewed for an abuse of discretion. *People v Williams (John)*, 241 Mich App 519, 521 (2000).

Comments of potential jurors during voir dire may warrant a new trial where they are "'such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment.'" *People v Sowders*, 164 Mich App 36, 47 (1987), quoting *People v Nick*, 360 Mich 219, 230 (1960). A new trial was not warranted in *Sowders*, 164 Mich App at 47-48, where a prospective juror commented during voir dire that she knew a local police officer who was to be a witness in the case, but that, even though the officer had arrested her brother, she did not harbor any bad feelings toward the officer, and generally had positive feelings about the police department.

A trial court's decision to grant an anonymous jury is reviewed for an abuse of discretion. *Talley*, 164 F3d at 1001.

A trial court's decision whether to remove a juror is reviewed for an abuse of discretion. *Tate*, 244 Mich App at 559.

10.5 Oaths or Affirmations

A. Juror Oath Before Voir Dire

M Crim JI 1.4 provides:

> "(1) I will now ask you to stand and swear to answer truthfully, fully, and honestly all the questions that you will be asked about your qualifications to serve as a juror in this case. If you have religious beliefs against taking an oath, you may affirm that you will answer all the questions truthfully, fully, and honestly.
>
> (2) Here is your oath: 'Do you solemnly swear (or affirm) that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case?'"

B. Juror Oath Following Selection

"[J]eopardy attaches when the jury is selected and sworn." *People v Allan (David)*, 299 Mich App 205, 217 (2013).

"The following oath shall be administered to the jurors for the trial of all criminal cases: 'You shall well and truly try, and true deliverance make, between the people of this state and the prisoner

at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God.'" MCL 768.14.

"Any juror shall be allowed to make affirmation, substituting the words 'This you do under the pains and penalties of perjury' instead of the words 'so help you God.'" MCL 768.15.

"The word 'oath' shall be construed to include the word 'affirmation' in all cases where by law an affirmation may be substituted for an oath; and in like cases the word 'sworn' shall be construed to include the word 'affirmed.'" MCL 8.3k.

MCR 2.511(H) states:

> "The jury must be sworn by the clerk substantially as follows:
>
> "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God."

M Crim JI 2.1 states:

> "(1) Ladies and gentlemen of the jury, you have been chosen to decide a criminal charge made by the State of Michigan against one of your fellow citizens.
>
> (2) I will now ask you to stand and swear to perform your duty to try the case justly and to reach a true verdict. If your religious beliefs do not permit you to take an oath, you may instead affirm to try the case justly and reach a true verdict.
>
> (3) Here is your oath: 'Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.'"

The jury oath is not a mere formality required only by tradition. *People v Clemons (Keith)*, 177 Mich App 523, 528 (1989). "The

required oath is necessary to protect the defendant's fundamental right of a trial by an impartial jury." *Id.* at 529-530.

A defendant was not entitled to relief on the basis of his unpreserved claim that the trial court administered the wrong juror's oath where, under the particular circumstances of the case, "the trial court's failure to properly swear the jury [did not] seriously affect[] the fairness, integrity, or public reputation of the judicial proceedings[.]" *People v Cain (Brandon)*, 498 Mich 108, 112 (2015), citing *People v Carines*, 460 Mich 750, 763 (1999). In *Cain (Brandon)*, 498 Mich at 113, the court clerk "mistakenly read [to the empaneled jury] the oath given to prospective jurors before voir dire[]" rather than the oath required by MCR 2.511(H)(1) and MCL 768.14. Noting that "the fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis[,]" the Michigan Supreme Court concluded that "the record reveal[ed] that the jurors were conscious of the gravity of the task before them and the manner in which that task was to be carried out, the two primary purposes served by the juror's oath." *Cain (Brandon)*, *498* Mich at 112, 121 (citations omitted). The jurors "stated under oath that they could be fair and impartial, and the trial court thoroughly instructed them on the particulars of their duties[;]" although the oath that was administered "was not a perfect substitute for the oath required by MCR 2.511(H)(1)," the defendant was not entitled to relief based on this unpreserved error because he "was actually ensured a fair and impartial jury[.]" *Cain (Brandon)*, 498 Mich at 123, 126, 128-129 (cautioning courts "to take particular care that the error that occurred in this case be avoided in the future[]").[23]

C. Oath for Bailiff Before Deliberation

"You do solemnly swear [or affirm] that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial from separating from each other; that you will not suffer any communication to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of

[23] In *People v Allan (David)*, 299 Mich App 205, 207, 210-211, 218-219 (2013), overruled in part by *Cain (Brandon)*, 498 Mich at 127-128, the Court of Appeals held that a trial court's failure to comply with its obligation to swear in the jury, as "clearly established" under MCL 768.14, MCR 2.511(H)(1), and MCR 6.412(F), constitutes a plain, structural error that "render[s a] defendant's trial fundamentally unfair[.]" The *Cain (Brandon)* Court, however, noted that the Court of Appeals in *Allan (David)* "should have engaged in a fact-intensive and case-specific inquiry under the fourth *Carines* prong to assess whether, in light of any 'countervailing factors' on the record, . . . leaving the error unremedied would constitute a miscarriage of justice, i.e., whether the fairness, integrity, or public reputation of the proceedings was seriously affected." *Cain (Brandon)*, 498 Mich at 117 n 4, 127 n 7, 128 (declining to decide whether a court's failure to properly swear the jury constitutes "a structural constitutional error," and noting that under *People v Vaughn*, 491 Mich 642, 654 (2012), "*even with regards to a structural error* 'a defendant is not entitled to relief unless he [or she] can establish . . . that the error . . . seriously affected the fairness, integrity, or public reputation of judicial proceedings[]'") (additional citations omitted).

them, orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God." MCL 768.16.

D. Oath for Witness

"Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." MRE 603.

MCL 600.1432 governs the mode of administering oaths and makes reference to "[t]he usual mode of administering oaths . . . by the person who swears holding up the right hand . . . ." If a witness is opposed to swearing under oath, MCL 600.1434 permits an affirmation of truthful testimony. *Donkers v Kovach*, 277 Mich App 366, 374 (2007). However, neither MCL 600.1434 nor MRE 603 *requires* a witness to raise his or her right hand when swearing or affirming to testify truthfully. *Donkers*, 277 Mich App at 373-374.

"Because the administrations of oaths and affirmations is a purely procedural matter, to the extent MRE 603 conflicts with MCL 600.1432 and MCL 600.1434, MRE 603 prevails over the statutory provisions, meaning that no specific formalities are required of an oath or affirmation[] . . . [and that] oaths need not be prefaced with any particular formal words." *People v Putman*, 309 Mich App 240, 244 (2015) (citing *Donkers*, 277 Mich App at 372-373, and holding that where "the trial court asked each witness, including [the] defendant's own witnesses, if they promised to testify truthfully or some similar variation of that question[, and e]ach witness answered . . . in the affirmative[, t]his oath was sufficient" to satisfy MRE 603).

~~A defendant waives error based on the admission of unsworn testimony by failing to "object at the time the unsworn witness is giving the testimony[.]" *People v Sardy*, ___ Mich App ___, ___ (2015), citing *Mettetal v Hall*, 288 Mich 200, 207-208 (1939); *People v Kemmis*, 153 Mich 117, 117-118 (1908); *People v Knox*, 115 Mich App 508, 511 (1982). Accordingly, "although [the] defendant objected at [his] trial that the [child-]victim's preliminary examination testimony had not been given under oath or by affirmation," he "waived the issue concerning [admission at trial of] the [unavailable] victim's unsworn testimony[]" where "there was no objection at the time that the testimony was actually procured at the preliminary examination." *Sardy*, ___ Mich App at ___.~~

E. Oath for Interpreter

An interpreter must be administered an oath or affirmation "to make a true translation." MRE 604. MCL 393.506(1) requires a qualified interpreter for a deaf or deaf-blind person to make an oath or affirmation to make a true interpretation in an understandable manner in the English language to the best of the interpreter's ability. The following may be used for both foreign language and sign language interpreters:

> "Do you solemnly swear or affirm that you will make a true and understandable interpretation of the witness and that you will accurately interpret the statements made by the witness to the best of your ability?"

"As a general rule, the proceedings or testimony at a criminal trial are to be interpreted in a simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken, so that the participants receive a timely, accurate, and complete translation of what has been said . . . . The interpreter should not aid or prompt the primary witness in any way, or render a summary of what the witness stated." *People v Cunningham*, 215 Mich App 652, 654-655 (1996) (citations omitted).

F. Child Witness

MRE 601 provides that "[u]nless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules." In the case of a child witness, a court may simply ask the child if he or she will promise to tell the truth. See M Crim JI 5.9. ~~"M Crim JI 5.9 [(providing that if a witness is a young child, a promise to tell the truth takes the place of an oath)] is not inconsistent with [the oath requirements of] MCL 600.1434 or MRE 603, and a simple promise by a young child to tell the truth would appear to comport with the statute and rule of evidence." *People v Sardy*, ___ Mich App ___, ___ (2015) (concluding that although a child witness "showed her ability to distinguish truth from lies on questioning by the prosecutor," error occurred where "the district court and the prosecutor [inadvertently] failed[] . . . to take the one extra step to obtain a promise or affirmation to tell the truth[]").~~

G. Suggested Caution to Witness

The following instruction should be given when witnesses have been excluded under MRE 615:

> "I instruct you not to discuss this case or your possible testimony with any other witness until you learn the case has been concluded."

10.6 Subpoenas

A. In General

MCL 600.1455(1) authorizes courts of record to issue subpoenas requiring the testimony of witnesses, and MCR 2.506 regulates that process. There are a number of specialized statutes providing for subpoenas in particular situations. See, e.g., the Uniform Interstate Depositions and Discovery Act, MCL 600.2201 *et seq*.,[24] permitting a party to "submit a foreign subpoena to the clerk of the circuit court in the county in which discovery is sought to be conducted" in order "[t]o request issuance of a subpoena" in Michigan. MCL 600.2203(1).[25] In addition to requiring the attendance of a party or witness, the court is authorized to subpoena a representative of an insurance carrier for a party, "with information and authority adequate for responsible and effective participation in settlement discussions," to be present or immediately available at trial. MCR 2.506(A)(4). Subpoenas may be signed by an attorney of record in the action or by the clerk of the court. MCR 2.506(B)(1). The court may enforce its subpoenas using its contempt power, MCR 2.506(E), and is provided other enforcement options by MCR 2.506(F).[26]

One of the rights of an accused in a criminal prosecution is "to have compulsory process for obtaining witnesses in his or her favor." Const 1963, art 1, § 20. See also MCL 767.32 and MCL 775.15. The right to offer testimony of witnesses and compel their attendance is the right to present a defense. *Washington (Jackie) v Texas*, 388 US 14, 19 (1967). A criminal defendant's right to compulsory process, though fundamental, is not absolute. *People v McFall*, 224 Mich App 403, 408 (1997). It requires a showing that the witness's testimony would be both material and favorable to the defense. *Id*. at 408. Matters of compulsory process, as well as trial continuances to obtain a witness, are decided at the discretion of the trial court. *Id*. at 411; *In re Jackson (Rebecca)*, 199 Mich App 22, 28 (1993).

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[24] Effective April 1, 2013, 2012 PA 362 added Chapter 22, the Uniform Interstate Depositions and Discovery Act, MCL 600.2201 *et seq*., to the Revised Judicature Act. The Uniform Interstate Depositions and Discovery Act "applies to requests for discovery in actions pending on April 1, 2013." MCL 600.2208.

[25] See also MCR 2.305(F), providing that "[a] person may request issuance of a subpoena in this state for an action pending in another state or territory under the Uniform Interstate Depositions and Discovery Act, MCL 600.2201 *et seq*., to require a person to attend a deposition, to produce and permit inspection and copying of materials, or to permit inspection of premises under the control of the person."

[26] See the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 5, for more information.

B. Subpoena Duces Tecum (Subpoena for Production of Evidence)

A party or witness may be required to bring specified notes, records, documents, photographs, or other portable tangible things. MCR 2.506(A)(1). Subpoenas issued pursuant to MCR 2.506(A)(1) "have no relation to subpoenas issued in conjunction with discovery proceedings. The end of the discovery period does not preclude the issuance of trial subpoenas, including subpoenas duces tecum, even if the records to be produced were not the subject of discovery." *Boccarossa v Dep't of Transportation*, 190 Mich App 313, 316 (1991).

A subpoena for hospital medical records is controlled by MCR 2.506(I).

C. Motion to Quash Subpoena

MCR 2.506(H) states that a person served with a subpoena may appear and challenge the subpoena. For good cause, the witness may be excused, with or without a hearing. MCR 2.506(H)(3). Otherwise, the person must appear unless excused by the court or the party who had the subpoena issued. MCR 2.506(H)(4).

10.7 Conducting the Trial[27]

"The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court." MCR 2.513(B).[28]

A. Stipulations

The prosecution retains the burden of proving beyond a reasonable doubt each element of the crime charged, even if the defendant offers to stipulate to any elements of the crime charged. *People v Mills*, 450 Mich 61, 69 (1995). Evidence may be properly admitted on an undisputed point—one to which the defendant has stipulated—if the evidence is necessary to "illustrate[] the nature and extent of the [victim's] injuries." *Id.* at 70-71. For example, in *Mills*, 450 Mich at 66, 70 n 5, 79-80, even though the defendants offered to stipulate

[27] See Section 10.9 for information on jury matters during trial. See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 1, for discussion of limitations on evidence.

[28] "The provisions of the rules of civil procedure apply to [criminal] cases . . ., except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, or (3) when a statute or court rule provides a like or different procedure." MCR 6.006(D).

to the contents of photographs depicting the severity of the burns inflicted on the victim, the trial court properly admitted the photographs because they were necessary to show the defendants' intent to kill and to corroborate the testimony of the prosecution's expert witness and the victim. But see *People v Crawford (Douglas)*, 458 Mich 376, 381 n 3, 395-400 (1998), where the trial court committed error requiring reversal in declining the defendant's offer to stipulate to his prior convictions, where admission of the convictions constituted improper use of MRE 404(b) evidence.

B. Opening Statement

Opening statements serve to introduce the case to the jury.[29] "Unless the parties and the court agree otherwise, the . . . prosecutor, before presenting evidence, must make a full and fair statement of the case and the facts the . . . prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a similar statement. The court may impose reasonable time limits on the opening statements." MCR 2.513(C) (applicable only to jury trials). See also MCR 2.507(A), which is applicable to both jury and nonjury trials (unless waived with the consent of the court and opposing counsel, a party introducing evidence "must make a full and fair statement of that party's case and the facts the party intends to prove"); *People v Stimage*, 202 Mich App 28, 31 (1993). The court may impose reasonable time limits on opening statements and closing arguments. MCR 2.507(G); MCR 2.513(C). "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32 (1976). An opening statement is the appropriate time to state the facts to be proven at trial. *People v Nard*, 78 Mich App 365, 374-375 (1977).

In the absence of bad faith, it is not error when the prosecutor fails to prove the assertions made during opening statements. *People v Wolverton*, 227 Mich App 72, 75 (1997). Counsel may argue their theories of the law during opening statement. *People v Myers*, 30 Mich App 409, 429 (1971). "While this court has always conceded to a trial court a liberal discretion in the control and direction of statements and arguments of counsel to the jury, it has as strongly upheld the right of counsel to state their theory of the law as applicable to the facts which they expect to prove." *People v Lum Lee*, 258 Mich 618, 621 (1932).

[29] "Opening statements are commonly waived in bench trials." *People v McNally*, unpublished opinion per curiam of the Court of Appeals, February 10, 2005 (Docket No. 252849). (An unpublished opinion is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).)

1. Prejudicial or Inflammatory Remarks

It is improper for a prosecutor to appeal to a jury's sympathy during opening statement. *People v Watson*, 245 Mich App 572, 591 (2001). However, reversal is not required where the prosecutor's conduct is isolated and where the appeal to jury sympathy is not blatant or inflammatory. *Id.* at 591. The ultimate determination of whether the prosecutor engaged in improper conduct depends on whether the prosecutor's conduct, taken in context, deprived the defendant of a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645 (2003).

2. Dismissal, Mistrial, or Retrial

A trial court may dismiss the action against a defendant after the prosecutor's opening statement where it finds that even if the prosecution proved all the facts intended, there would be no basis to convict. *People v Recorder's Ct Judge*, 78 Mich App 576, 578-579 (1977). However, this practice is discouraged and should only be used after careful judicial consideration. *Id.* at 579.

Where the prosecutor makes comments—in good faith or bad faith—during opening statement which are not substantiated at trial by the evidence, reversal is not required unless the defendant was unfairly prejudiced. *Wolverton*, 227 Mich App at 76-78. In *Wolverton*, 227 Mich App at 78, the trial court erred in denying the defendant's motion for a mistrial where the prosecutor in good faith disclosed the results of the defendant's blood alcohol test during opening statement, and that evidence was ultimately not admitted at trial due to lack of a proper foundation.

"[T]he cumulative effect of an attorney's misconduct at trial may require retrial when the misconduct sought 'to prejudice the jury and divert the jurors' attention from the merits of the case.'" *Yost v Falker*, 301 Mich App 362, 363-367 (2013) (quoting *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978), and holding that although defense counsel "intended to prejudice the jury[]" through his repeated suggestions during opening statement, cross-examination, and closing argument "that the jury should find for [the] defendant to deter the filing of lawsuits[,]" retrial was not required "because a note sent by the jury to the court during deliberations unequivocally demonstrated that [defense counsel's] efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim[]").

C. Interim Commentary

"Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial." MCR 2.513(D) (applicable only in jury trials).

D. Witness Examination

1. Trial Court's Duty to Exercise Control Over Witnesses

"The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a). "The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons." MRE 611(b).

2. Taking Testimony by Use of ~~Audio and~~ Videoconferencing Technology[30]

MCR 6.006(A) allows courts to use two-way interactive video technology to conduct certain proceedings between a courtroom and a prison, jail, or other location, including probable cause conferences and other pretrial conferences, pleas, show cause hearings, waivers and adjournments of extradition, and referrals for forensic determination of competency.[31] See also MCR 4.401(E) ("[a] district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006[]").

MCR 6.006(C)(1) states that, on a showing of good cause, as long as the defendant is either present in the courtroom or has waived the right to be present, circuit courts may use ~~two-way interactive video~~ videoconferencing technology in certain proceedings to take testimony from a person at another location, including evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and

[30] For additional discussion of the use of audio and video technology, including confrontation clause issues associated with such technology, see Section 10.11(B); see also the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 6.

proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status.

MCR 6.006(C)(2) states that, on a showing of good cause, as long as the defendant is either present in the courtroom or has waived the right to be present, circuit courts may, with the consent of the parties, use ~~two-way interactive~~ videoconferencing technology during a trial to take testimony from a person at another location. A party who does not consent to the use of ~~two-way interactive~~ videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting. *Id.* "[I]f either the defendant or [defense] counsel objects, the 'party' cannot be said to have consented[; h]owever, . . . for the . . . objection to be valid, it must be made on the record." *People v Buie (Buie III)*, 491 Mich 294, 319 (2012).[32]

MCL 600.2164a(1) specifically permits the use of video communication equipment for the purpose of presenting expert testimony at trial. If the court determines "that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony," and if all the parties consent, the court may allow a qualified expert witness "to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place." *Id.*[33]

Additionally, the Revised Judicature Act, at MCL 600.2163a, permits the use of videorecorded statements or closed-circuit television in presenting the testimony of child victim-witnesses, victim-witnesses with developmental disabilities,

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[31] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Remote participation as set out in Administrative Order No. 2012-7 is permitted only in the following situations: "1) judicial assignments; 2) circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district; 3) district court districts that have multiple court locations in which a judicial officer would have to travel to a different courthouse within the district; [and] 4) a multiple district plan in which a district court magistrate would have to travel to a different district." *Id.* "The judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." *Id.* Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

[32] See Section 10.11 for additional discussion of *Buie III*, 491 Mich 294, and confrontation clause issues associated with the use of ~~interactive~~ video technology.

and "vulnerable adult" victim-witnesses in prosecutions and proceedings involving certain offenses.[34] See MCL 600.2163a(1)(e); MCL 600.2163a(6); MCL 600.2163a(18).[35]

3. Special Protections for Certain Witnesses[36]

MCL 600.2163a affords child victim-witnesses, victim-witnesses with developmental disabilities, and "vulnerable adult" victim-witnesses special protections in prosecutions and proceedings involving certain offenses. MCL 600.2163a(1)(e).[37] The special protections available under MCL 600.2163 include the use of dolls or mannequins, the presence of a support person, the exclusion of all unnecessary persons from the courtroom, the placement of the defendant as far from the witness stand as is reasonable, the use of a podium, and the use of videorecorded statements or closed-circuit television in presenting the victim-witness's testimony.

Additionally, "[a]lthough MCL 600.2163a [does] not provide the trial court with [the] specific authority[]" to allow a support dog to accompany a victim while he or she testifies, "it is within the trial court's inherent authority to control its courtroom and the proceedings before it to allow a witness to testify accompanied by a support animal." *People v Johnson (Jordan)*, ___ Mich App ___, ___ (2016), citing MCL 768.29; MRE 611(a) (additional citations omitted). A trial court is not required to make findings of good cause or necessity before allowing the use of a support animal. *Johnson (Jordan)*, ___ Mich App at ___ (citations omitted). However, "as a practical matter it will be the better practice for trial courts to make some findings regarding [the] decision to use or not use a support animal[,]" and "the court should consider the facts and circumstances of each individual witness to determine whether the use of the support animal will be useful to the expeditious and effective ascertainment of the truth."

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[33] The party wishing to present expert testimony by video communication equipment must file a motion at least seven days before the date set for trial, unless good cause is shown to waive that requirement. MCL 600.2164a(2). The party "initiat[ing] the use of video communication equipment" must pay the cost for its use, unless the court directs otherwise. MCL 600.2164a(3). "A verbatim record of the testimony shall be taken in the same manner as for other testimony." MCL 600.2164a(1).

[34] Section 17b of the Juvenile Code, MCL 712A.17b, affords similar protections, but does not apply to vulnerable adults. See MCL 712A.17b(1)(d).

[35] See also MCL 712A.17b(5); MCL 712A.17b(16).

[36] For additional discussion of special protections for certain victims and witnesses, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 6.

[37] Section 17b of the Juvenile Code, MCL 712A.17b, affords similar protections, but does not apply to vulnerable adults. See MCL 712A.17b(1)(d).

4. Direct Examination

Unless otherwise ordered by the court, the prosecution must introduce its testimony first. MCR 2.507(B). As long as the prosecutor acts in good faith, he or she should be allowed wide latitude in presenting the case, so that the jurors can grasp the theory and the defendant's connection with the alleged offense. *People v Dye*, 356 Mich 271, 277 (1959). In *Dye*, 356 Mich at 277, the trial court did not abuse its discretion in "allowing the prosecutor by direct and cross-examination to bring out and refer to certain allegedly irrelevant and collateral matters pertaining to the defendant's varied marital life, his ownership of property, his professional experience and training, and numerous other things[,]" when "in so doing the prosecutor was in good faith attempting to show a motive for the crime and to attack the credibility and show the possible bias of the defendant and certain of his witnesses."

Leading questions are only permissible on direct examination as necessary to develop a witness's testimony. MRE 611(c)(1). See, e.g., *Watson*, 245 Mich App at 587, where reversal was not required where the prosecutor asked leading questions of the thirteen-year-old victim only to the extent necessary to develop her testimony.

Only one attorney for a party is permitted to examine a witness, unless otherwise ordered by the court. MCR 2.507(C).

The trial court has broad discretion to examine witnesses. *People v Gendron*, 144 Mich App 509, 517 (1985). For example, in *Gendron*, 144 Mich App at 517-518, no abuse of discretion occurred where the trial court extensively questioned two alibi witnesses to clarify relevant testimony because those witnesses had difficulty understanding the prosecutor's questions and communicating their answers.

5. Cross-Examination

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. MRE 611(b). However, the trial court may limit cross-examination regarding matters not testified to on direct examination. *Id*. Stated another way, "[t]his evidentiary rule plainly confers on the trial judge the discretion to limit the scope of cross-examination to matters testified to on direct examination." *People v Kimber*, unpublished opinion per curiam of the Court of Appeals, issued May 2, 2000 (Docket No. 206358), slip op p 3.[38]

The trial court has broad discretion in controlling cross-examination, but due regard must be given to the defendant's constitutional rights. *People v Holliday*, 144 Mich App 560, 566 (1985).

The trial court "may limit . . . cross-examination to protect [a] witness from 'harassment or undue embarrassment.'" *People v Daniels (Daniel)*, 311 Mich App 257, 268 (2015), quoting MRE 611(a).

Leading questions are permissible during cross-examination. MRE 611(c)(2).

"[H]ostile cross-examination of a defendant in a criminal prosecution is a function of the prosecuting attorney and [] a judge before whom a jury case is being tried should avoid any invasion of the prosecutor's role." *People v Cole*, 349 Mich 175, 196 (1957).

"[T]he cumulative effect of an attorney's misconduct at trial may require retrial when the misconduct sought 'to prejudice the jury and divert the jurors' attention from the merits of the case.'" *Yost v Falker*, 301 Mich App 362, 363-367 (2013) (quoting *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978), and holding that although defense counsel "intended to prejudice the jury[]" through his repeated suggestions during opening statement, cross-examination, and closing argument "that the jury should find for [the] defendant to deter the filing of lawsuits[,]" retrial was not required "because a note sent by the jury to the court during deliberations unequivocally demonstrated that [defense counsel's] efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim[]").

Under MRE 611(a), "'a trial court, in certain circumstances, may prohibit a defendant who is exercising his right to self-representation from personally questioning the victim.'" *Daniels (Daniel)*, 311 Mich App at 268 (citation omitted). "MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault[; t]he court must balance the criminal defendant's right to self-representation with 'the State's important interest in protecting child sexual abuse victims from further trauma.'" *Daniels (Daniel)*, 311 Mich App at 269 (citation omitted). "[T]he trial court wisely and properly

[38] Unpublished opinions of the Court of Appeals are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

prevented [the] defendant from personally cross-examining [his children, regarding their testimony that he sexually abused them,] to stop the children from suffering 'harassment and undue embarrassment[,]'" following "a motion hearing at which [the court] heard considerable evidence that [the] defendant's personal cross-examination would cause [the children] significant trauma and emotional stress." *Id*. at 270-271, quoting MRE 611(a) (additional citations omitted). The defendant's right to self-representation was not violated under these circumstances where the defendant was instructed "to formulate questions for his [children], which his advisory attorney then used to cross examine them." *Daniels (Daniel)*, 311 Mich App at 270-271.

6. Redirect Examination

On redirect examination, a witness may explain answers he or she made on cross-examination. *People v Harris (Benson)*, 127 Mich App 538, 545 (1983).

7. Recross-Examination

On recross-examination, the prosecution may inquire into new matters not covered during cross-examination where the new matters are in response to matters introduced during redirect examination. *People v Goddard (Kenneth)*, 135 Mich App 128, 138 (1984), rev'd on other grounds 429 Mich 505 (1988).

E. Closing Argument

"After the close of all the evidence, the parties may make closing arguments. The . . . prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the . . . prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments." MCR 2.513(L) (applicable only to jury trials). See also MCR 2.507(G) (applicable to jury and nonjury trials).

Committee Tip:

Many courts give jury instructions before closing argument, because it assists the jury in better understanding the closing arguments of the parties. See MCR 2.513(N)(1) (the trial court, in its discretion and on notice to the parties, may instruct the jury before closing arguments).

In a case where the defendant asserted the affirmative defense of insanity, the trial court's decision to deny the defendant's request to make a surrebuttal argument did not constitute an abuse of discretion because former MCR 6.414(G)[39] "references only the prosecution's ability to make a rebuttal argument[,]" and "the prosecution's burden to prove the elements of the crime beyond a reasonable doubt was still greater than [the] defendant's burden to prove insanity by a preponderance of the evidence." *People v Lacalamita*, 286 Mich App 467, 473 (2009).

1. Permissible Content of Closing Argument

During closing argument, a prosecutor may argue the evidence admitted at trial and reasonable inferences arising from that evidence. *People v Kelly (Albert)*, 231 Mich App 627, 641 (1998). The prosecutor may not submit issues which are beyond the scope of guilt or innocence, or make predictions on the consequences of the jury's verdict. *People v Biondo*, 76 Mich App 155, 158-160 (1977) (it was error requiring reversal for the prosecutor to argue that the jurors had an opportunity to impact the local drug problem by convicting the defendant). The prosecutor can evaluate the personality, truthfulness, and integrity of witnesses. *People v Couch*, 49 Mich App 69, 72-73 (1973). The prosecutor may not appeal to the sympathy of the jurors, to their sense of civic duty, *People v Abraham (Nathaniel)*, 256 Mich App 265, 273 (2003), or to their religious beliefs. *People v Mischley*, 164 Mich App 478, 483 (1987). A "prosecutor may not question defense counsel's veracity." *People v Wise*, 134 Mich App 82, 101-102 (1984).

"A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof. However, a prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment. A prosecutor may also argue that the evidence was uncontradicted even if the defendant is the only person who could have contradicted the evidence." *People v Fyda*, 288 Mich App 446, 463-464 (2010).

[39] Effective September 1, 2011, ADM 2005-19 deleted MCR 6.414 and added MCR 2.513(L), which contains language similar to former MCR 6.414(G).

The prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, because that type of argument effectively states that defense counsel does not believe his or her own client, which undermines the defendant's presumption of innocence. *People v Unger*, 278 Mich App 210, 236 (2008). In its initial closing argument, not in response to defense counsel comments, "[t]he prosecution . . . clearly exceeded the bounds of proper argument when it suggested (1) that defense counsel had attempted to 'confuse the issue[s]' and 'fool the jury' by way of 'tortured questioning,' 'deliberately loaded questions,' and 'a deliberate attempt to mislead,' (2) that defense counsel had attempted to 'confuse' and 'mislead' the jury by using 'red herrings' and 'smoke and mirrors,' and (3) that defense counsel had attempted 'to deter [the jury] from seeing what the real issues are in this case.'" *Id.* at 238. Because the trial court instructed the jury that the attorneys' arguments were not evidence, and "because a timely objection and curative instruction could have alleviated any prejudicial effect the improper prosecutorial comments may have had, [there was] no error requiring reversal." *Id.* See also *People v Schrauben*, ___ Mich App ___, ___ (2016) (holding that "the prosecutor's argument that defense counsel is a 'mud slinger' who 'pulls things out of people and muddies up the water[]' [improperly] suggest[ed] that defense counsel was distracting the jury from the truth and deterring the jury from seeing the real issues[,]" but nevertheless concluding that reversal was not warranted because "the trial court instructed the jury that the attorneys' statements and arguments were not evidence" and "any prejudicial effect created by the improper statements could have been alleviated by a timely objection and curative instruction[]") (citations omitted).

The prosecutor did not commit misconduct and deny the defendant a fair trial by "comparing [the defendant's] criminal culpability through aiding and abetting to teamwork[]" and by "[telling] the jury that it could convict [the defendant] based on a team theory of guilt[.]" *People v Blevins*, ___ Mich App ___, ___ (2016). "The prosecutor's reference[] to the way in which all members of a sports team share in the team's victory was obviously a metaphor[,] . . . [and] the trial court clearly instructed the jury that the arguments of counsel were not evidence." *Id.* at ___.

"If the defendant makes an argument, the . . . prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument." MCR 2.513(L); see also MCR 2.507(F).

"[T]he cumulative effect of an attorney's misconduct at trial may require retrial when the misconduct sought 'to prejudice the jury and divert the jurors' attention from the merits of the case.'" *Yost v Falker*, 301 Mich App 362, 363-367 (2013) (quoting *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978), and holding that although defense counsel "intended to prejudice the jury" through his repeated suggestions during opening statement, cross-examination, and closing argument "that the jury should find for [the] defendant to deter the filing of lawsuits[,]" retrial was not required "because a note sent by the jury to the court during deliberations unequivocally demonstrated that [defense counsel's] efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim[]").

2. Defendant's Right to Present a Defense

Where defense counsel, in closing argument, does "not . . . attempt to add new evidence to the trial[,]" but rather makes "a permissible attempt to argue a reasonable inference from the evidence adduced at trial[,]" a "trial court abuse[s] its discretion when it refuse[s] to allow defense counsel" to include this argument. *People v Stokes*, 312 Mich App 181, 206-207 (2015) (concluding that "the trial court abused its discretion when it refused to allow defense counsel to specifically argue that [a particular other individual had] . . . committed the crimes[,]" because the argument was reasonably inferable from the evidence). However, "this error [does] not deprive [a defendant] of [the constitutional] right to present a defense[]" where "[t]he relevant evidence [is] presented to the jury[]" and counsel's other arguments "clearly impl[y]" the reasonable inference, such that the defendant is "not deprived of a meaningful opportunity to present a complete defense." *Id.* at 207-208 (citations omitted).

3. Remarks Involving Witness Testimony

The prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard (Connell)*, 226 Mich App 528, 548 (1997). The prosecutor is free to argue the evidence and all reasonable inferences from it as it relates to the prosecutor's theory of the case. *People v Schumacher*, 276 Mich App 165, 178-179 (2007). However, "[a] prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness[.]" *People v McGhee (Larry A)*, 268 Mich App 600, 630 (2005). "Improper vouching occurs when a prosecutor either (1) bluntly states a personal belief in a

witness's credibility, 'thereby placing the prestige of the [prosecutor's office] behind that witness,' or (2) 'implies that the witness's testimony is corroborated by evidence known to the government but not known to the jury.'" *United States v Henry (Roderick)*, 545 F3d 367, 378-379 (CA 6, 2008), quoting *United States v Francis*, 170 F3d 546, 550-551 (CA 6, 1999).[40] As long as a prosecutor's comments about a defendant's testimony are supported by reasonable inferences from the record evidence and are not wholly based on the prosecutor's personal opinion, a prosecutor may properly attack a defendant's credibility just as the prosecutor would any other witness's credibility. *Henry (Roderick)*, 545 F3d at 382.

"The prosecutor's characterization of [the] defendant's account of the criminal episode as a lie or a 'story' did not deprive [the] defendant of a fair and impartial trial[] . . . nor did it constitute plain error that affected [the] defendant's substantial rights[;] . . . the prosecutor's classification of [the] defendant's account of the incident as a lie properly advanced the prosecution's position that [the] defendant's testimony was not credible in light of the contradictory evidence adduced at trial[, and] . . . [t]he prosecutor did not improperly imply that he had special knowledge that [the] defendant fabricated his account of the incident." *People v Steanhouse*, 313 Mich App 1, 33, 34 (2015) (citations omitted). See also *Cristini v McKee*, 526 F3d 888, 902 (CA 6, 2008) (where the prosecutor's argument "was based on evidence in the record, and was not framed in such a way that would suggest the prosecutor knew of any outside evidence[,]" the prosecutor's repeated references to defense witnesses as "liars" was not constitutionally improper).

Where the complaining witness testified, without prompting, that she was a religious person, and the prosecutor then couched his closing argument in terms of a credibility contest between a person with a "deep rooted belief in God" and a person who was a "liar," the defendant's conviction required reversal. *People v Leshaj*, 249 Mich App 417, 422 (2002).

A prosecutor may "argue from the evidence presented that an expert witness had a financial motive to testify at trial." *Unger*, 278 Mich App at 236, 239 (prosecutor was free to argue that defense counsel "bought" a defense expert's testimony by paying the expert a substantial sum of money). But where a case turns primarily on conflicting expert testimony, a prosecutor should take special steps to avoid misconduct

[40] Though persuasive, Michigan state courts "are not . . . bound by the decisions of lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

designed to impugn the integrity of defense expert witnesses. *Id.* at 240. In *Unger*, 278 Mich App at 240, the Court found that the prosecutor unnecessarily and impermissibly impugned the integrity of a defense expert witness by arguing that the expert was hired "'to come in with [his] credentials and fool this jury,'" that the expert was hired to provide "'[r]easonable doubt at reasonable prices,'" and that the expert "'did what he was paid to do.'"

"[A]ttacking the credibility of a theory advanced by a defendant does not [improperly] shift the burden of proof." *McGhee (Larry A)*, 268 Mich App at 635.

"The mere disclosure of a plea agreement with a prosecution witness, which includes a provision for truthful testimony, does not constitute improper vouching or bolstering by the prosecutor, provided the prosecutor does not suggest special knowledge of truthfulness." *People v Cooper (James)*, 309 Mich App 74, 90 (2015), citing *People v Bahoda*, 448 Mich 261, 276 (1995). See also *People v Tomasik*, ___ Mich ___, ___ (2015) (holding that "[t]he trial court abused its discretion by admitting the recording of the defendant's interrogation[,]" and noting that "[i]n a trial in which the evidence essentially presents a 'one-on-one' credibility contest between the complainant and the defendant, the prosecutor cannot improperly introduce statements from the investigating detective that vouch for the veracity of the complainant and indicate that the detective believes the defendant to be guilty[]") (citations omitted).

4. Remarks Involving Defendant's Failure to Testify

It is impermissible for the prosecutor to comment on a defendant's failure to take the stand. *Griffin (Eddie) v California*, 380 US 609, 615 (1965). The prosecutor also may not direct questions to the defendant during closing arguments which would require a defendant who did not testify to explain the evidence against him or her. *People v Green (Louis)*, 131 Mich App 232, 234-239 (1983). Such a practice would shift the burden of proof to the defendant and violate the Fifth Amendment protection against self-incrimination. *Id.* at 236-237. However, when a defendant takes the stand, the prosecutor may comment on the validity of the argument without shifting the burden of proof to the defendant. *People v Fields (Carl)*, 450 Mich 94, 109-113, 116 (1995). Questioning a defendant about his or her failure to confront his accomplice does not violate the defendant's right to silence. *People v Hackett (William)*, 460 Mich 202, 204-205 (1999).

"'[T]he Fifth Amendment is not violated when a defendant who testifies in his [or her] own defense is impeached with his [or her] prior silence' at his [or her] first trial. *Jenkins*[*v Anderson*, 447 US 231, 235 (1980)], citing *Raffel v United States*, [271 US 494 (1926)]." *People v Clary*, 494 Mich 260, 263-264, 266, 271-272 (2013) (noting that "even though this [type of] silence is . . . post-*Miranda* silence[,] . . . *Raffel* has not been overruled by . . . any . . . United States Supreme Court decision[,]" and holding that where the defendant did not testify at his first trial, which ended in a mistrial, he was not "improperly impeached with his silence when the prosecutor [at the retrial] made repeated references to his failure to testify at his first trial[]").[41]

A prosecutor may point out that specific inculpatory evidence is undisputed without violating the prohibition against commenting on a defendant's failure to testify—especially when a person other than the defendant could have provided testimony to dispute the evidence. *People v Perry (Michael)*, 218 Mich App 520, 538 (1996).

5. Remarks Involving Failure to Produce Corroborating Witnesses

"[C]ourts [] permit[] the prosecutor to offer a rhetorical argument regarding a defendant's failure to produce witnesses which could corroborate his story. The underlying rationale is that the constitutional protection against defendant's failure to take the stand does not apply to witnesses. For this reason, the prosecutor has been permitted to comment upon (1) defendant's failure to call an accomplice or indicted co-defendant and (2) the failure of such witnesses to testify. This rule is subject to an exception . . . that the prosecutor may not comment on such witnesses' failure to testify when they are called by the defendant and invoke their constitutional right to remain silent." *People v Gant (Percy)*, 48 Mich App 5, 8-9 (1973) (internal citations omitted).

In *Gant (Percy)*, 48 Mich App at 9, the defendant "disavowed any involvement in the charged crime and offered an explanation which, if true, could be easily verified by the [defendant's] two unidentified companions." The Court of Appeals held that "[t]he prosecutor's comment upon defendant's failure to produce these witnesses constituted a

[41] The defendant's convictions following his second trial were nevertheless reversed because the prosecutor improperly referred to the defendant's post-arrest, post-*Miranda* silence in violation of *Doyle v Ohio*, 426 US 610, 618-619 (1976). *Clary*, 494 Mich at 263. See Section 10.7(E).

permissible attempt to challenge the quality of the proffered defense consistent with the cited authorities," and that "[e]ven if the missing witnesses are considered accomplices or the actual perpetrators of the crime, defendant's failure to seek their testimony to the point where such is denied by their invocation of the Fifth Amendment creates adverse circumstantial evidence subject to comment by the prosecutor." *Id.* at 9.

6. Remarks Referring to the Defendant's Pre-Arrest Silence or Conduct

"[T]he prosecutor may not . . . refer to [a] defendant's post-arrest, post-*Miranda* silence with the police[.]" *People v Clary*, 494 Mich 260, 271 (2013), citing *Doyle v Ohio*, 426 US 610, 618-619 (1976). However, "[a] defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and *before Miranda*[42] warnings have been given[;] . . . [a] prosecutor may not comment on a defendant's silence in the face of accusation, but may comment on silence that occurred before any police contact." *People v McGhee (Larry A)*, 268 Mich App 600, 634 (2005). Furthermore, although "*due process* prohibits prosecutors from pointing to the fact that a defendant was silent after he [or she] heard *Miranda* warnings, *Doyle*[, 426 US at 617-618], . . . that rule does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him[or her], *Jenkins v Anderson*, 447 US 231, 240 (1980)." *Salinas v Texas*, 570 US ___, ___ n 3 (2013) (plurality opinion).

A criminal suspect generally must "expressly invoke the privilege against self-incrimination in response to [noncustodial police questioning] . . . in order to benefit from it," because "[a] suspect who stands mute has not done enough to put police on notice that he [or she] is relying on his [or her] Fifth Amendment privilege."[43] *Salinas*, 570 US at ___. Accordingly, where "[the] petitioner voluntarily answered the [noncustodial] questions of a police officer who was investigating a murder[, b]ut . . . balked when the officer asked whether a ballistics test would show that the shell casings

[42] *Miranda v Arizona*, 384 US 436 (1966).

[43] "[T]wo exceptions [apply] to the requirement that witnesses invoke the privilege[against self-incrimination:] . . . First, . . . a criminal defendant need not take the stand and assert the privilege at his [or her] own trial[, *Griffin (Eddie) v California*, 380 US 609, 613-615 (1965), and] . . . [s]econd, . . . a witness' failure to invoke the privilege must be excused where governmental coercion makes his [or her] forfeiture of the privilege involuntary[, *Miranda*, 384 US at 467-468, 468 n 37]." *Salinas*, 570 US at ___.

found at the crime scene would match [the] petitioner's shotgun[,]" the prosecution's argument at trial "that [the petitioner's] reaction to the officer's question suggested that he was guilty[]" did not violate the Fifth Amendment privilege against self-incrimination, because the petitioner had failed to expressly invoke the privilege. *Id*. at ___.

"'[A] prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true.'" *McGhee (Larry A)*, 268 Mich App at 634-635 (citations omitted). However, "[w]here it would not have been natural for the defendant to contact the police—where doing so may have resulted in the defendant incriminating himself[or herself]—the prosecution cannot properly comment on the defendant's failure to contact the police." *People v Dye (Paul)*, 431 Mich 58, 80 (1988). See also *People v Gibbs (Phillip)*, 299 Mich App 473, 484 (2013) ("[t]he prosecutor's comments . . . suggest[ing] that if [the defendant's] testimony were true—that his participation in [a] robbery was coerced—he would have called 911 or gone to the police immediately[]" were not improper; the comments "referred to [the defendant's] prearrest silence and, therefore, did not violate his right to remain silent[,]" and "if [the defendant's] version of the events were true[] . . . it would have been natural for him to contact the police[]").

"[A] prosecutor may comment on the inferences that may be drawn from a defendant's flight." *McGhee (Larry A)*, 268 Mich App at 635.

Where "[the] defendant had been informed of his *Miranda* rights at his arraignment[,] . . . the prosecutor's references to [his] post-arrest, post-*Miranda* silence with the police violated *Doyle*[, 426 US at 618-619]." *Clary*, 494 Mich at 272 (holding that the prosecutor improperly referred to the defendant's failure, "after he was arrested and arraigned, . . . [to tell] the police that he did not shoot the complainant[]").

7. Failure to Correct Misleading or False Witness Testimony

"It is inconsistent with due process when the prosecution allows false testimony from a state's witness to stand uncorrected." *People v Smith (Feronda)*, 498 Mich 466, 475 (2015), citing *Napue v Illinois*, 360 US 264, 269 (1959) (additional citations omitted). In *Smith (Feronda)*, 498 Mich at 470, "the prosecution breached a duty to correct the substantially misleading, if not false, testimony of a key witness about his

formal and compensated cooperation in the government's investigation." The defendant was entitled to a new trial because, "[g]iven the overall weakness of the evidence against the defendant and the significance of the witness's testimony, . . . there [was] a reasonable probability that the prosecution's exploitation of the substantially misleading testimony affected the verdict." *Id.*, citing *Napue*, 360 US at 271-272. "Due process required that the jury be accurately apprised of the incentives underlying the testimony of this critical witness," and "[c]apitalizing on [the witness]'s testimony that he had no paid involvement in the defendant's case [was] inconsistent with a prosecutor's duty to correct false testimony." *Smith (Feronda)*, 498 Mich at 480, 487, citation omitted. Because "there [was] a 'reasonable likelihood' that the false impression resulting from the prosecutor's exploitation of the testimony affected the judgment of the jury[,] . . . the defendant [was] entitled to a new trial." *Id.* at 483, quoting *Napue*, 360 US at 271.

See, however, *People v Schrauben*, ___ Mich App ___, ___ (2016) (holding that "the trial court did not abuse its discretion by denying [the] defendant's motion for a new trial based on perjury[]" where, "[e]ven if the prosecutor knowingly presented perjured testimony, the false testimony likely would not have affected the judgment of the jury[;]" although "the inconsistencies [in a key witness's testimony] . . . certainly cast doubt on [the witness's] testimony at trial and raised questions as to his involvement in the [defendant's crimes]," "there was concrete evidence presented which implicated [the] defendant, despite the level of [the witness's] potential involvement[]").

8. Standard of Review for Prosecutorial Error Claims[44]

Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451 (2005).

Prosecutorial misconduct may constitute constitutional or nonconstitutional error. *People v Blackmon*, 280 Mich App 253, 269-271 (2008). Whether an error is constitutional or

[44] See *People v Cooper (James)*, 309 Mich App 74, 88 (2015), agreeing with the "prosecutor's contention that it is a misnomer to label [these types of] claims . . . as 'prosecutorial misconduct[]'" and that "the term 'misconduct' is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct." Where "the conduct about which a defendant complains is premised on the contention that the prosecutor made a technical or inadvertent error at trial[,] . . . [rather than] the kind of conduct that would warrant discipline under [the] code of professional conduct[,] . . . [the] claim[] of error might be better and more fairly presented as [a] claim[] of 'prosecutorial error[.]'" *Id.* at 88.

nonconstitutional is a question of law subject to de novo review. *Id.* at 259. "[T]o be constitutional error, [in the absence of an allegation that the misconduct violated a specific constitutional right,] the misconduct must have *so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law*." *Id.* at 269, citing *Donnelly v DeChristoforo*, 416 US 637, 643 (1974).

If prosecutorial misconduct is preserved and is constitutional in nature, the proper standard of review on direct appeal is the "harmless beyond a reasonable doubt" standard. *Blackmon*, 280 Mich App at 271.

If prosecutorial misconduct is preserved and is nonconstitutional in nature, the proper standard of review on direct appeal is whether "it is more probable than not that the error in question 'undermine[d] the reliability of the verdict,' thereby making the error 'outcome determinative.'" *Blackmon*, 280 Mich App at 270, quoting *People v Lukity*, 460 Mich 484, 495-496 (1999).

Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights, and reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, irrespective of the defendant's innocence. *People v Roscoe*, 303 Mich App 633, 648 (2014) (citations omitted); *People v Odom*, 276 Mich App 407, 413 (2007). Review of unpreserved claims is precluded unless a curative instruction could not have eliminated the prejudicial effect, or the failure to consider the issue would result in a miscarriage of justice. *People v Avant*, 235 Mich App 499, 512 (1999). For example, unfair prejudice produced by prosecutorial comments may be cured by the court's instruction to the jury that counsel's arguments are not evidence. *People v Green (Rodney)*, 228 Mich App 684, 693 (1998); see also *Roscoe*, 303 Mich App at 649 (citing *People v Unger*, 278 Mich App 210, 235 (2008), and holding that although the prosecutor improperly "stated that she had personal knowledge that the government's witness was lying[,]" the "error was not outcome determinative[] . . . [because, h]ad [the] defendant objected to this instance of prosecutorial misconduct, an immediate curative instruction would have been sufficient to cure the error[]" and "the jury eventually heard other testimony that the witness was lying[]").

A trial court's decision to permit the prosecution to include certain comments in its opening statement is reviewed for an

abuse of discretion. *People v Jansson*, 116 Mich App 674, 690 (1982).

Issues of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the entire record and evaluate a prosecutor's remarks in context. *People v Dobek*, 274 Mich App 58, 64 (2007). Prosecutorial arguments are also considered in light of the defense arguments. *People v Lawton*, 196 Mich App 341, 353 (1992).

"[T]he cumulative effect of an attorney's misconduct at trial may require retrial when the misconduct sought 'to prejudice the jury and divert the jurors' attention from the merits of the case.'" *Yost v Falker*, 301 Mich App 362, 363-367 (2013) (quoting *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978), and holding that although defense counsel "intended to prejudice the jury" through his repeated suggestions during opening statement, cross-examination, and closing argument "that the jury should find for [the] defendant to deter the filing of lawsuits[,]" retrial was not required "because a note sent by the jury to the court during deliberations unequivocally demonstrated that [defense counsel's] efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim[]").

F. Summation of Evidence by Court

"After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury." MCR 2.513(M) (applicable only to jury trials).

10.8 Questions or Comments by Judge

A trial court is vested with broad discretion over the administration of trial proceedings. *People v Taylor (Kelvin)*, 252 Mich App 519, 522 (2002). See also MCL 768.29; MRE 611(a).

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 340 (1995); see also *People v Stevens (Adam)*,

498 Mich 162, 164 (2015). Examples of objectionable conduct by the trial court include volunteering information not in evidence, "campaigning from the bench," and interrupting or making derogatory remarks toward counsel. *People v Conyers*, 194 Mich App 395, 405-406 (1992).

"A judge's conduct pierces [the] veil [of judicial impartiality] and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Stevens (Adam)*, 498 Mich at 164.[45] "In evaluating the totality of the circumstances, [a] reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial." *Id*. at 172, 190-191 (concluding that "it [was] reasonably likely that the judge's conduct with respect to [the] defendant's expert witness improperly influenced the jury by creating the appearance of advocacy or partiality against [the] defendant[,]" and that the judge's curative instruction to the jury "was not enough to overcome the bias the judge exhibited against the defense throughout the trial[]").

"[I]t is appropriate for a judge to question witnesses to produce fuller and more exact testimony or elicit additional relevant information[;]" however, "[i]t is inappropriate for a judge to exhibit disbelief of a witness, intentionally or unintentionally[,]" and "[i]t is essential that the judge 'not permit his [or her] own views on disputed issues of fact to become apparent to the jury.'" *Stevens (Adam)*, 498 Mich at 173-174 (citations omitted). Judicial questioning that creates a suspicion as to the witness's credibility is discouraged. *People v Sterling*, 154 Mich App 223, 228 (1986). "While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Cheeks*, 216 Mich App 470, 480 (1996).

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[45] The *Stevens (Adam)* Court, noting that "there [was] no clear line of precedent establishing the appropriate test . . . to determine whether a trial judge's conduct pierced the veil of judicial impartiality[,]" rejected earlier formulations of the standard that examined, for example, whether the judge's conduct "'*may well have* unjustifiably aroused suspicion in the mind of the jury as to [the] defendant's credibility[,]'" "'*may well have* created an atmosphere of prejudice[,]'" "'*unduly influence[d]* the jury[,]'" or "'place[d] his [or her] *great influence* on one side or the other[.]'" *Stevens (Adam)*, 498 Mich at 169-170 (citations omitted). "In order to provide clarity going forward," the *Stevens (Adam)* Court "propose[d] a new articulation of the appropriate test, grounded in a criminal defendant's right to a fair and impartial jury trial." *Stevens (Adam)*, 498 Mich at 170 (citations omitted).

It is improper for a trial judge to belittle, scold, or demean a defendant's attorney to the extent that the jury might regard the attorney with contempt. *People v Ross (Kenneth)*, 181 Mich App 89, 91 (1989). However, where defense counsel engaged in "excessive and improper questioning of" a witness, "the trial judge appropriately exercised her duty to control the trial" by interrupting counsel's questioning, and her comments that defense counsel "'drag[ged] things out[]'" and that his questioning was "'argumentative'" "were not calculated to pierce the veil of judicial impartiality and were unlikely to unduly influence the jury to [the] defendant's detriment[;]" "the trial judge's 'interruptions' and remarks were reasonably measured" and were necessitated by "defense counsel's behavior of talking back to the judge and ignoring [her] directives to move on and rephrase questions[.]" *People v Biddles*, ___ Mich App ___, ___ (2016) (additionally holding that the defendant was not deprived of a fair trial by "the trial judge's remark that defense counsel might 'get a spanking[]'" when counsel, after the court sustained the prosecutor's objections, asked to approach the bench; although the comment was made "in a jesting manner[]" and "would have been better left unsaid," considering the comment in context, it could not be concluded "that the isolated and flippant statement influenced the jury[]").

"When the issue is preserved and a reviewing court determines that a judge has pierced the veil of judicial impartiality, a structural error has been established that requires reversing the judgment and remanding the case for a new trial." *Stevens (Adam)*, 498 Mich at 178 (citations omitted). "[J]udicial partiality can never be held to be harmless and, therefore, is never subject to harmless-error review." *Id*. at 179-180 ("overrul[ing] *People v Weathersby*, [204 Mich App 98 (1994)], and all other cases applying harmless-error analysis to questions of judicial partiality[]") (citations omitted).

10.9 Issues Affecting the Jury During Trial

A. Reference Document

"The court may authorize or require counsel in . . . criminal cases to provide the jurors with a reference document or notebook, the contents of which should include, but which is not limited to, a list of witnesses, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the preliminary jury instructions, admitted exhibits, and other admissible information to assist jurors in their deliberations." MCR 2.513(E).

B. Jury Note Taking

MCR 2.513(H) states:

> "The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded."[46]

C. Jury Questions

The court may allow the jury to ask questions of any witness. MCR 2.513(I). If the court allows jury questions, it must ensure that the questions are asked by the court itself. *Id.* In addition, it must ensure "that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions." *Id.* The court must inform the jury "of the procedures to be followed for submitting questions to witnesses." *Id.* See also *People v Heard*, 388 Mich 182, 188 (1972) ("The questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. The trial judge may permit such questioning if he [or she] wishes, and it was error for a judge to rule that under no circumstances might a juror ask any questions.").

See M Crim JI 2.9, which states:

> "(1) During the trial you may think of an important question that would help you understand the facts in this case. You are allowed to ask such questions.
>
> (2) You should wait to ask questions until after a witness has finished testifying and both sides have finished their questioning. If you still have an important question after this, do not ask it yourself. Raise your hand, write the question down, and pass it to the bailiff, who will give it to me.

[46] In civil cases only, jurors "are permitted to discuss the evidence among themselves in the jury room during trial recesses." MCR 2.513(K). There is no corresponding rule for criminal cases.

> (3) There are rules of evidence that a trial must follow. If your question is allowed under those rules, I will ask the witness your question. If your question is not allowed, I will either rephrase it or not ask it at all.
>
> (4) On the other hand, if you cannot hear what a lawyer or witness says, please raise your hand immediately and ask to have the question or answer repeated."

D. Jury View[47]

MCL 768.28 states that the court may order a view by the jury "whenever such court shall deem such view necessary."

MCR 2.513(J) provides:

> "On motion of either party, on its own initiative, or at the request of the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view, provided, however, that in a criminal case, the court may preclude a defendant from attending a jury view in the interests of safety and security. During the view, no person, other than the officer designated by the court, may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion."

Because the purpose of a jury view is to help the jury understand evidence *already introduced* at trial, a jury view should not be conducted until *after* the relevant evidence has been admitted at trial.[48] *People v Unger*, 278 Mich App 210, 303 (2008).

Committee Tip:

Take a tape recorder along to the jury view to record any questions that jurors may have. Then, make a record of the jury view after returning to court.

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[47] See also MCR 2.507(D) (applicable to bench trials), which provides that "[o]n application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred." Note that "[t]he provisions of the rules of civil procedure apply to [criminal] cases . . ., except (1) as otherwise provided by rule or statute, (2) when it clearly appears that they apply to civil actions only, or (3) when a statute or court rule provides a like or different procedure." MCR 6.006(D). See Section 10.2 for discussion of bench trials.

[48] This issue was considered in the context of the defendant's claim that his counsel was ineffective.

Whether to permit a jury view of the place where the crime occurred is left to the discretion of the court. *People v Mallory*, 421 Mich 229, 245 (1984). A crime scene may be viewed despite changed conditions, where the jury has been apprised of the changes. *People v King (Levurn)*, 210 Mich App 425, 432 (1995).

An accused defendant in custody has the fundamental right to be present at a jury view of the crime scene.[49] *King (Levurn)*, 210 Mich App at 432-433.[50] A defendant may waive his or her right to be present at a jury view by affirmative consent, by failure to appear at the view when he or she is free to do so, and by disorderly or disruptive conduct at trial precluding continuation of the trial in his or her presence. *Id.* at 433.

E. Prohibited Jury Actions

The court is required to instruct the jurors regarding certain prohibited actions during the term of jury service. MCR 2.511(H)(2). Specifically, the jurors must not:

> "(a) discuss the case with others, including other jurors, except as otherwise authorized by the court;
>
> "(b) read or listen to any news reports about the case;
>
> "(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose information prohibited in subsection (d) below;
>
> "(d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:
>
> > "(i) information about a party, witness, attorney, or court officer;

[49] In a bench trial, it is error for a judge to conduct a view "without having given the defendant and counsel for both parties an opportunity to be present with him [or her]." *People v Eglar*, 19 Mich App 563, 565 (1969).

[50] However, see MCR 2.513(J) ("in a criminal case, the court may preclude a defendant from attending a jury view in the interests of safety and security[]").

"(ii) news accounts of the case;

"(iii) information collected through juror research on any topics raised or testimony offered by any witness;

"(iv) information collected through juror research on any other topic the juror might think would be helpful in deciding the case."

10.10 Defendant's Conduct and Appearance at Trial

A. Presumption of Innocence

1. Generally

Due Process entitles an accused to the presumption of innocence. *In re Winship*, 397 US 358, 364 (1970). The Sixth Amendment guarantee of the right to a fair trial means that a criminal defendant is entitled to have his or her guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. *Taylor (Michael) v Kentucky*, 436 US 478, 485 (1978). "[A] criminal defendant generally has the right to appear before the court with the appearance, dignity, and self-respect of a free and innocent [person] . . . ." *People v Payne*, 285 Mich App 181, 187 (2009) (internal citations and quotations omitted).

2. Clothing

The defendant's right to a fair and impartial trial generally requires that the defendant not appear before the jury in jail clothes. *People v Daniels (Jerry)*, 163 Mich App 703, 710 (1987). The presumption of innocence would be prejudiced if the defendant was forced to appear before a jury in jail garb. *Id.* at 710. The defendant's timely request to appear in civilian clothes must be granted. *People v Harris (Thomas)*, 201 Mich App 147, 151 (1993). This general rule does not apply to bench trials where an absence of prejudice is presumed. *Daniels (Jerry)*, 163 Mich App at 710.

A defendant's right to appear in civilian clothes is not absolute and may be denied if the request is untimely. *People v Turner (Clarence Duane)*, 144 Mich App 107, 109 (1985). The request should be made before the jury has been impaneled so that the

jury has not had occasion to see the defendant in prison attire. *Id*. at 109. It is error requiring reversal and an abuse of the court's discretionary power when the court fails to explain the reasoning behind its decision to deny the defendant's motion. *Id*. at 110-112.

3. Handcuffs/Shackles

Freedom from shackling is an important component of a fair trial, *People v Dixon (Lamont)*, 217 Mich App 400, 404 (1996), because absent a showing of manifest need for restraints, appearing shackled or handcuffed before a jury can adversely affect a defendant's constitutional presumption of innocence, *People v Dunn*, 446 Mich 409, 425 n 26 (1994); can interfere with a defendant's ability to communicate with his attorney, *Illinois v Allen (William)*, 397 US 337, 344 (1970); can interfere with a defendant's ability to participate in his or her own defense (by freely choosing to testify), *Deck v Missouri*, 544 US 622, 631 (2005); and "'affront[s]' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" *Id*. at 631, quoting *Allen (William)*, 397 US at 344.

In order to protect the defendant's presumption of innocence and ensure a fair trial, it is the preferred practice to have the defendant appear before the court without handcuffs. *People v Wells*, 103 Mich App 455, 459 (1981). A defendant may only be shackled on a finding supported by record evidence that it is necessary to prevent escape, injury to persons in the courtroom, or to maintain order. *Dunn*, 446 Mich at 425. "[A]n evidentiary hearing [is] the best way to discern whether there is a state interest in shackling 'specific to a particular trial[,]'" because "a formal hearing with sworn testimony [] allow[s] for factual disputes to be resolved and for a meaningful record to facilitate review." *People v Maxwell*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 281909), slip op p 2,[51] quoting *United States v Miller (Shawn)*, 531 F3d 340, 348 (CA 6, 2008). The decision is discretionary with the trial court, and the trial court should consider the totality of the circumstances, including the defendant's background. *Dixon (Lamont)*, 217 Mich App at 404-405; *People v Williams (Tyrone)*, 173 Mich App 312, 314-315 (1988).

"'[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court

[51] Unpublished opinions of the Court of Appeals are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.'" *People v Arthur (Charles)*, 495 Mich 861, 862 (2013) (quoting *Deck*, 544 US at 629, with added emphasis, and holding that "the trial court did not violate the defendant's due process rights by ordering [him] to wear leg shackles" in light of his reported escape attempt and his history of physical violence; "the court sought to shield the defendant's leg restraints from the jury's view[, and] . . . no juror actually saw the defendant in shackles[]"). See also *Mendoza v Berghuis*, 544 F3d 650, 654-656 (CA 6, 2008) (the defendant's due process rights were not violated where his leg restraints were concealed from the jury by "skirting both counsel tables with brown paper for the duration of the trial," and where he was unshackled to testify); *People v Payne*, 285 Mich App 181, 186 (2009) ("even if a trial court abuses its discretion and requires a defendant to wear restraints, the defendant must show that he [or she] suffered prejudice as a result of the restraints to be entitled to relief[;]" if the jury was unable to see shackles on the defendant, no prejudice occurs.

A defendant's constitutional rights are not violated when jurors see him or her shackled during transport to or from the courtroom. *Mendoza*, 544 F3d at 655-656. See also *United States v Moreno*, 933 F2d 362, 368 (CA 6, 1991) (discussing the reasonableness of transporting defendants with restraints).

"The trial court did not unconstitutionally 'nullify' the defendant's right to self-representation by declining to remove the defendant's leg shackles." *Arthur (Charles)*, 495 Mich at 862. "While a defendant's right to self-representation encompasses certain specific core rights, including the right to be heard, to control the organization and content of his [or her] own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at times, the right to self-representation is not unfettered." *Id.*, citing *McKaskle v Wiggins*, 465 US 168, 174, 176-178 (1984). "That the defendant elected to relinquish his right of self-representation rather than exercise that right while seated behind the defense table does not amount to a denial of the defendant's right of self-representation." *Arthur (Charles)*, 495 Mich at 862 (citation omitted).

A decision to restrain a defendant may be based on information from the Department of Corrections or a county jail. *Dixon (Lamont)*, 217 Mich App at 405. If restraints are used in the jury's presence, the court may want to consider a cautionary instruction that the restraints are not evidence and should not be considered as evidence. *Wells*, 103 Mich App at

461. A decision to restrain a defendant is reviewed for an abuse of discretion under the totality of the circumstances. *Id.* at 404-405. Absent a showing of prejudice, an appellate court will not reverse a conviction simply because the jury happened to see the defendant in handcuffs. *Id*. at 460.

In *Maxwell,* unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 281909), slip op at 1-2, the trial court abused its discretion in denying the defendant's request to remove the defendant's shackles or take measures to conceal them from the jury. Specifically, the trial court "dismissed the deleterious effects of shackling, equating them with awareness that the defendant was in custody." *Id*. Additionally, there was no record evidence to support the trial court's implication that the defendant posed a security concern. *Id*. In reversing the defendant's convictions and remanding the case for a new trial, the Court of Appeals noted that "[t]he jury's assessment of [the] defendant's credibility may have been affected by the implicit suggestion that [the] defendant posed such a problem that shackles were needed." Further, "[t]he trial court did not cure th[e] prejudice by indicating that the shackles were merely consistent with being in custody." *Id*. Because "[s]hackles inherently connote a need to restrain someone . . . [s]uch an implication is more prejudicial than a mere understanding that someone is in jail pending a trial." *Id*.

An appellate court's harmless error analysis requires more than a cursory review of the totality of circumstances under which a defendant was convicted when no justification existed for shackling a defendant during his jury trial. *Ruimveld v Birkett*, 404 F3d 1006 (CA 6, 2005).

In *Ruimveld*, 404 F3d at 1008, the Michigan Court of Appeals had concluded that although the defendant was improperly shackled during trial, the error was harmless. The federal Court of Appeals for the Sixth Circuit noted that the Michigan Court of Appeals failed to conduct a meaningful review of the circumstances surrounding the defendant's conviction, which, according to the federal court, clearly showed that the defendant's shackling likely had a substantial and injurious effect on the jury's verdict. *Id.* at 1017-1018. The federal court pointed out that the Michigan Court of Appeals failed to consider the fact that "[t]he evidence against [the defendant] was merely circumstantial . . . that the jury deliberated for over three hours despite the simple facts, and made inquiries to the judge regarding presumptions of innocence, burdens of proof, and reasonable doubt. Given the closeness of the case, the effect of any error was thus likely to be magnified." *Id*. at 1016.

The court may also face the question whether it is proper to handcuff or otherwise restrain witnesses. In *People v Banks*, 249 Mich App 247, 256-258 (2002), the Court of Appeals held that the trial court abused its discretion to control trial proceedings and infringed on the defendant's right to a fair trial by ordering an alibi witness to be handcuffed without facts on the record to support the need to restrain the witness. In other words, the "propriety of handcuffing or shackling a testifying witness is subject to the same analysis as that for defendants." *Id.* at 257.

4. Gagging

"[I]f a defendant is unruly, disruptive, rude, and obstreperous, a trial court is within its discretion to gag a defendant when repeated warnings have been ineffective." *People v Conley (Aaron)*, 270 Mich App 301, 309 (2006). Gagging should only be used as a last resort to ensure the defendant's cooperation and maintain an appropriate courtroom atmosphere. *People v Kerridge*, 20 Mich App 184, 188 (1969), overruled on other grounds by *People v Parker (Lorenzo)*, 393 Mich 531 (1975).

There are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant: (1) binding and gagging him or her, and thereby keeping the defendant present; (2) holding the defendant in contempt; and (3) removing the defendant from the courtroom until he or she promises to properly conduct him- or herself. *Allen (William)*, 397 US at 343-344. In some situations, it might be the most fair and reasonable way to handle a defendant who is disruptive. *Id.* at 344.

A defendant is not denied his or her right to a fair trial when, after the defendant has interrupted the court proceedings on several occasions, the trial judge threatens to tape the defendant's mouth shut if the defendant continues disruptive verbal outbursts. *Conley (Aaron)*, 270 Mich App at 309.

B. Right to Be Present

1. Failure to Appoint Foreign Language Interpreter[52]

"The lack of simultaneous translation [as provided for in MCL 775.19a may] implicated[a] defendant's rights to due process of law guaranteed by the United States and Michigan Constitutions." *People v Gonzalez-Raymundo*, 308 Mich App 175,

[52] See Section 1.7 for discussion of foreign language interpreters.

188 (2014), citing US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. "Specifically, a defendant has a right to be present at a trial against him[or her and] a defendant's lack of understanding of the proceedings against him [or her] renders him [or her] effectively absent[;]" furthermore, "lack of simultaneous translation impairs a defendant's right to confront witnesses against him [or her] and participate in his [or her] own defense." *Gonzalez-Raymundo*, 308 Mich App at 188 (citations omitted).

2. Disruptive Conduct of Defendant

A defendant has the constitutional right to be present at his or her trial, which includes voir dire. US Const, Am VI; Const 1963, art 1, § 20; *Allen (William)*, 397 US at 338; *People v Buie (On Remand) (Buie IV)*, 298 Mich App 50, 56-57 (2012). Michigan law requires that a defendant charged with a felony be present at his or her trial. MCL 768.3. However, neither the constitutional nor the statutory right to be present is absolute. *People v Kruger*, 466 Mich 50, 54 n 9 (2002). When the conduct of the defendant disrupts the administration of justice, the court has the authority to examine the circumstances of the case and take appropriate action regarding a disruptive defendant. *Id.* at 54. "Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself [or herself] consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Allen (William)*, 397 US at 343.

A trial court's decision to remove a defendant from the courtroom during trial is reviewed for an abuse of discretion. *People v Harris (Reginald)*, 80 Mich App 228, 230 (1977). See *Buie IV*, 298 Mich App at 58-59 (the defendant's removal from courtroom following a single interruption of voir dire was not justified).

Where a competent defendant "defiantly refused to participate in the [judicial] process or to accept any and all services, regularly interrupted the courts with his denunciation of the justice system, made far-fetched claims that had no basis in fact or law, . . . refused to answer questions posed to him by the courts[,] . . . defiantly showed up in inappropriate attire and in [an unnecessary] wheelchair[,] . . . accused the courts of being derelict in their duties, . . . and generally engaged in disrespectful, disorderly, and disruptive behavior[,]" he forfeited his right to be present and was "properly excluded . . . from the courtroom during his trial." *People v Kammeraad*, 307 Mich App 98, 100, 120-121 (2014).

3. Defendant's Absence

A defendant may waive his or her right to be present by failing to appear for trial. *People v Woods (Art)*, 172 Mich App 476, 479 (1988). Two elements are necessary for a valid waiver of the right to be present at trial: (1) specific knowledge of the right, and (2) an intentional decision to abandon the right. *Id.* at 479. In *Woods (Art)*, the defendant was voluntarily absent from his trial, but the record was silent regarding whether he was aware that he had a right to be present at trial. *Id*. The Court declined to presume waiver from the record, and found that the defendant did not waive his right to be present at trial. *Id*. However, the Court held that the defendant's absence made no difference in the result reached, and declined to reverse his conviction because he failed to demonstrate any reasonable possibility of prejudice. *Id*. at 480.

A defendant's voluntary departure from the courtroom after trial has begun may waive the defendant's right to be present and may not preclude the trial judge from proceeding with the trial. *People v Swan*, 394 Mich 451, 452 (1975). In *Swan*, 394 Mich at 451, the defendant, who was free on bond, did not return to the courtroom after a recess during trial. The trial court waited several hours for the defendant to return, and then adjourned the case. *Id*. at 451-452. Defendant failed to appear when the court reconvened four days later, and a record was made regarding attempts to locate the defendant. *Id*. at 452. The trial court decided to complete the trial in the defendant's absence, and the jury convicted the defendant of the charged offense. *Id*. In that situation, the Michigan Supreme Court upheld the defendant's conviction. *Id*.

See also *Buie IV*, 298 Mich App at 58-59 (the defendant, who "specifically asked to be excused from the courtroom[,]" could not be found to have voluntarily waived his right to be present because "[t]he record [was] silent[] . . . as to whether he was ever specifically apprised of his constitutional right to be present[;]" nor did the defendant waive his right to be present by interrupting voir dire, because his removal following his single interruption of the proceedings was not justified).

4. Standard of Review

"The proper test for determining whether a defendant's absence from a part of a trial requires reversal of his or her conviction is whether there is any reasonable possibility of prejudice." *Woods (Art)*, 172 Mich App at 480. See *Buie IV*, 298 Mich App at 59-60 (the defendant's absence "for . . . a short

period during voir dire" before he agreed to behave and was allowed to return did not result in any reasonable possibility of prejudice, where the "evidence of [the] defendant's guilt was overwhelming" and he was present for the remainder of trial).

C. Testimony

1. Right to Testify

The trial court is not required to advise the defendant that he or she has a right to testify, or to obtain a waiver of that right on the record. *People v Harris (Derrick)*, 190 Mich App 652, 661-662 (1991). "In fact, courts have recognized that it is inadvisable for a [] court to develop such a record because it may infringe on the defendant's right *to* testify." *United States v Yono*, 605 F3d 425, 426 (CA 6, 2010) (trial court's failure to develop a record indicating that the defendant's decision to testify on his own behalf at trial was made knowingly and voluntarily did not violate the defendant's Fifth Amendment right against self-incrimination, because he had no right to such a record).

2. Medication

A defendant may have the right to be taken off antipsychotic drugs before testifying unless the court finds that he or she presents a risk to himself or herself, or others. See *Riggins v Nevada*, 504 US 127, 134, 137 (1992) (a defendant has a due process liberty interest in freedom from the involuntary administration of anti-psychotic drugs).

3. Refusal to Answer Questions

The court may strike all or part of a witness's testimony if the witness refuses to permit meaningful cross-examination. *People v Holguin*, 141 Mich App 268, 272-273 (1985).

D. Self-Incrimination—Requiring Defendant to Display Body or Perform Act

It is not a violation of the Fifth Amendment to require a defendant to do any of the following:

- Display an arm tattoo to the jury. *United States v Alpern*, 564 F2d 755, 762 (CA 7, 1977); *United States v Bay*, 762 F2d 1314, 1315-1317 (CA 9, 1984).

- Shave a beard. *United States v Lamb*, 575 F2d 1310, 1316 (CA 10, 1978); *United States v Valenzuela*, 722 F2d 1431, 1433 (CA 9, 1983).

- Wear an article of clothing. *People v Garner*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 1996 (Docket No. 177271).[53]

- Give voice samples. *People v Burhans*, 166 Mich App 758, 762 (1988); *People v Henderson*, 69 Mich App 418, 421 (1976); *People v Roberson*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2002 (Docket No. 223791).[54]

- Give handwriting samples. *Gilbert v California*, 388 US 263, 266 (1967); *Burhans*, 166 Mich App at 762; *United States v Campbell*, 732 F2d 1017, 1020-1021 (CA 1, 1984) (however, it is a violation of the privilege to require the defendant to write words dictated to him or her because that requires the defendant in effect to say "This is the way I spell these words."); *People v Petrac*, 89 Mich App 188, 193 (1979). Similarly, if written answers to incriminating questions or a signature on an incriminating statement were obtained, the defendant could assert his or her Fifth Amendment privilege. *Petrac*, 89 Mich App at 190.

- Stand for purposes of identification. *United States v Wilson (Loren)*, 719 F2d 1491, 1496 (CA 10, 1983).

- Remove a pair of glasses. *Wilson (Loren)*, 719 F2d at 1496.

- Expose his or her teeth and gums to be viewed by a witness. *United States v Maceo*, 873 F2d 1, 4-6 (CA 1, 1989).

- Utter certain phrases so that the jury can compare the defendant's voice with the voice on a tape of a drug transaction. *United States v Leone*, 823 F2d 246, 249-250 (CA 8, 1987); See also *Burhans*, 166 Mich App at 762 ("[c]ompelling a defendant to perform actions which demonstrate identifying physical characteristics, such as handwriting or voice exemplars, does not compel a defendant to give testimonial or communicative

[53] Unpublished opinions of the Court of Appeals are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[54] Unpublished opinions of the Court of Appeals are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

evidence, and so does not violate the privilege against self-incrimination").

10.11 Confrontation

A. Defendant's Right of Confrontation

1. Generally

A criminal defendant has the right to be confronted by the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; MCL 763.1. The Confrontation Clause of the Sixth Amendment is made applicable to the states through the Fourteenth Amendment. *Pointer (Bob) v Texas*, 380 US 400, 403 (1965); *People v Sammons*, 191 Mich App 351, 356 (1991). The Confrontation Clause implicates two broad categories of cases: those involving the admission of out-of-court statements and those involving restrictions imposed by law or the trial court on the scope of cross-examination. *Delaware v Fensterer*, 474 US 15, 18 (1985). "By its straightforward terms, the Confrontation Clause directs inquiry into two questions: (1) Does the person in controversy compromise a 'witness against' the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to 'confront' that witness under the Confrontation Clause?" *People v Fackelman*, 489 Mich 515, 562 (2011).

A defendant's right to confrontation is guaranteed through the right of cross-examination, the oath taken by witnesses, and the defendant's ability to observe a witness's demeanor while testifying. *People v Lawson*, 124 Mich App 371, 374 (1983), overruled in part on other grounds *People v Buie (Buie III)*, 491 Mich 294, 313-315 (2012). The protections of the Confrontation Clause extend to pretrial entrapment hearings, *Sammons*, 191 Mich App at 362, and pretrial suppression hearings. *People v Levine (Brian Eric)*, 231 Mich App 213, 223 (1998), vacated on other grounds 461 Mich 172 (1999). The Confrontation Clause guarantees only that a defendant has the opportunity for effective cross-examination; a defendant is not guaranteed an ideal cross-examination. *United States v Owens*, 484 US 554, 559 (1988). A defendant's right to confrontation is satisfied when he or she has the opportunity to explore matters such as a witness's poor eyesight, bias, and bad memory. *Id.* at 559.

Under the "language conduit" rule, "an interpreter is considered an agent of the declarant, not an additional declarant, and the interpreter's statements are regarded as the

statements of the declarant without creating an additional layer of hearsay[;]" thus, where a defendant has a full opportunity to cross-examine the declarant, he or she has no additional constitutional right to confront the interpreter. *People v Jackson (Andre)*, 292 Mich App 583, 595-597 (2011). In *Jackson (Andre)*, 292 Mich App at 587, 593-594, a hospitalized shooting victim was questioned by a police officer. Because the victim was unable to speak at the time of the interview, he answered the questions by either squeezing the hand of an attending nurse (to indicate "yes") or not (to indicate "no"). *Id.* at 593-594. The Court stated that the following factors should be examined when determining whether statements made through an interpreter are admissible under the language conduit rule:

> "(1) whether actions taken subsequent to the conversation were consistent with the statements translated, (2) the interpreter's qualifications and language skill, (3) whether the interpreter had any motive to mislead or distort, and (4) which party supplied the interpreter." *Jackson (Andre)*, 292 Mich App at 596, citing *United States v Nazemian*, 948 F2d 522, 527-528 (CA 9, 1991), and *People v Gutierrez*, 916 P2d 598, 600-601 (Colo App, 1995).

Concluding that none of these factors militated against application of the language conduit rule, the Court held that although the victim's nonverbal answers qualified as testimonial statements, the defendant did not have a constitutional right to confront the nurse, "because what she reported were properly considered to be [the victim's] statements." *Jackson (Andre)*, 292 Mich App at 596-597. Because he "had a full opportunity to cross-examine" the victim, the defendant's Confrontation Clause rights were satisfied. *Id.* at 597.

2. Scope

The right of the accused to confront witnesses is a crucial element of the trial process and serves to protect the defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 20. This is because "[a] witness 'may feel quite differently when he [or she] has to repeat his [or her] story looking at the man [or woman] whom he [or she] will harm greatly by distorting or mistaking the facts." *Iowa v Coy*, 487 US 1012, 1019 (1988), quoting Professor Zecariah Chafee, Jr., *The*

Blessings of Liberty, p 35 (1956). In *Coy*, 487 US at 1020, the defendant's right of confrontation was violated where a screen was placed between him and the complaining witnesses. And in *Sammons*, 191 Mich App at 356, 366, the defendant's right of confrontation was violated when the trial court permitted a police informant to testify at an entrapment hearing while wearing a mask, and without disclosing his true identity.

However, the right to confront witnesses is not absolute and may succumb to other compelling interests. *People v Kasben*, 158 Mich App 252, 255 (1987). A compelling interest is present when the state is protecting victims of sexual assault. *Id.* at 254. For example, "the prohibitions (on questions regarding a victim's previous sexual conduct) in the rape-shield law will not deny a defendant's right of confrontation in the overwhelming majority of cases." *People v Arenda*, 416 Mich 1, 13 (1982). And in *Maryland v Craig*, 497 US 836, 857 (1990), the United States Supreme Court held that the defendant's right of confrontation was not violated in a child sexual abuse case where the child victim testified outside the defendant's physical presence via one-way closed-circuit television. "The Court found that an important state interest was involved (protection of a child witness from trauma caused by testifying in the physical presence of the defendant), while also noting that the procedure employed preserved other important elements of the confrontation right, i.e., oath, cross-examination, and observation of the witness'[s] demeanor." *Sammons*, 191 Mich App at 363.

See also *People v Rose*, 289 Mich App 499, 510-517 (2010). In *Rose*, 289 Mich App at 516-517, the trial court did not violate the defendant's right to confrontation by permitting the child victim to testify with a witness screen, where the trial court found that the victim feared the defendant, that the witness screen was necessary to protect the child's welfare, that there was a high probability that testifying face-to-face with the defendant would cause psychological damage to the victim, and that having to testify face-to-face with the defendant may cause the victim to abstain from testifying altogether. Additionally, "aside from [the victim's] inability to see [the defendant], the use of the witness screen otherwise preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process." *Id.*

Where the defendant failed to object on the record to the use of two-way interactive video technology to present the testimony of an examining physician and a DNA expert, and where defense counsel stated that she would "'leave [the issue of the

admission of the video testimony] to the [trial c]ourt's discretion,'" the defendant waived his right of confrontation under the state and federal constitutions. *People v Buie (Buie III)*, 491 Mich 294, 297-298, 316 (2012), reversing *People v Buie (Buie II) (After Remand)*, 291 Mich App 259 (2011).[55] Noting that "[t]here is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel[,]" the *Buie III* Court held that "where the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record." *Buie III*, 491 Mich at 306, 313, overruling in part *People v Lawson*, 124 Mich App 371, 376 (1983). Although defense counsel stated at trial that the defendant "'wanted to question the veracity of these proceedings,'" that statement did not constitute an objection because (1) it was not phrased as an objection, (2) the defendant effectively acquiesced to the use of two-way interactive technology when his counsel stated that she would leave it to the court's discretion whether to use the technology, (3) the defendant made no complaints on the record when the court proceeded to explain how the technology worked, (4) the first remote witness testified via two-way interactive technology without further complaint, and (5) there was no complaint made before the testimony of the second remote witness. *Buie III*, 491 Mich at 316-317.

3. Defendant's Conduct

The Sixth Amendment Confrontation Clause guarantees the right of the defendant to be present at trial. *Illinois v Allen (William)*, 397 US 337, 338 (1970). However, as with the compelling interests present in sexual assault cases, the right to confrontation may succumb to a defendant's prior conduct. When the conduct of the defendant disrupts the administration of justice, the court has the authority to examine the circumstances of the case and take appropriate action regarding a disruptive defendant. A defendant may be removed from the courtroom to ensure that the trial process is conducted in a dignified manner. *People v Staffney*, 187 Mich App 660, 664 (1990). Ordinarily, the defendant must be warned before he or she is removed from the courtroom. *Id.* at 664. A defendant may be removed without a warning when his or her behavior is aggressive and violent. *Id.* at 665. See also *People v Buie (On Remand) (Buie IV)*, 298 Mich App 50, 59 (2012)

[55] Effective January 1, 2017, ADM File No. 2013-18 amended MCR 6.006(C) to refer to "videoconferencing technology" rather than "two-way interactive video technology[.]"

("[a]lthough [the defendant] had a . . . history of acting out and disrupting [prior] proceedings[,]" his removal from the courtroom following a single interruption of voir dire was not justified).

4. Unavailable Witnesses

The Confrontation Clause bars the admission of *testimonial* statements of an *unavailable witness* unless the defendant had a prior opportunity for cross-examination. *Crawford (Michael) v Washington*, 541 US 36, 68 (2004).[56] However, *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *United States v Davis*, 577 F3d 660, 667-668 (CA 6, 2009) (the admission of statements made by an unidentified woman to a police officer was not barred by *Crawford* because the statements were not offered to prove the truth of the matter asserted, but rather, were offered as background for the police officer's investigation).

a. Constitutional Unavailability

A witness is constitutionally unavailable for purposes of the Confrontation Clause if he or she is absent and the prosecutor made a good faith effort to obtain the witness's presence at trial. *Barber v Page*, 390 US 719, 724-725 (1968).

~~"In examining a Confrontation Clause argument and determining whether a person is unavailable as part of that analysis, it is proper to consider MRE 804(a), which addresses hearsay exceptions relative to unavailable witnesses and sets forth situations in which a witness is properly deemed 'unavailable.'" *People v Sardy*, ___ Mich App ___, ___ (2015), citing *People v Garland*, 286 Mich App 1, 7 (2009).~~

MRE 804(a) provides:

> "'Unavailability as a witness' includes situations in which the declarant—
>
> > (1) is exempted by ruling of the court on the ground of privilege from testifying

[56] *Crawford (Michael)* overruled, in part, *Ohio v Roberts (Herschel)*, 448 US 56 (1980), which permitted admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate 'indicia of reliability'" and fell within either a "firmly rooted hearsay exception" or showed "particularized guarantees of trustworthiness." *Roberts (Herschel)*, 448 US at 66. *Crawford (Michael)* is not retroactive. *Whorton v Bockting*, 549 US 406, 409 (2007).

> concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

b. Testimonial and Nontestimonial Statements

"[A] 'testimonial statement' is best defined as a statement about a past event or fact that the declarant would reasonably expect to be used later in a criminal prosecution when made." *Confrontation and Crawford,* Hon. Mark A. Randon, Michigan Bar Journal, December 2007, p 26. The *Crawford* (*Michael)* Court declined to delineate a comprehensive definition of "testimonial," but provided the following examples of clearly testimonial and clearly nontestimonial statements:

Clearly testimonial:

- formal police interrogations,
- prior testimony,

- plea allocutions, and
- depositions.
- Clearly nontestimonial:
- casual remarks to acquaintances,
- off-hand, overheard remarks,
- statements in furtherance of a conspiracy,
- statements unwittingly made to informants, and
- business records. *Crawford (Michael)*, 541 US at 51-52, 56-58.

Following *Crawford (Michael)*, the United States Supreme Court clarified the definition of "testimonial statement" in *Davis (Adrian) v Washington*, 547 US 813 (2006). *Davis* involved two companion cases: *Davis (Adrian) v Washington* and *Hammon v Indiana*. The Court held that whether hearsay evidence constitutes a "testimonial statement" barred from admission against a defendant—where the declarant is unavailable and the defendant has not had an opportunity to cross-examine the declarant—requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis (Adrian)*, 547 US at 826. In *Davis (Adrian)*, the Court concluded that statements made to a 911 operator were nontestimonial because they described events "as they were actually happening," in an "ongoing emergency." *Davis (Adrian)*, 547 US at 827. But in *Hammon*, the Court concluded that statements made to the police at a crime scene were testimonial because they were made during the course of an interrogation. *Davis (Adrian)*, 547 US at 826-832.

The following cases further distinguish between testimonial and nontestimonial statements:

- *Michigan v Bryant*, **562 US 344 (2011).**

Pre-death statements made by a gunshot victim to police officers identifying and describing his shooter and the location of the shooting were nontestimonial and their admission at the defendant's trial did not violate the Confrontation Clause because "the circumstances of the interaction between [the victim] and the police objectively

indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency.'" *Michigan v Bryant*, 562 US 344, 348-349, 378 (2011), quoting *Davis v Washington*, 547 US 813, 822 (2006). In *Bryant*, 562 US at 374, the United States Supreme Court found that "there was an ongoing emergency . . . where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." Additionally, the Court found that the primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency where the questions the police asked the victim were precisely the type of questions necessary to allow them to assess the situation, the threat to their own safety, and possible danger to the victim and the public. *Id*. at 374-378.

- *People v Fackelman*, **489 Mich 515 (2011).**

A non-testifying psychiatrist's out-of-court medical report that "memorialized [the] defendant's medical history and the events that led to his admittance to the hospital, provided [an] all-important diagnosis, and outlined a plan for treatment[]" constituted a testimonial statement that was used as substantive evidence of the defendant's sanity in violation of his Sixth Amendment right of confrontation. *Fackelman*, 489 Mich at 518-519, 532, 564. In *Fackelman*, 489 Mich at 519-520, 523, the defendant was found guilty but mentally ill of charges stemming from his armed assault of a man that the defendant believed had caused his son's death. The two testifying expert witnesses disagreed as to whether the defendant was legally insane at the time of the crimes, which was the sole issue at trial. *Id*. at 521-523. The defendant's expert witness testified that in making his determination that the defendant was legally insane, he relied in part on a report prepared by a hospital psychiatrist regarding the defendant's psychiatric condition two days after the incident; however, the report was neither authenticated nor admitted as evidence, and the defendant did not elicit testimony regarding the psychiatrist's diagnosis. *Id*. at 536-541. On cross-examination, the prosecutor revealed the hospital psychiatrist's diagnosis of "'[m]ajor depression, single episode, severe without psychosis[;]'" the prosecutor subsequently referred to the report in his examination of the prosecution's expert witness, who testified that she agreed with the diagnosis. *Id*. at 522-523.

The Michigan Supreme Court held that the report, which was made following the defendant's arrest and "expressly focused on [the] defendant's alleged crime and the charges pending against him[,]" constituted testimonial evidence because it "was 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]'" *Fackelman*, 489 Mich at 533, quoting *Crawford (Michael)*, 541 US at 52. Moreover, "the prosecutor's improper introduction and repeated use of [the] diagnosis that [the] defendant was not, in fact, experiencing psychosis fully rendered the [psychiatrist] a witness against [the] defendant." *Fackelman*, 489 Mich at 530. Because the diagnosis "provided a tiebreaking expert opinion" by "the only expert unaffiliated with either party . . . [and] the only doctor who had personal knowledge concerning [the] dispositive issue[,]" its use at trial constituted plain error requiring reversal of the defendant's convictions. *Id*. at 538, 564.

- ***People v Walker (Alvin)*, 273 Mich App 56 (2006).**

A crime victim's statements to a neighbor and a police officer were improperly admitted because they constituted testimonial statements for purposes of the Confrontation Clause, and the defendant had not had an opportunity to cross-examine the victim. *Walker (Alvin)*, 273 Mich App at 64. In *Walker (Alvin)*, the defendant beat the victim and threatened to kill her. *Id*. at 59. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called 911. *Id*. at 59-60. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. *Id*. at 60. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. *Id*. Because the circumstances in *Walker* (*Alvin)* were substantially similar to the circumstances in *Davis* (*Adrian)* and *Hammon*, the Court concluded that a similar outcome was warranted. *Walker (Alvin)*, 273 Mich App at 61-65. Like the United States Supreme Court in *Davis (Adrian)*, the *Walker* (*Alvin)* Court determined that the content of the 911 call was nontestimonial evidence properly admitted at trial because the operator's questioning "was directed at eliciting further information to resolve the present emergency and to ensure that the victim, the neighbor, and others potentially at risk . . .

would be protected from harm while police assistance was secured." *Walker (Alvin)*, 273 Mich App at 64.

The *Walker* (*Alvin)* Court further concluded that "[u]nlike the 911 call, the victim's written statement recorded by her neighbor, and her statements to the police at the scene, [we]re more akin to the statements in *Hammon*, which the *Davis* (*Adrian)* Court found inadmissible under the Confrontation Clause." *Walker (Alvin)*, 273 Mich App at 64. The Court explained:

> "As in *Hammon*, where the police questioned the domestic assault victim separately from her husband and obtained her signed affidavit of the circumstances of the assault, in this case, the police questioning first occurred in the neighbor's home, and there is no indication of a continuing danger. Rather, the victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events began and progressed. *Davis (Adrian)*, [547 US] at [830]. Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are generally testimonial under the standards set forth in *Davis (Adrian)*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime—which is, of course, precisely what the officer[s] *should* have done.' *Davis (Adrian)*, [547 US] at [830]. Accordingly, the victim's written statement and her oral statements to the police are inadmissible." *Walker (Alvin)*, 273 Mich App at 64-65.

- *People v Jordan (Childred)*, **275 Mich App 659 (2007).**

The lengthy sequence of events following a 73-year-old victim's rape and robbery qualified as an ongoing emergency during which the statements made by the victim (who died before trial) constituted nontestimonial evidence under *Crawford* (*Michael)* and *Davis (Adrian)*. In *Jordan (Childred)*, immediately after the early morning assault, the victim ran out of her house in her nightgown

yelling for help. *Jordan (Childred)*, 275 Mich App at 661. The owner/operator of a nearby service station responded to the victim's screams and called 911. *Id*. The police arrived 45 minutes later and although the victim told the service station owner/operator that she had been raped, she failed to tell the police about the rape when she was initially questioned. *Id*. The victim's friend arrived at the scene after the police left, but the victim did not mention the rape. *Id*. After learning of the rape by talking with the service station owner/operator, the friend took the victim to the police station where she told the police about the rape. *Id*. at 661-662. "Because all statements by the victim were necessary to resolving the ongoing emergency, the statements were nontestimonial." *Id*. at 664-665.

- *People v Taylor (Geracer)*, **275 Mich App 177, 181-182 (2007).**

A decedent's statements identifying his assailant to the police during the hectic minutes shortly after the fatal shooting took place were admissible as nontestimonial statements under *Crawford (Michael)*. In the alternative, the decedent's statements were also admissible as dying declarations under the historic hearsay exception to the Confrontation Clause. *Taylor (Geracer)*, 275 Mich App at 182-183.

- *People v Bauder*, **269 Mich App 174, 180-187 (2005).**

A victim's statements to friends, coworkers, and the defendant's relatives in the weeks before her death were not testimonial statements and their admission did not violate the defendant's right of confrontation.

- *Bullcoming v New Mexico*, **564 US 647 (2011).**

An unsworn forensic laboratory report in which a laboratory analyst certified that he had tested the defendant's blood-alcohol concentration ("BAC"), and that the BAC was well above the threshold for the crime of aggravated driving while intoxicated, was created solely for an evidentiary purpose and was therefore testimonial. *Bullcoming v New Mexico*, 564 US at 651-652, 663-664 (2011). Accordingly, "[t]he [defendant's] right [was] to be confronted with the analyst who made the certification, unless that analyst [was] unavailable at trial, and the [defendant] had an opportunity, pretrial, to cross-examine that particular scientist[;]" the in-court

"surrogate testimony" of a scientist who did not sign the report or perform or observe the test was not sufficient to satisfy the requirements of the Confrontation Clause. *Id.* at 652, 661-662. See also *Melendez-Diaz v Massachusetts*, 557 US 305, 307-308, 311, 329 (2009) (the affidavits of state laboratory analysts stating that material seized by police and connected to the defendant was a certain quantity of drugs constituted testimonial hearsay and could not be admitted as evidence unless the analysts who authored the affidavits testified at trial or the defendant has had an opportunity to cross-examine them regarding the affidavits); *People v Payne*, 285 Mich App 181, 196, 198 (2009) (the admission of a nontestifying DNA analyst's laboratory reports violated the defendant's Sixth Amendment right to confrontation because the witnesses who actually testified concerning the laboratory reports "had not personally conducted the testing, had not personally examined the evidence collected from the victims, and had not personally reached any of the scientific conclusions contained in the reports"; the laboratory reports constituted testimonial hearsay absent a showing that the DNA analyst was unavailable to testify and that the defendant had a prior opportunity for cross-examination).[57]

- ***Williams v Illinois*, 567 US ___ (2012) (plurality opinion).**

The Confrontation Clause was not violated by a forensic specialist's testimony "that a DNA profile produced by an outside laboratory, [using semen from vaginal swabs taken from the victim,] . . . matched a profile produced by the state police lab using a sample of [the] petitioner's blood[;] . . . that [the outside laboratory] provided the police with a DNA profile[; and that] . . . notations on documents admitted as business records[indicated] that, according to the records, vaginal swabs taken from the victim were sent to and received back from [the outside laboratory]." *Williams*, 567 US at ___ (opinion by Alito, J.). Noting that, "[u]nder settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true[,]" the *Williams* plurality concluded that "[o]ut-of-court statements that are related by the expert solely for the purpose of

[57] MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See the Michigan Judicial Institute's *Evidence Benchbook* for more information on forensic laboratory reports and certificates.

explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Id*. at ___. Where the forensic expert "did not testify to the truth of any other matter concerning [the outside laboratory;] . . . made no other reference to the [outside laboratory's] report, which was not admitted into evidence and was not seen by the trier of fact[;] . . . did [not] . . . testify to anything that was done at the . . . [outside] lab[; and did not] . . . vouch for the quality of [its] work[,]" her testimony did not run afoul of the Confrontation Clause. *Id*. at ___.

In addition, the *Williams* plurality expressed the view that, "even if the report produced by [the outside laboratory] had been admitted into evidence, there would have been no Confrontation Clause violation[,]" because the report "was produced before any suspect was identified[and] . . . was sought not for the purpose of obtaining evidence to be used against [the] petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose." *Williams*, 567 US at ___. The plurality explained:

> "The . . . report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. . . . [T]he profile that [the lab] provided was not inherently inculpatory[; o]n the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known. If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. . . . The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be

subpoenaed by the defense and questioned at trial." *Williams*, 567 US at ___.[58]

- ***People v Nunley*, 491 Mich 686 (2012).**

A certificate generated by the Michigan Department of State (DOS) "to certify that it had mailed a notice of driver suspension to a group of suspended drivers[,]" as required by MCL 257.212, was not testimonial; therefore, it could be admitted, for the purpose of proving the notice element of the charged offense, driving while license revoked or suspended, MCL 257.904(1), "without violating the Confrontation Clause." *Nunley*, 491 Mich at 689-690. Noting that, "under *Crawford*[, 541 US at 51-52,] and its progeny, courts must consider the circumstances under which the evidence in question came about to determine whether it is testimonial[,]" the *Nunley* Court concluded that the DOS certificate "[was] not testimonial because the circumstances under which it [was] generated would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial[; rather,] . . . the circumstances reflect[ed] that the creation of a certificate of mailing, which [was] necessarily generated *before* the commission of any crime, [was] a function of the legislatively authorized administrative role of the DOS independent from any investigatory or prosecutorial purpose." *Nunley*, 491 Mich at 689-690, 706-707. Accordingly, as "a nontestimonial business record created primarily for an administrative reason rather than a testimonial affidavit or other record created for a prosecutorial or investigative reason[,]" the certificate, assuming that it "qualifie[d] under a hearsay exception within [the] rules of evidence[,]" could "be admitted into evidence absent accompanying witness testimony without violating the Confrontation Clause." *Id.* at 690, 699 n 26, 706.

- ***People v Lonsby*, 268 Mich App 375, 391-393 (2005).**

A nontestifying serologist's notes and laboratory report are testimonial statements under *Crawford (Michael)*. In *Lonsby*, a crime laboratory serologist who did not analyze the physical evidence testified regarding analysis that

[58] MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See the Michigan Judicial Institute's *Evidence Benchbook* for more information on forensic laboratory reports and certificates.

was performed by another serologist. *Lonsby*, 268 Mich App at 380-381. The testimony included theories on why the nontestifying serologist conducted certain tests, as well as her notes regarding the tests. *Id*. at 380-381. In *Crawford (Michael)*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby*, 268 Mich App at 377, quoting *Crawford (Michael)*, 541 US at 51-52. The Court of Appeals found that because the serologist would clearly expect that her notes and laboratory report would be used for prosecutorial purposes, the information satisfied *Crawford (Michael)'s* definition of a "testimonial statement." *Lonsby*, 268 Mich App at 619-620. See *People v Lewis*, 490 Mich 921 (2011), vacating in part *People v Lewis (On Remand)*, 287 Mich App 356 (2010), and holding that a statutorily-mandated autopsy report prepared by two nontestifying medical examiners was testimonial and that its admission violated the defendant's Sixth Amendment right to confrontation, but that "the admission of the report was not outcome determinative[;]" see also *People v Dendel (On Second Remand)*, 289 Mich App 445, 468 (2010) (the admission of expert testimony based on a report prepared by non-testifying forensic analysts violated the defendant's Sixth Amendment right to confrontation because "the testing . . . was performed in anticipation of a criminal trial, after the medical examiner's original findings had been challenged." Specifically, "[t]he medical examiner did not merely delegate to the [] laboratory an ordinary duty imposed by law: he sought from the lab specific information to investigate the possibility of criminal activity. Under th[o]se circumstances, any statements made in relation to th[e] investigation took on a testimonial character").[59]

Cf. *People v Dinardo*, 290 Mich App 280, 290 (2010), where, without production of the original Datamaster ticket or a copy of it, the admission of Datamaster breath-test results did not violate the defendant's constitutional right of confrontation, because "the original Datamaster ticket, showing the breath-test procedures and [the] defendant's

[59] MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See the Michigan Judicial Institute's *Evidence Benchbook* for more information on forensic laboratory reports and certificates.

specific alcohol level, [did not] amount[] to testimonial hearsay within the meaning of *Crawford* [*v Washington*, 541 US 36 (2004)]." The Court of Appeals held that "while the Datamaster ticket showed facts relevant to the ultimate issue of [the] defendant's guilt, the ticket was neither a testimonial statement nor hearsay because it was not the statement of a witness or a declarant." *Dinardo*, 290 Mich App at 294. "Instead, the Datamaster ticket was generated by a machine, following an entirely automated process that did not rely on any human input, data entry, or interpretation." *Id*. The Court directed that "[b]ecause the Datamaster ticket was not a testimonial hearsay statement, [the police officer who administered the test] will be permitted to testify regarding the breath-test results [on remand]." *Id*. Further, the Court directed that "because the contemporaneously prepared [written report] constitutes a recorded recollection pursuant to MRE 803(5), [the officer] will be permitted to read its contents into evidence at trial [on remand]." *Id*.[60]

Statements by a victim of sexual abuse to a Sexual Assault Nurse Examiner (SANE) may be testimonial or nontestimonial. *People v Spangler*, 285 Mich App 136, 154 (2009). To make that determination, "the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." *Id*. at 154. See *Spangler*, 285 Mich App at 155-156, for a nonexhaustive list of factual indicia helpful to making an admissibility determination under the Confrontation Clause.

In *People v Garland*, 286 Mich App 1, 11 (2009), the statements made by a sexual abuse victim to a SANE were held to be nontestimonial because "under the totality of the circumstances of the [victim's] statements, an objective witness would reasonably believe that the statements made to the nurse objectively indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency[,]" and because "the circumstances did not reasonably indicate to the victim

[60] MCR 6.202 governs the admissibility of forensic laboratory reports and certificates. See the Michigan Judicial Institute's *Evidence Benchbook* for more information on forensic laboratory reports and certificates.

that her statements to the nurse would later be used in a prosecutorial manner against [the] defendant." Specifically, because the victim did not have any outwardly visible signs of physical trauma, the nurse would not have been able to treat the victim without knowing her history. *Id.* at 11. Additionally, the police investigation took place after and apart from the nurse taking the victim's history and physically examining her. *Id.* at 9.

- ***Miller (Sharee) v Stovall*, 608 F3d 913 (CA 6, 2010).**

The suicide note of the defendant's deceased lover, "confessing to [the defendant's] husband's murder and accusing [the defendant] of conspiring in the crime," constituted testimonial evidence. *Miller (Sharee) v Stovall*, 608 F3d 913, 928 (CA 6, 2010) (affirming the district court's conditional grant of habeas corpus). Along with the suicide note, which stated that the defendant "was involved and helped set . . . up" the murder of the defendant's husband, the defendant's deceased lover left evidence implicating himself and the defendant in planning and carrying out the murder of the defendant's husband. *Id.* at 916-917. The United States Court of Appeals for the Sixth Circuit employed the reasonable-expectation test to determine whether the suicide note was testimonial:

"'The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his [or her] statement being used against the accused in investigating and prosecuting the crime.'" *Miller (Sharee)*, 608 F3d at 924, quoting *United States v Cromer*, 389 F3d 662, 675 (CA 6, 2004).

The Sixth Circuit held that "in light of everything else that [the defendant's deceased lover] did to prepare the case against [the defendant], 'a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.'" *Miller (Sharee)*, 608 F3d at 925, quoting *Cromer*, 389 F3d at 675. Specifically, "[b]ecause [the defendant's deceased lover] took care to assemble, preserve, and arrange delivery to the police of [evidence of the crime], and because the suicide note was placed atop the briefcase [holding evidence of the crime] and contained a

direct accusation of [the defendant] . . . it was foreseeable that the authorities would use the note against her." *Id.* at 925. The Sixth Circuit ruled that the admission of the testimonial suicide note at the defendant's trial violated her Sixth Amendment right to confrontation. *Id.* at 926.

- ***Ohio v Clark (Darius)*, 576 US ___, ___ (2015).**

"[T]he Sixth Amendment's Confrontation Clause [did not] prohibit[] prosecutors from introducing . . . [a young child's] statements" to his teachers in which he "identified [the defendant] as his abuser[;]" because "neither the child nor his teachers had the primary purpose of assisting in [the defendant]'s prosecution, the child's statements [did] not implicate the Confrontation Clause and therefore were admissible at trial[]" when "the child was not available to be cross-examined." *Clark (Darius)*, 576 US at ___ ("declin[ing] to adopt a categorical rule excluding [statements to persons other than law enforcement officers] from the Sixth Amendment's reach[,]" but noting that "such statements are much less likely to be testimonial than statements to law enforcement officers[,]" and further noting that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause[]").

c. Forfeiture By Wrongdoing

Crawford (*Michael)*, 541 US 36, does not bar the admission of an unavailable witness's testimonial statements where the defendant "has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." *People v Jones (Kyle)*, 270 Mich App 208, 212-214 (2006). See MRE 804(a) (providing in part that "[a] declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying[;]" MRE 804(b)(6) (providing that "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness[]" is "not excluded by the hearsay rule if the declarant is unavailable as a witness[]"). However, the doctrine of forfeiture by wrongdoing does not apply to every case in which a defendant's wrongful act has caused a witness to be unavailable to testify at trial; rather, "the prosecution

must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing; (2) the wrongdoing was intended to procure the declarant's unavailability; and (3) the wrongdoing did procure the unavailability." *People v Burns (David)*, 494 Mich 104, 115 (2013).[61]

"For the [forfeiture] rule to apply, a defendant must have 'engaged in or encouraged wrongdoing that was *intended to*, *and did*, *procure* the unavailability of the declarant as a witness.'" *Burns (David)*, 494 Mich at 113, quoting MRE 804(b)(6). MRE 804(b)(6) "incorporates the specific intent requirement at issue in *Giles*[*v California*, 554 US 353, 367-368 (2008),]" which "requir[es] the prosecution to show that [the] defendant acted with, at least in part, the particular purpose to cause [the witness's] unavailability, rather than mere knowledge that the wrongdoing may cause the witness's unavailability." *Burns (David)*, 494 Mich at 114-115, 117, 119 (holding that evidence that "during the alleged [sexual] abuse [the] defendant instructed [the child-victim] 'not to tell' anyone and warned her that if she told, she would 'get in trouble[]'" did not "satisf[y] the causation element of MRE 804(b)(6)[]"). See also *People v Roscoe*, 303 Mich App 633, 640-642 (2014) ("[t]he trial court's admission of the victim's . . . statement [identifying the defendant as his assailant] violated both the rules of evidence and [the] defendant's right to confront the witness because the trial court failed to make a factual finding that [the] defendant had the requisite specific intent[]" to procure the witness's unavailability; however, "because the erroneous admission of the evidence was not outcome determinative[in light of ample other evidence of the defendant's guilt], reversal [was] not warranted[]"); *People v McDade*, 301 Mich App 343, 354-355 (2013) (because the forfeiture-by-wrongdoing doctrine "applies . . . when the defendant, or an intermediary, engaged in conduct specifically designed to prevent a witness from testifying[,]" the trial court's admission of an unavailable witness's recorded interviews did not violate the defendant's right of confrontation where the defendant conveyed to the witness a note containing "language that could be construed as threatening[]" and that "reflect[ed] an effort specifically designed to prevent [the witness] from testifying[]").

[61] "Although not required by [the] court rules, . . . trial courts [should] make findings of fact on the record for each of the three elements required by MRE 804(b)(6)." *Burns (David)*, 494 Mich App at 118 n 42.

The principle of forfeiture by wrongdoing also applies when the *prosecutor*, rather than the defendant, has procured a witness's unavailability. *People v Lopez (Devaun)*, ___ Mich App ___, ___ (2016). Where a prosecution witness "invoked the Fifth Amendment [at trial] because 'he felt threatened[]'" when the prosecutor told him that he could be charged with perjury and incarcerated for life if he testified inconsistently with his preliminary examination testimony, the trial court erred in admitting the witness's preliminary examination testimony under MRE 804(b)(1); under MRE 804(a), the witness was not *unavailable*, and his prior testimony was therefore inadmissible, "because the prosecutor's threats procured [the witness's] unavailability[.]" *Lopez (Devaun)*, ___ Mich App at ___ (noting that "[n]o principled basis exists for distinguishing between the intimidation of defense witnesses and the silencing of prosecution witnesses[]") (citations omitted). "Despite that [the prosecution witness] was represented by counsel, the prosecutor not only invoked the specter of prosecution for perjury[]" if the witness testified at trial inconsistently with his preliminary examination testimony, but also "informed [the witness] that he risked incarceration 'for life' if convicted[;]" these "statements exceeded mere advisement, and crossed into the realm of threat and intimidation." *Id*. at ___ (noting that "[w]hile a prosecutor may inform a witness that false testimony may result in a perjury charge, the circumstances surrounding the prosecutor's intervention . . . demonstrate[d] that the prosecutor went well beyond merely 'advising[]'") (citations omitted). "Because the prosecutor improperly silenced [the witness], the court was required to exclude [the witness's] preliminary examination testimony in the first instance, or to strike the testimony from the record thereafter[; b]y admitting prior testimony in clear violation of the evidentiary rules designed in part to protect a defendant's right to confront the witnesses against him, the trial court violated [the defendant's] fundamental right to a fair trial, abusing its evidentiary discretion." *Id*. at ___ (citations omitted).

d. Impeachment

An unavailable witness's former testimonial statement may be admitted to impeach a witness without violating the Confrontation Clause according to *Crawford (Michael)*. *People v McPherson*, 263 Mich App 124, 134 (2004). For example, in *Tennessee v Street*, 471 US 409, 411 (1985), the

defendant testified in his own defense, claiming that his confession was coerced and was derived from an accomplice's testimony. The prosecution was allowed to introduce the accomplice's testimony at trial, and the defendant argued that his right of confrontation was violated because he did not have the opportunity to cross-examine the accomplice. *Id*. at 410-412. However, the United States Supreme Court held that introduction of the accomplice's confession for the legitimate, nonhearsay purpose of rebutting the defendant's testimony that his own confession was a coerced copy of the accomplice's statement did not violate the defendant's right of confrontation. *Id*. at 417. Similarly, in *McPherson*, 263 Mich App at 131, the defendant argued that the admission of an accomplice's statement that implicated the defendant (the testimony was elicited by the prosecutor from the defendant on cross-examination) violated his right of confrontation. The Court concluded that because the prosecutor's question was intended to impeach the defendant's statement that the accomplice was the gunman, its admission did not violate the defendant's right of confrontation. *Id*. at 134.

5. Codefendant or Coconspirator Testimony

A defendant's Sixth Amendment right of confrontation is violated when his or her nontestifying codefendant's statements—which implicate the defendant—are introduced at their joint trial. *Bruton v United States*, 391 US 123, 126 (1968).

Even though a *Bruton* error is an error of constitutional magnitude, it does not require automatic reversal of a defendant's conviction; rather, it is subject to harmless error analysis. *People v Pipes*, 475 Mich 267, 276-277 (2006). For example, in *Pipes*, 475 Mich at 269, a joint trial was held for two codefendants charged with first-degree premeditated murder. The trial court admitted into evidence the confessions of the two codefendants that incriminated one another, and a *Bruton* error occurred when both codefendants decided to exercise their right to remain silent. *Id*. at 275-276, 279. However, neither defendant preserved the issue by objecting on *Bruton* grounds, and both defendants were convicted. *Id*. at 273, 277. The Michigan Supreme Court held that the codefendants did not demonstrate plain error affecting their substantial rights, and upheld their convictions. *Id*. at 284.

The Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession if the confession is

redacted to completely eliminate the defendant's name and other references to the defendant. *Richardson (Gloria) v Marsh*, 481 US 200, 208-209 (1987). However, merely redacting the codefendant's name and replacing it with a blank, the term "deleted," or some other symbol still points too directly at a jointly tried codefendant and violates the Confrontation Clause. *Gray (Kevin) v Maryland*, 523 US 185, 192 (1998).

The admissibility of an unavailable codefendant's *nontestimonial* statement against interest is governed by MRE 804(b)(3) (hearsay exception for statements against the declarant's penal interest); it is not governed by the Confrontation Clause. *People v Taylor (Eric)*, 482 Mich 368, 370 (2008), overruling *People v Poole*, 444 Mich 151 (1993), to the extent that *Poole* held that that type of statement is governed by both MRE 804(b)(3) and the Confrontation Clause. *Poole*'s MRE 804(b)(3) analysis remains valid and sets out the applicable standard for determining the admissibility of a codefendant's statement under MRE 804(b)(3). *Taylor (Eric)*, 482 Mich at 378. "[W]here . . . the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3)." *Poole*, 444 Mich at 161.

Committee Tip:

Remember that if the hearsay in question is not testimonial, it is not barred by Crawford (Michael). People v DeShazo, 469 Mich 1044 (2004). See, e.g., United States v Johnson (Earl), 581 F3d 320, 325 (CA 6, 2009), where the admission of a nontestifying codefendant's tape-recorded statements did not violate the Confrontation Clause because the_statements were not testimonial. Whether a statement is testimonial depends on whether the declarant intended to testify against the accused; that is, whether a reasonable person in the declarant's position would anticipate his or her statement being used against the defendant in investigating and prosecuting the crime. Id. *at 325. Because the codefendant in* Johnson (Earl), *581 F3d at 325, "did not know that his statements were being recorded and because . . . he did not anticipate them being used in a criminal proceeding against [the defendant],"*

they were not testimonial. Therefore, the Confrontation Clause was inapplicable.

B. Taking Testimony by Use of Audio and Video Technology

1. Use of Two-Way Interactive Video Technology in Certain Proceedings[62]

A court may use telephonic, voice, video conferencing, or two-way interactive video technology during certain criminal proceedings. See MCR 6.006. However, in Michigan, defendants in felony cases have a constitutional and a *statutory* right to be "personally present" at trial. MCL 768.3. Thus, use of this technology may implicate a defendant's right to confrontation.[63]

MCR 6.006(A)-(D) state:

> "(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and

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[62] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Remote participation as set out in Administrative Order No. 2012-7 is permitted only in the following situations: "1) judicial assignments; 2) circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district; 3) district court districts that have multiple court locations in which a judicial officer would have to travel to a different courthouse within the district; [and] 4) a multiple district plan in which a district court magistrate would have to travel to a different district." *Id*. "The judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." *Id*. Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

[63] See Section 10.11 for more information on confrontation issues.

waivers and adjournments of preliminary examinations.

(B) Defendant in the Courtroom—Preliminary Examinations. As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination.

(C) Defendant in the Courtroom—Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use ~~two-way interactive~~ videoconferencing technology to take testimony from a person at another location in the following proceedings:

(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;

(2) with the consent of the parties, trials. A party who does not consent to the use of ~~two-way interactive~~ videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

(D) Mechanics of Use. The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court."

Where the defendant failed to object on the record to the use of two-way interactive video technology to present the testimony of an examining physician and a DNA expert, and where defense counsel stated that she would "'leave [the issue of the admission of the video testimony] to the [trial c]ourt's discretion,'" the defendant both waived his constitutional right of confrontation and "consent[ed]" to the use of the video

technology within the meaning of MCR 6.006(C)(2).[64] *People v Buie (Buie III)*, 491 Mich 294, 297-298, 316, 318-319 (2012), reversing *People v Buie (Buie II) (After Remand)*, 291 Mich App 259 (2011). Noting that "[t]here is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel[,]" the *Buie III* Court held that "where the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record." *Buie III*, 491 Mich at 306, 313, overruling in part *People v Lawson*, 124 Mich App 371, 376 (1983). Although defense counsel stated at trial that the defendant "'wanted to question the veracity of these proceedings,'" that statement did not constitute an objection because (1) it was not phrased as an objection, (2) the defendant effectively acquiesced to the use of two-way interactive technology when his counsel stated that she would leave it to the court's discretion whether to use the technology, (3) the defendant made no complaints on the record when the court proceeded to explain how the technology worked, (4) the first remote witness testified via two-way interactive technology without further complaint, and (5) there was no complaint made before the testimony of the second remote witness. *Buie III*, 491 Mich at 316-317.

Turning to MCR 6.006(C), the *Buie III* Court concluded that the defendant "consent[ed]" to the video testimony within the meaning of MCR 6.006(C)(2) and that the trial court did not abuse its discretion in finding that "good cause" was shown for the use of video technology. *Buie III*, 491 Mich at 318-320. "If either the defendant or [defense] counsel objects, the 'party' cannot be said to have consented[under MCR 6.006(C)(2); h]owever, as with the Confrontation Clause, for the defendant's objection to be valid, it must be made on the record." *Buie III*, 491 Mich at 319. Additionally, contrary to the defendant's argument, the Court held that "the use of 'good cause' in MCR 6.006(C) [does not] import[] the constitutional standard from [*Maryland v Craig*, 497 US 836, 845-846, 850-852 (1990),] for dispensing with confrontation, to wit, that the 'cause' be 'necessary to further an important public policy' or 'state interest[;]'" rather, video testimony may be admitted under MCR 6.006(C) if there is "a 'satisfactory,' 'sound or valid' 'reason[,]'" and "there is no need to identify a corresponding state interest[.]" *Buie III*, 491 Mich at 319 (citation omitted). Because "both parties apparently consented to the use of video testimony, the trial court did not [abuse its discretion] by

[64] Effective January 1, 2017, ADM File No. 2013-18 amended MCR 6.006(C) to refer to "videoconferencing technology" rather than "two-way interactive video technology[.]"

concluding that convenience, cost, and efficiency were sound reasons for using video testimony." *Id*. at 320.

2. Expert Testimony

MCL 600.2164a(1) specifically permits the use of video communication equipment for the purpose of presenting expert testimony at trial. If the court determines "that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony," and if all the parties consent, the court may allow a qualified expert witness "to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place." *Id*.[65]

3. Special Protections for Certain Victim-Witnesses[66]

MCL 600.2163a affords child victim-witnesses, victim-witnesses with developmental disabilities, and "vulnerable adult" victim-witnesses special protections in prosecutions and proceedings involving certain offenses. MCL 600.2163a(1)(e).[67] These special protections include the use of videorecorded statements or closed-circuit television in presenting the victim-witness's testimony. See MCL 600.2163a(6); MCL 600.2163a(18).[68]

In prosecutions of adult offenders, a videorecorded statement may be used in court only for one of the following:

> "(a) It may be admitted as evidence at all pretrial proceedings, except that it may not be introduced at the preliminary examination instead of the live testimony of the witness.
>
> (b) It may be admitted for impeachment purposes.

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[65] The party wishing to present expert testimony by video communication equipment must file a motion at least seven days before the date set for trial, unless good cause is shown to waive that requirement. MCL 600.2164a(2). The party "initiat[ing] the use of video communication equipment" must pay the cost for its use, unless the court directs otherwise. MCL 600.2164a(3). "A verbatim record of the testimony shall be taken in the same manner as for other testimony." MCL 600.2164a(1).

[66] For additional discussion of special protections for certain victims and witnesses, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 6.

[67] Section 17b of the Juvenile Code, MCL 712A.17b, affords similar protections, but does not apply to vulnerable adults. See MCL 712A.17b(1)(d).

[68] See also MCL 712A.17b(5); MCL 712A.17b(16).

> (c) It may be considered by the court in determining the sentence.
>
> (d) It may be used as a factual basis for a no contest plea or to supplement a guilty plea." MCL 600.2163a(6).[69]

"A videorecorded deposition may be considered in court proceedings only as provided by law." MCL 600.2163a(7).

MCL 600.2163a(18) permits the use of closed circuit television to present the testimony of qualifying victim-witnesses. "If, upon the motion of a party or in the court's discretion, the court finds on the record that the witness is or will be psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections afforded the witness in subsections [MCL 600.2163a](3), [MCL 600.2163a](4), [MCL 600.2163a](15), and [MCL 600.2163a](17),[70] the court shall order that the witness may testify outside the physical presence of the defendant by closed circuit television or other electronic means that allows the witness to be observed by the trier of fact and the defendant when questioned by the parties." See also MCL 712A.17b(16), which contains substantially similar language and is applicable during the adjudication stage of a juvenile proceeding.

A defendant can be denied the right to face-to-face confrontation when the court permits a child witness to testify against the defendant outside the defendant's presence. *Staffney*, 187 Mich App at 665. The right to face-to-face confrontation may be denied to further public policy when the reliability of the testimony is assured. In such an instance, a closed-circuit television is an appropriate mode of communication. *Id.* at 665. In addition, when the witness is mentally and psychologically challenged and the assault was of an extreme nature, closed-circuit television is an appropriate mode of communication. *People v Burton*, 219 Mich App 278, 288-289 (1996).

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[69] In juvenile proceedings, a videorecorded statement "shall be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness." MCL 712A.17b(5).

[70] These subsections allow, under limited circumstances, the use of dolls or mannequins, the presence of a support person, the exclusion of all unnecessary persons from the courtroom, the placement of the defendant as far from the witness stand as is reasonable, and the use of a podium. MCL 712A.17b contains similar provisions.

C. Use of Support Animal

"[I]t is within the trial court's inherent authority to control its courtroom and the proceedings before it to allow a witness to testify accompanied by a support animal." *People v Johnson (Jordan)*, ___ Mich App ___, ___ (2016), citing MCL 768.29; MRE 611(a). The use of a support dog to accompany a young victim of sexual abuse and another young witness (the victim's brother) when they testified "did not implicate the Confrontation Clause because it did not deny [the] defendant a face-to-face confrontation with his accuser[.]" *Johnson (Jordan)*, ___ Mich App at ___ (noting that "the victim and the victim's brother testified on the witness stand without obstruction[,] . . . the presence of the dog did not affect the witnesses' *competency* to testify[or] . . . the oath or affirmation given to the witnesses, the witnesses were still subject to cross-examination, and the trier of fact was still afforded the unfettered opportunity to observe the witnesses' demeanor[]").

D. Waiver

"The Confrontation Clauses of our state and federal constitutions provide that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him [or her]." *People v Buie (Buie III)*, 491 Mich 294, 304 (2012). However, "[t]here is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel." *Id.* at 306, 313, overruling in part *People v Lawson*, 124 Mich App 371, 376 (1983).

In *Buie III*, 491 Mich at 297-298, 316, the defendant failed to object on the record to the use of two-way interactive video technology[71] to present the testimony of an examining physician and a DNA expert, and defense counsel stated that she would "'leave [the issue of the admission of the video testimony] to the [trial c]ourt's discretion[.]'" The Michigan Supreme Court held that, under these circumstances, the defendant had waived his right of confrontation under the state and federal constitutions. *Id.* at 297, 310-318, reversing *People v Buie (Buie II) (After Remand)*, 291 Mich App 259 (2011). "[W]here the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record." *Buie III*, 491 Mich at 313. Although defense counsel stated at trial that the defendant "'wanted to question the veracity of these proceedings,'" that statement did not constitute an objection because (1) it was not phrased as an objection, (2) the defendant effectively acquiesced to

[71] Effective January 1, 2017, ADM File No. 2013-18 amended MCR 6.006(C) to refer to "videoconferencing technology" rather than "two-way interactive video technology[.]"

the use of two-way interactive technology when his counsel stated that she would leave it to the court's discretion whether to use the technology, (3) the defendant made no complaints on the record when the court proceeded to explain how the technology worked, (4) the first remote witness testified via two-way interactive technology without further complaint, and (5) there was no complaint made before the testimony of the second remote witness. *Id*. at 316-317.[72]

E. Standard of Review

Whether a defendant has been denied his or her right to confrontation is a constitutional question reviewed de novo on appeal. *People v Beasley*, 239 Mich App 548, 557 (2000). "[T]he trial court's factual findings [are reviewed] for clear error." *People v Buie (Buie III)*, 491 Mich 294, 304 (2012)~~; see also *People v Sardy*, ___ Mich App ___, ___ (2015) ("[a] trial court's factual finding on the issue of [witness] unavailability is reviewed for clear error[]") (citation omitted)~~. "Confrontation Clause violations are subject to harmless-error analysis." *Miller (Sharee) v Stovall*, 608 F3d 913, 926 (CA 6, 2010), citing *Delaware v Van Arsdall*, 475 US 673, 682 (1986).

A trial court's findings of fact regarding the trustworthiness of a hearsay statement are reviewed for clear error. *People v Barrera*, 451 Mich 261, 268-269 (1996).

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575 (2001).

A trial court's decision to admit video testimony under MCR 6.006(C) is reviewed for an abuse of discretion. *Buie III*, 491 Mich at 319-320.

A *Bruton*[73] error is an error of constitutional magnitude subject to harmless error analysis; it does not require automatic reversal of a defendant's conviction. *Pipes*, 475 Mich at 276-277. Where a *Bruton* error is unpreserved, it is subject to review for "plain error that affected substantial rights." *Pipes*, 475 Mich at 278, quoting *People v Carines*, 460 Mich 750, 774 (1999). Under this standard, even where a nontestifying codefendant's statement was improperly admitted at a joint trial, the other codefendant's self-incriminating statement may be properly admitted against that codefendant and may be considered to determine whether the error was harmless. *Pipes*, 475 Mich at 280.

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[72] The *Buie III* Court additionally held that, under these circumstances, the defendant "consent[ed]" to the use of the video technology within the meaning of MCR 6.006(C)(2). *Buie III*, 491 Mich at 318-320.

[73] *Bruton v United States*, 391 US 123 (1968).

10.12 Directed Verdict

A. Rule

MCR 6.419 provides in part:

> "(A) Before Submission to the Jury. After the prosecutor has rested the prosecution's case-in-chief or after the close of all the evidence, the court on the defendant's motion must direct a verdict of acquittal on any charged offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.
>
> (B) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.
>
> (C) After Jury Verdict. After a jury verdict, the defendant may file an original or renewed motion for directed verdict of acquittal in the same manner as provided by MCR 6.431(A) for filing a motion for a new trial."

A postjudgment motion for a directed verdict must be filed within six months of entry of the judgment of sentence. MCR 6.419(C); MCR 6.431(A)(3).

B. Test Applied by the Court

A directed verdict of acquittal is appropriate only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Mehall*, 454 Mich 1, 6 (1997). If the court has reserved decision on a motion for directed verdict, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." MCR 6.419(B). It is impermissible for a trial court to determine the credibility of

witnesses in deciding a motion for a directed verdict, no matter how inconsistent or vague that testimony may be. *Mehall*, 454 Mich at 6.

"The court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal and for conditionally granting or denying a motion for a new trial." MCR 6.419(F).

C. Double Jeopardy Implications

When a trial court grants a defendant's motion for a directed verdict of acquittal, the prohibition against double jeopardy generally prevents further action against the defendant based on the same charges. *People v Nix*, 453 Mich 619, 626-627 (1996). "However, the trial court's characterization of its ruling is not dispositive, and what constitutes an 'acquittal' is not controlled by the form of the action." *People v Mehall*, 454 Mich 1, 5 (1997). Rather, a reviewing court must "determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v Martin Linen Supply Co*, 430 US 564, 571 (1977); see also *Mehall*, 454 Mich at 5. "Retrial is not permitted if the trial court evaluated the evidence and determined that it was *legally insufficient* to sustain a conviction." *Id.* at 6.

"[R]etrial is barred when a trial court grants an acquittal because the prosecution . . . failed to prove an 'element' of the offense that, in actuality, it did not have to prove." *Evans v Michigan*, 568 US ___, ___ (2013). In *Evans*, 568 US at ___, "[w]hen the State of Michigan rested its case at [the defendant's] arson trial, the [trial] court entered a directed verdict of acquittal, based upon its view that the State had not provided sufficient evidence of a particular element of the offense." However, "the unproven 'element' was not actually a required element at all." *Id.* at ___. The United States Supreme Court held that "a midtrial acquittal in these circumstances is an acquittal for double jeopardy purposes[.]" *Id.* at ___. Accordingly, the defendant's "trial ended in an acquittal when the trial court ruled the State had failed to produce sufficient evidence of his guilt." *Id.* at ___. "The Double Jeopardy Clause thus bars retrial for his offense and should have barred the State's appeal." *Id.* at ___, reversing *People v Evans*, 491 Mich 1 (2012).[74]

[74] On April 5, 2013, the Michigan Supreme Court, "[i]n conformity with the mandate of the Supreme Court of the United States[]" in *Evans*, 568 US ___, entered an order vacating its judgment and opinion in *Evans*, 491 Mich 1, and affirming the judgment of the Wayne County Circuit Court. *People v Evans*, 493 Mich 959, 959-960 (2013).

After *Evans*, 568 US ___, was decided, MCR 6.419 was amended[75] to eliminate the provision in former MCR 6.419(A) prohibiting the court from reserving decision on the defendant's motion for directed verdict and to add new MCR 6.419(B), permitting the court to "reserve decision on the motion[] . . . and decide the motion[, on the basis of the evidence at the time the ruling was reserved,] either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict."[76]

D. Standard of Review

In reviewing a trial court's decision on a motion for a directed verdict, an appellate court reviews the record de novo to determine whether the evidence presented, viewed in the light most favorable to the prosecution, could have persuaded a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122 (2001).

"[P]ostponing a hearing on a defendant's motion for directed verdict is harmless error where the prosecutor presented sufficient evidence to convict the defendant at the close of his proofs." *People v Vincent*, 455 Mich 110, 114 n 1 (1997).

10.13 Jury Instructions

A. Generally

A defendant has a constitutional right to instructions that include: (1) the elements of the offense, *United States v Gaudin*, 515 US 506, 510 (1995); (2) any applicable defenses, *Mathews v United States*, 485 US 58, 63 (1988); (3) the requisite intent, *Morissette v United States*, 342 US 246, 274 (1952); and (4) a proper reasonable doubt instruction, *In re Winship*, 397 US 358, 363 (1970). Taken as a whole, the instructions must be accurate and fair. *Estelle v McGuire*, 502 US 62, 72 (1991).

The court is required to instruct the jury on the law applicable to the case. MCL 768.29. "The trial court must instruct the jury not only on all the elements of the charged offense, but also, upon request, on material issues, defenses, and theories that are supported by the evidence. *People v Anstey*, 476 Mich 436, 453 (2006). Instructions for

[75] ADM 2010-34, effective September 1, 2013.

[76] "Allowing the court to reserve judgment until after the jury returns a verdict mitigates double jeopardy concerns because 'reversal would result in reinstatement of the jury verdict of guilt, not a new trial.'" Staff Comment to ADM 2010-34, quoting *Evans*, 568 US at ___ n 9.

which no supporting evidence exists should not be given. *People v Wess*, 235 Mich App 241, 243 (1999).

MCR 2.512 governs instructions to the jury. "At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict." MCR 2.512(B)(1). Additionally, "[b]efore or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in [MCR 2.512(A)(2)], that party's theory of the case." MCR 2.512(B)(2). See also MCR 2.513(N)(1), which provides, in part, that "[a]fter closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments." The trial court must also "provide a written copy of the final jury instructions to take into the jury room for deliberation." MCR 2.513(N)(3). However, the written jury instructions required under MCR 2.513(N)(3) "[do] not substitute for a spoken charge[,]" and the trial court must "*verbally* communicate [to the jury] a complete set of jury instructions[.]" *People v Traver*, ___ Mich App ___, ___ (2016) (holding that the trial court's failure to provide the jury with verbal instructions constituted plain error requiring reversal) (citations omitted; emphasis added).

The court should be careful to characterize the instructions given as the court's instructions rather than identify them as instructions requested by a party. *People v Hunter*, 370 Mich 262, 268 (1963).

B. Model Jury Instructions

The Committee on Model Civil Jury Instructions and the Committee on Model Criminal Jury Instructions are authorized to adopt, amend, and repeal model jury instructions. MCR 2.512(D)(1). Trial courts are required to use the model civil jury instructions and model criminal jury instructions in the manner set out in MCR 2.512(D)(2)-(4), which provides as follows:

> "(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or the Committee on Model Criminal Jury Instructions or a predecessor committee must be given in each action in which jury instructions are given if
>
> (a) they are applicable,
>
> (b) they accurately state the applicable law, and

(c) they are requested by a party.

(3) Whenever a committee recommends that no instruction be given on a particular matter, the court shall not give an instruction unless it specifically finds for reasons stated on the record that

(a) the instruction is necessary to state the applicable law accurately, and

(b) the matter is not adequately covered by other pertinent model jury instructions.

(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions, when given, must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative."

C. Request for Instructions

MCR 2.512(A) provides:

"(1) At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.

(2) In addition to requests for instructions submitted under [MCR 2.512](A)(1), after the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted.

(3) A copy of the requested instructions must be served on the adverse parties in accordance with MCR 2.107.

(4) The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury.

(5) The court need not give the statements of issues or theories of the case in the form submitted if the court

presents to the jury the material substance of the issues and theories of each party."

D. Preliminary Instructions

MCR 2.513(A) provides, in relevant part:

> "After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all . . . charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) [(requiring the court to give requested model civil jury instructions and model criminal jury instructions where applicable and accurate)] does not apply to such preliminary instructions."

E. Interim Instructions

"At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict." MCR 2.512(B)(1).

The court must also instruct the jury on the applicable law, issues presented, and, if requested under MCR 2.512(A)(2), a party's theory of the case. MCR 2.512(B)(2). These instructions may be given "[b]efore or after arguments, or at both times, as the court elects." *Id.*

F. Final Instructions

1. Required Instructions

The trial court is required to instruct the jury *after* closing arguments are made or waived. MCR 2.513(N)(1). However, the trial court has the discretion (after giving notice to the parties) to instruct the jury *before* the parties give their closing arguments. *Id*. If instructions are given before closing arguments, the trial court may give any appropriate further instructions afterwards. *Id*. A complete set of jury instructions

must be *verbally* communicated to the jury. *Traver*, ___ Mich App at ___.

2. Providing Copies of Instructions

The court must provide the jury with a written copy of the final instructions to take into the jury room during deliberations. MCR 2.513(N)(3). If a juror requests additional copies, the court may provide them as necessary. *Id.* The court also has discretion to provide the jury with a copy of electronically recorded instructions." *Id.*

The written jury instructions required under MCR 2.513(N)(3) "[do] not substitute for a spoken charge[,]" and the trial court must "*verbally* communicate [to the jury] a complete set of jury instructions[.]" *Traver*, ___ Mich App at ___ (holding that the trial court's failure to provide the jury with verbal instructions constituted plain error requiring reversal) (citations omitted; emphasis added).

3. Clarifying or Amplifying Instructions

"When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions." MCR 2.513(N)(4). See also *People v Kosik*, 303 Mich App 146, 156 (2013) (a trial court may provide an "instruction clarif[ying] an issue that the trial court [feels] the jurors might . . . question[]").

G. Content of Instructions

Each party has the opportunity to submit requested instructions to the court before closing argument. MCR 2.513(N)(1). A copy of the written instructions submitted to the court must be served on the other parties. *Id.* Before closing argument, the court must inform the parties of its proposed action on the requests. *Id.*

The omission of an essential element of a criminal jury instruction is an error of constitutional magnitude. *People v Carines*, 460 Mich 750, 761 (1999). If the defendant preserves the issue at trial, and the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it was harmless beyond a reasonable doubt. *Id.* at 774. See also *Neder v United States*, 527 US 1, 10 (1999) (indicating that failure to instruct a jury on one of several elements may be subject to a harmless-error analysis). If the defendant fails to

preserve the issue at trial, review on appeal is for plain error. *Carines*, 460 Mich at 764. Where an instruction omitted an element of an offense, and "the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings." *People v Kowalski*, 489 Mich 488, 506 (2011). Furthermore, where a defendant's attorney "clearly expresses satisfaction with a trial court's decision [regarding a jury instruction], counsel's action will be deemed to constitute a waiver[]" of the defendant's claim on appeal that a jury instruction was improper. *Id.* at 503-504 ("by expressly and repeatedly approving the jury instructions on the record, [the] defendant waived any objection to the erroneous instructions[]").

However, "[it]t is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt." *People v Duncan (Timothy)*, 462 Mich 47, 48 (2000) (the defendant's two felony-firearm convictions were reversed because the jury was not instructed on any elements of that offense). See also *Traver*, ___ Mich App at ___ (holding that where the trial court failed to provide the jury with the model instruction for felony-firearm, M Crim JI 11.34, in violation of MCR 2.512(D)(2), and instead provided an inaccurate instruction that omitted the elements of the offense, the error constituted structural error mandating a new trial) (citations omitted).

"[W]hen a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element," a challenge to the sufficiency of the evidence "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." *Musacchio v United States*, 577 US ___, ___ (2016). "If a jury instruction requires the jury to find guilt on the elements of the charged crime, a defendant will have had a 'meaningful opportunity to defend' against the charge[, a]nd if the jury instruction requires the jury to find those elements 'beyond a reasonable doubt,' the defendant has been accorded the procedure that [is] required to protect the presumption of innocence." *Id.* at ___ (citations omitted).

Jury instructions, when read as a whole, must convey the correct concept of reasonable doubt. *Victor v Nebraska*, 511 US 1, 5, 7, 18, 22 (1994) (approving of instructions defining reasonable doubt as, among other things, "not a mere possible doubt," but one "depending on moral evidence," such that the jurors could not say they felt an abiding conviction, "to a moral certainty," of the truth of the charge; and as a doubt that will not permit an abiding

conviction, "to a moral certainty," of the accused's guilt, and an "actual and substantial doubt" that is not excluded by the "strong probabilities of the case").

"The verdict form is treated as, essentially, part of the package of jury instructions." *People v Eisen*, 296 Mich App 326, 330 (2012), citing *People v Wade (Michael)*, 283 Mich App 462, 464-468 (2009). Accordingly, where the trial court's oral jury instructions were plainly erroneous in omitting an element of a charged offense, the error's prejudicial effect was mitigated by the presence of the missing element on the verdict form; thus, no reversible error occurred. *Eisen*, 296 Mich App at 329-331.

H. Instructions on Lesser Included Offenses

1. Necessarily Included Lesser Offenses

"'Necessarily included' lesser offenses encompass situations in which it is impossible to commit the greater offense without first having committed the lesser." *People v Hendricks*, 446 Mich 435, 443 (1994). Either party may request instructions on lesser included offenses. *Id.* at 442.

"[A] requested instruction on a necessarily included lesser offense is proper if [(1)] the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and [(2)] a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357 (2002).

MCL 768.32 expressly allows a jury to find a defendant guilty of an inferior degree of an offense. *Hendricks*, 446 Mich at 441-442.

"(1) Except as provided in subsection (2),[77] upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense." MCL 768.32.

"[T]he word 'inferior' in the statute does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense

[77] Subsection (2) concerns indictments for controlled substance offenses listed in MCL 333.7401(2)(a)*(i)* or MCL 333.7401(2)(a)*(ii)*, or MCL 333.7403(2)(a)*(i)* or MCL 333.7403(2)(a)*(ii)*.

from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense." *People v Torres (Gavino) (On Remand)*, 222 Mich App 411, 419-420 (1997). "MCL 768.32(1) only permits instructions on necessarily included lesser offenses, not cognate lesser offenses." *People v Reese (Clinton)*, 466 Mich 440, 446 (2002).

Where an offense is divided into degrees, MCL 768.32(1) permits finding a defendant guilty of a lesser degree of the charged offense if the lesser degree is an "inferior" offense as defined in *Cornell*, 466 Mich 335. In other words, the lesser degree of the offense must be a necessarily included lesser offense and not a cognate lesser offense of the crime charged. *People v Nyx (Maurice)*, 479 Mich 112 (2007) (plurality opinion).

"[W]hen dealing with degreed offenses that can be committed by alternative methods[,]" "a more narrowly focused evaluation of the statutory elements at issue is necessary[.]" *People v Wilder*, 485 Mich 35, 44 (2010). "Such an evaluation requires examining the charged predicate crime to determine whether the alternative elements of the lesser crime committed are subsumed within the charged offense. As long as the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense. Not all possible statutory alternative elements of the lesser offense need to be subsumed within the elements of the greater offense in order to conclude that the lesser offense is a necessarily included lesser offense." *Id.* at 44-45.

In *Wilder*, 485 Mich at 38, the defendant entered a residence without permission, displayed a weapon, and committed a larceny; he was charged with first-degree home invasion under MCL 750.110a(2) (requires commission/intent to commit a felony, larceny, or assault in the dwelling), and was convicted of third-degree home invasion under MCL 750.110a(4)(a) (requires commission/intent to commit a misdemeanor in the dwelling). The Court instructed that "in order to determine whether the specific elements used to convict [the] defendant of third-degree home invasion in this case constitute a necessarily included lesser offense of first-degree home invasion, one must examine the offense of first-degree home invasion as charged and determine whether the elements of third-degree home invasion as convicted are subsumed within the charged offense." *Wilder*, 485 Mich at 45.

In *Wilder*, 485 Mich at 44, the Court of Appeals erred in concluding that third-degree home invasion in this case was not a necessarily included lesser offense of first-degree home

invasion because "it failed to confine its analysis to the elements at issue in this case; rather, it based its decision on an analysis of alternative elements that were not at issue." In reaching its conclusion, the Court of Appeals wrongly "reasoned that if there *could* be any instance in which the underlying misdemeanor is not subsumed within the predicate felony, then the entire crime is a cognate offense." *Id*. The Michigan Supreme Court concluded that in this case, third-degree home invasion under MCL 750.110a(4)(a) based on the commission of misdemeanor larceny is a necessarily included lesser offense of first-degree home invasion, MCL 750.110a(2), because "every felony larceny necessarily includes within it a misdemeanor larceny." *Wilder*, 485 Mich at 46. The remaining alternative elements on which a third-degree home invasion conviction can be based were not relevant to the analysis in this case. *Id*. at 44.

"[E]ither a misdemeanor *or* felony larceny . . . may serve as the predicate offense for second-degree home invasion[, MCL 750.110a(3); c]onsequently, where[] . . . the predicate offense for [a] home invasion charge [is] a larceny, third-degree home invasion[, MCL 750.110a(4), is] a lesser-included offense of second-degree home invasion." *People v Jackson (Kevin) (On Reconsideration)*, ___ Mich App ___, ___ (2015), applying *Wilder*, 485 Mich at 46 (additional citation omitted). However, a trial court errs in giving an instruction on third-degree home invasion where there "is no record evidence that [the] defendant entered [a] home to commit any crime other than a larceny." *Jackson (Kevin) (On Reconsideration)*, ___ Mich App at ___ (nevertheless concluding "that the improper jury instruction did not affect [the] defendant's substantial rights[]" because "the instruction allowed [the] defendant the chance to be convicted of a *lesser* offense than that which the evidence supported[]") (citations omitted).

"[E]ntering without permission[, MCL 750.115,] is not a lesser offense of entering with the intent to commit a larceny[, MCL 750.111][,]" because "entering without permission contains an additional element—the lack of permission—on which the prosecution would have to prove additional facts that are not necessary for the prosecution to prove entering with intent to commit a larceny." *People v Heft*, 299 Mich App 69, 75-76 (2012). Although the Michigan Supreme Court in *Cornell*, 466 Mich at 360, held that entering without permission is necessarily included in entering with intent to commit larceny, *Cornell* was distinguishable "because it expressly concerned a situation in which the prosecution charged the defendant with 'breaking and entering,' not merely entering." *Heft*, 299 Mich App at 75-

76. In contrast, in *Heft*, 299 Mich App at 76-77, "the [defendant's theory] of [the] case [was] inconsistent with entering without permission[,]" and "[t]he prosecution was not required to prove that [the defendant] did not have permission to enter the house to prove entering with intent to commit larceny, but would have been required to prove that [he] did not have permission to enter the house to prove entering without permission."

The Michigan Supreme Court held that it was error for the trial court to instruct the jury on the cognate lesser offense of felonious assault where, although the defendant was originally charged with felonious assault, the information was amended to instead charge assault with intent to commit murder. *People v Wheeler*, 480 Mich 965 (2007). Thus, where the defendant was no longer charged with felonious assault, instruction on that offense constituted plain error because felonious assault is a cognate lesser offense of assault with intent to commit murder. *Id*.

Third-degree criminal sexual conduct (CSC-III) is not a necessarily included offense of first-degree criminal sexual conduct (CSC-I) because it is possible to commit CSC-I without first committing CSC-III. *People v Apgar*, 264 Mich App 321, 326-327 (2004). In *Apgar*, 264 Mich App at 324, the defendant was charged with two counts of CSC-I. After jury selection, the prosecution moved to amend the information to include a charge of CSC-III. *Id*. at 324-325. The trial court denied the motion, but instructed the jury on CSC-III. *Id*. at 325. The jury ultimately convicted the defendant of CSC-III. *Id*. While the trial court improperly instructed the jury on CSC-III because the defendant was not charged with CSC-III and CSC-III is a *cognate* lesser offense of CSC-I, the error did not require reversal because the defendant was provided adequate notice of the uncharged offense (CSC-III) when all elements of the offense were proved, without objection, at the defendant's preliminary examination and trial. *Id*. at 327-329.

See also *People v Walls*, 265 Mich App 642, 646 (2005), where the Court concluded that felonious assault (MCL 750.82) is a cognate lesser offense of assault with intent to rob while armed (MCL 750.89), and not a necessarily included lesser offense as the defendant argued. Whereas a conviction for felonious assault requires that the offender possess a dangerous weapon, a conviction for assault with intent to rob while armed may be based on the offender's possession of "any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon." MCL 750.89. Because conviction of felonious assault (lesser offense) requires

possession of a dangerous weapon, and conviction of assault with intent to rob while armed (greater offense) does not require possession of a dangerous weapon, it is possible to commit the greater offense without first committing the lesser offense. *Walls*, 265 Mich App at 646.

Where "the only difference [] between the possession with intent to deliver offenses is the amount of the illegal substance, it [is] not [] possible to commit the greater offense without committing the lesser offense." *People v McGhee (Larry A)*, 268 Mich App 600, 607 (2005). However, this does not necessarily mean that a trial court must give instructions for all possible amounts if the defendant so requests. *Id.* at 607-608. In *McGhee (Larry A)*, 268 Mich App at 606, the defendant requested the trial court to instruct the jury on possession with intent to deliver 50 to 225 grams of cocaine. The trial court declined to give the defendant's requested instruction, and instead instructed the jury on possession with intent to deliver 225 to 650 grams of cocaine, and possession with intent to deliver more than 650 grams of cocaine. *Id.* at 608 n 2. "[A]n instruction on the lesser offense need only be given if a rational review of the evidence indicates that the element distinguishing the lesser offense from the greater offense is in dispute." *Id.* at 607. Because the "defendant did not argue or present evidence that he possessed a lesser amount[,]" "a rational view of the evidence d[id] not support defendant's claim that the amount of cocaine possessed was in dispute." *Id.* at 608.

Assault with intent to do great bodily harm less than murder is a lesser included offense of assault with intent to commit murder; therefore, the trial court properly instructed the jury on both offenses. *People v Brown (Tommy)*, 267 Mich App 141, 150-151 (2005). In *Brown (Tommy)*, 267 Mich App at 143-144, the defendant fired a gun toward several individuals, three of whom were injured, and one of whom suffered serious and permanent injuries. The defendant asserted that assault with intent to do great bodily harm less than murder was a cognate lesser offense of assault with intent to commit murder and objected to the trial court's decision to instruct the jury on the lesser charge. *Id.* at 144. A majority of the *Brown* (*Tommy)* panel concluded that the specific intent necessary for the offense of assault with intent to do great bodily harm less than murder was "completely subsumed" by the specific intent necessary for the offense of assault with intent to commit murder. *Id.* at 150-151.

The duty of the trial judge to instruct on lesser included offenses is determined by the evidence. *Torres (Gavino)*, 222 Mich App at 416. If evidence has been presented which would

support a conviction of a lesser included offense, refusal to give a requested instruction is error requiring reversal. *Id.* at 416. Even over the objection of counsel, a defendant can make a knowing waiver of the right to instructions on lesser included offenses. *People v Jones (Ponce)*, 424 Mich 893 (1986).

Statutory involuntary manslaughter is not an inferior offense of second-degree murder because it is possible to commit second-degree murder without first committing involuntary manslaughter. *People v Smith (Randy)*, 478 Mich 64, 71 (2007). Because statutory involuntary manslaughter requires elements not required to commit second-degree murder (that the death resulted from the discharge of a firearm intentionally pointed at the victim), statutory involuntary manslaughter is not a necessarily included lesser offense of second-degree murder, and denial of a defendant's request for such a jury instruction is proper. *Id.* at 71.

It is not error to refuse to instruct the jury on a lesser offense or attempted offense that is unsupported by the evidence. *People v Davis (Keith)*, 277 Mich App 676, 688-689 (2008), vacated in part on other grounds 482 Mich 978 (2008). In *Davis (Keith)*, 277 Mich App at 677-678, codefendants Davis and Perez were convicted of assault with intent to rob while armed, stemming from an incident in which their efforts to rob a liquor store were thwarted. Perez argued on appeal that the trial court erred in failing to instruct the jury on the crime of attempted assault with intent to rob. *Id*. at 688. The Court of Appeals ruled that the trial court did not err because the evidence did not support a finding that Perez's efforts to assault the storeowner were prematurely thwarted. *Id*. at 688-689. Instead, the evidence only suggested that Perez completed the assault but was prevented from completing the robbery. *Id*. at 689. Attempted robbery is a necessarily included lesser offense of assault with intent to rob while armed; the only difference between the two offenses is the element of assault. *Id*. Even if the jury concluded that Perez's conduct did not constitute an assault, the assault element would fail, but the attempt to rob would remain. *Id*. Therefore, the trial court's refusal to instruct the jury on attempted assault with intent to rob was not error because the facts did not support the instruction. *Id*.

Larceny from the person, MCL 750.357, "is [not] a necessarily included lesser offense of robbery[, MCL 750.530]." *People v Smith-Anthony*, 494 Mich App 669, 672, 674 n 7, 687 n 53 (2013) (because, generally,[78] "a defendant [must] take property from the physical person or immediate presence of a victim to commit a larceny from the person[,]" while "robbery[, under MCL 750.530(2),] does not require that the taking have been

made in the 'immediate presence' of the victim[,]" the trial court erred in instructing the jury on larceny from the person as a lesser included offense of robbery).

Where a "[d]efendant [is] charged with the greater offense of reckless driving causing death[,]" MCL 257.626(5) precludes "an instruction on the misdemeanor lesser offense of moving violation causing death." *People v Jones (Thabo)*, 497 Mich 155, 172 (2014), rev'g 302 Mich App 434 (2013). "MCL 257.626(5) is not a matter of practice and procedure, and, consequently, there [is] no violation of separation of powers simply because a necessarily included lesser offense exists and the Legislature has acted within its constitutional authority by creating a substantive exception that prohibits or otherwise limits the [factfinder's] consideration of that lesser offense." *Jones (Thabo)*, 497 Mich at 169.

2. Cognate Lesser Included Offenses

"'Cognate' lesser included offenses are those that share some common elements, and are of the same class or category as the greater offense, but have some additional elements not found in the greater offense." *Hendricks*, 446 Mich at 443.

In *Cornell*, 466 Mich at 357, the Michigan Supreme Court announced that the jury should not be instructed on cognate lesser offenses. The Court held that except as provided in MCL 768.32(2) (regarding major controlled substance offenses), the jury must be instructed on necessarily included lesser offenses, if the difference between the greater and lesser offense is in dispute. *Cornell*, 466 Mich at 357.

3. Lesser Included Misdemeanors

The five conditions for a lesser included misdemeanor offense instruction are: (1) there must be a proper request for the instruction; (2) there must be an inherent relationship between the greater and lesser offenses (to be inherently related, the offenses must relate to the protection of the same interests, and by their general nature, proof of the lesser offense is necessarily presented in showing the greater offense); (3) a rational view of the evidence at trial must support the requested misdemeanor instruction; (4) if the prosecution is

[78] "In rare cases, a taking outside the victim's immediate presence may satisfy the from-the-person element only if a defendant or the defendant's accomplices use force or threats to create distance between a victim and the victim's property." *People v Smith-Anthony*,494 Mich 669, 672-673 (2013). These circumstances were not present in the *Smith-Anthony* case. *Id.* at 673.

requesting the instruction on a lesser included offense, the defendant must have been given adequate notice; and (5) the instructions requested must not result in undue confusion or injustice. *People v Steele (Chester)*, 429 Mich 13, 19-22 (1987).

I. Questions About Instructions

Jurors may submit questions about the court's jury instructions. See MCR 2.513(N)(2). As part of its final instructions, the court must "advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations." *Id.* In addition, after giving its final instructions, the court must "invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate." *Id.* If the jurors have questions, "the court and the parties shall convene, in the courtroom or by other agreed-upon means." MCR 2.513(N). The question must be read aloud on the record, and the attorneys must offer suggestions for an appropriate response. *Id.* The court has discretion whether to provide the jury with a specific response. *Id.* No matter what it decides, the court must respond to all questions asked by the jury, "even if the response consists of a directive for the jury to continue its deliberations." *Id.*

J. Objections to the Instructions and Preservation of Error

Failure to give an instruction is not grounds for setting aside the verdict unless it was requested by the defendant. MCL 768.29. If a party wishes to object to the giving or the failure to give a jury instruction, it must be done "on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations)[.]" MCR 2.512(C). Objections must be "stat[ed] specifically to the matter to which the party objects and [must state] the grounds for the objection." *Id.* The court must give the objecting party the opportunity to make the objection without the jury present. *Id.*

K. Standard of Review

Claims of instructional error are generally reviewed de novo on appeal, but a trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 82 (2007). The trial court's role is to clearly present the case to the jury and to instruct the jury on the applicable law. *Id.* at 82. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the issues to be tried to the jury. *Id.*

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *McGhee (Larry A)*, 268 Mich App at 603. The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freeland*, 178 Mich App 761, 766 (1989). Even if somewhat imperfect, jury instructions are not erroneous if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v McLaughlin*, 258 Mich App 635, 668 (2003). "The verdict form is treated as, essentially, part of the package of jury instructions." *People v Eisen*, 296 Mich App 326, 330, 329-331 (2012) (holding that, although the trial court's oral jury instructions were plainly erroneous in omitting an element of a charged offense, no reversible error occurred because the verdict form reflected the missing element).

"A trial judge, having properly applied the law to the facts in a criminal case in which intent is not involved, and where the facts are undisputed, may say to the jury that it is their duty to bring in a verdict of guilty, but he [or she] may not go further and peremptorily direct or compel such verdict. The responsibility for the verdict must be left with the jury. It must be their verdict, not the verdict of the judge." *People v Heikkala*, 226 Mich 332, 337 (1924). In *Heikkala*, 226 Mich App at 333-334, the defendant was charged with manslaughter—killing another person by discharging a firearm pointed or aimed, intentionally but without malice, at the person. The trial court instructed the jury as follows:

> "It becomes my duty, gentlemen, to instruct you to render a verdict of guilty in this case. The court in a criminal case has no right to require a verdict of guilty from the jury—that is to say, has no right to take the verdict without the consent of the jury—but it is the duty of the court to permit the jury to render a verdict. However, gentlemen, I charge you that it is your duty in this case as jurors to render a verdict of guilty." *Heikkala*, 226 Mich at 334.

The jury found the defendant guilty. *Heikkala*, 226 Mich at 334. Even though the facts were not disputed, because the charged crime required the jury to find that the defendant intentionally pointed or aimed a firearm, the trial court erred in instructing the jury to render a guilty verdict. *Id.* at 337. If intent were not involved and the facts were undisputed, the last two sentences of the trial court's instruction would not be objectionable, but the first sentence would be objectionable as peremptorily instructing a guilty verdict. *Id.* at 337-338. The Michigan Supreme Court reversed the defendant's conviction and granted a new trial, noting that an instruction

regarding the presumption of innocence, if requested, should have been given. *Id*. at 338.

Under MCL 769.26, the failure to give a requested jury instruction constitutes error that requires reversal only "where it '"affirmatively appear[s]" that it is more probable than not that the error was outcome determinative.'" *People v Lyles*, ___ Mich ___, ___ (2015), quoting *People v Lukity*, 460 Mich 484, 496 (1999) (internal citation omitted). See also *People v Mitchell (Bradford)*, 301 Mich App 282, 288-289 (2013) (citing *People v Cornell*, 466 Mich 335, 365 (2002), and holding that the trial court's abuse of discretion in failing to give a requested instruction on a lesser included offense constituted error requiring reversal where an inquiry sent by the jury during deliberations "strongly suggest[ed] that it wanted to consider, and likely would have convicted [the] defendant of, a lesser charge"); *People v Hawthorne*, 474 Mich 174, 176, 181 (2006) (when a trial judge refuses a defendant's request to deliver an instruction on the defense of accident, a verdict is reversible if the defendant "establishe[s] that the alleged error undermined the reliability of the verdict[]").

To preserve an instructional error for review, a defendant must object to the instruction before the jury deliberates. *People v Gonzalez*, 256 Mich App 212, 225 (2003). Failure to make a timely objection to a jury instruction constitutes forfeiture and relief is only warranted if the error was plain and it affected the defendant's substantial rights. *Kowalski*, 489 Mich at 505-506; *Carines*, 460 Mich at 763. In contrast, if a party expresses satisfaction with the trial court's instructions, it constitutes a waiver that extinguishes any error regarding the instructions. *People v Carter (Vincent)*, 462 Mich 206, 215 (2000).

Where an instruction omitted an element of an offense, and "the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings." *Kowalski*, 489 Mich at 506. In *Kowalski*, 489 Mich at 502-503, the defendant established plain error with respect to the trial court's instruction on the elements of accosting, enticing, or soliciting a minor for immoral purposes or encouraging a minor to commit an immoral act, MCL 750.145a, because the instruction entirely omitted the *actus reus* element of one of the two alternative theories allowing conviction under the statute. However, because the undisputed evidence "established beyond any reasonable doubt" that the defendant's conduct "constituted the *actus reus* under either prong of the offense[,]" he "[could not] establish that the trial court's charge to the jury affected the outcome of the lower court proceedings[]" as required under *Carines*, 460 Mich at 770-771. *Kowalski*, 489 Mich at 507, 510.

10.14 Jury Matters During Deliberations

A. Separation of the Jury

It is within the trial court's discretion whether to permit jurors to separate after deliberations have started. *People v Nick*, 360 Mich 219, 225 (1960). MCL 768.16 provides that "[a]fter the jurors retire to consider their verdict, the court may permit the jurors to separate temporarily, whenever in his [or her] judgment such a separation is deemed proper[.]" Where the deliberations are lengthy, it is "quite proper to permit [the jury] to recess from time to time and go to their respective homes at night." *Nick*, 360 Mich at 225.

"Where it appears that a separation of jurors after submission of a criminal case to the jury was with authority of the court and not in violation of a statute or rule, or in some instances, where the separation was of such temporary or trivial nature as not to reasonably suggest the likelihood of prejudice, the defendant generally has the burden of proving reversible harm. In other words, to meet the burden of showing an abuse of discretion in a trial court's denial of a motion to sequester a jury during deliberations, a defendant must show more than the mere existence of circumstances capable of prejudicing the jury; he must demonstrate a nexus between the events or circumstances and juror taint." 75B Am Jur 2d Trial § 1291.

"Where a separation of a jury during deliberations in a criminal case is unauthorized, as being, for instance, in violation of a statute, rule, or order of the court, or if such separation occurs under circumstances which might expose the jurors to improper influences, a presumption of prejudice is created and the burden is placed upon the prosecution to show that no injury resulted. This rule has been supported by reasoning that admonition and instruction of the jury is probably ineffective in ameliorating the prejudicial effects of separation during the deliberations, and that the use of juror affidavits to prove a probability of prejudice is of dubious value because a juror cannot swear to being prejudiced by influences of which he [or she] is unaware." 75B Am Jur 2d Trial § 1291.

"Where a presumption of prejudice or injury [] arise[s] from a separation of the jurors after submission, the presumption may be rebutted by showing that the jurors were not subjected to any outside influence of any kind during the separation." 75B Am Jur 2d Trial § 1291.

B. Communication with the Jury

There are three categories of communication with a deliberating jury. *People v France*, 436 Mich 138, 142-144 (1990). These categories are discussed below. Ex parte communication with a deliberating jury is discouraged. *Id.* at 161. Consistent with MCR 2.513(B), a court must ensure that all case-related communications between the court and the jury are made part of the record.

1. Substantive

"Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an *absence* of prejudice." *France*, 436 Mich at 143.

- An example of a substantive communication is where the jury asks the trial court for a further definition of a particular crime, and the trial court provides the jury with a typewritten definition of that crime. *France*, 436 Mich at 144, 146 n 9.

2. Administrative

"Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial. Upon an objection, the burden of persuasion lies with the nonobjecting party to demonstrate that the communication lacked any prejudicial effect." *France*, 436 Mich at 143.

- An example of an administrative communication is where the jury asks the trial court for an exhibit or police report, and the trial court responds that because those items were not received in evidence, they are unavailable to the jury. *France*, 436 Mich at 145-146. See also *People v Marshall (Dustin)*, 298 Mich App 607, 624 (2012), vacated in part on other grounds 493 Mich 1020 (2013) (prejudice was not presumed from the absence of a record regarding whether there

were any communications between the jury and the trial court concerning four handwritten juror notes that were stapled to the verdict form, where "each [note] refer[red] to an evidentiary matter[]"); *Bourne v Curtin*, 666 F3d 411, 412-414 (CA 6, 2012) (trial court did not reversibly err by failing to consult with the parties before denying the jury's request to review trial testimony; the court's ex parte communication with the jury concerning its request "to review material it had already received during the trial[]" did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings, "[a]nd the trial court had good reason to conclude that [the] jury's request—to re-hear the testimony of *five* witnesses after deliberating for barely more than an hour—was unreasonable[]"); *Peoples v Lafler*, 734 F3d 503, 518-519 (CA 6, 2013) (rejecting the habeas petitioner's "claim[] that he was denied the right to counsel because the trial court told the jury, outside of the presence of [the petitioner] or his attorney, that a trial transcript was not available[;]" because "[t]he jury already had heard all testimony from the trial, . . . a transcript could only have provided this information a second time[,]" and "it was not objectively unreasonable for the state [appellate] court to conclude that communication regarding the transcript was 'administrative' and outside of the class of 'critical stage' jury instructions that subjects a defendant to prejudice if made without counsel[]"); *People v Powell (Willie)*, 303 Mich App 271, 274-276 (2013) (the trial court's instruction to the jury "to continue its deliberations until it could reach an agreement[]" was "administrative in nature[]" and did not violate the defendant's rights to be present and to have counsel at a critical stage of trial).

3. Housekeeping

"Housekeeping communications are those which occur between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general 'housekeeping' needs that are unrelated in any way to the case being decided. A housekeeping communication carries the presumption of no prejudice. First, there must be an objection to the communication, and then the aggrieved party must

make a firm and definite showing which effectively rebuts the presumption of no prejudice." *France*, 436 Mich at 144.

4. Committee Tips on Making a Written Response to a Written Jury Question

- Provide jury with envelopes and paper for questions;
- Meet with attorneys to see if an agreement can be reached on a response;
- Have attorneys review the written response;
- When next on the record, describe the question, agreement with counsel, and the response;
- Always obtain consent of counsel, on the record, for written, substantive communications with the jury.

C. Materials in Jury Room and Juror Exposure to Extraneous Evidence

The court *must* allow the jurors to take their notes (if they were permitted to take notes)[79] and final jury instructions[80] into the jury room when retiring to deliberate. MCR 2.513(O); see also MCR 2.513(H). The court *may* allow the jurors to take the reference document (if prepared under MCR 2.513[E]) and any exhibits or writings admitted into evidence into the jury room when retiring to deliberate. MCR 2.513(O).

"Consistent with a defendant's right to a fair and impartial jury, 'jurors may only consider the evidence that is presented to them in open court.'" *People v Stokes*, 312 Mich App 181, 187 (2015), quoting *People v Budzyn*, 456 Mich 77, 88 (1997). A trial court may not provide the jury with evidence that has not been admitted. *People v Davis (John)*, 216 Mich App 47, 57 (1996). "'[I]t is perfectly plain that the jury room must be kept free of evidence not received during trial, and that its presence, if prejudicial, will vitiate the verdict.'" *People v Keeth*, 63 Mich App 589, 593 (1975), quoting *Dallago v United States*, 427 F2d 546, 553 (1969). "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his [or her] rights of confrontation, cross-examination, and assistance of

[79] See Section 10.9(A) for information on jury note taking.

[80] See Section 10.13(A)(2) for information on providing copies of final jury instructions to the jurors.

counsel embodied in the Sixth Amendment." *Budzyn*, 456 Mich at 88.

"When a jury is exposed to extraneous evidence not properly admitted during trial, prompt action by the trial court may render the error harmless. If the extraneous evidence is removed from the jury immediately upon its discovery, the trial court cautions the jury that they cannot consider the extraneous evidence and the jury is instructed to start their deliberations over without consideration of the extraneous evidence, any error arising from the improper submission of evidence to the jury may be purged from the jury's verdict." *People v Sampson,* unpublished opinion per curiam of the Court of Appeals, issued October 2, 2003 (Docket Nos. 239329, 239330), slip op p 5.[81]

In *Sampson,* unpublished opinion per curiam of the Court of Appeals, issued October 2, 2003, (Docket Nos. 239329, 239330), slip op p 1, the defendant appealed his convictions arising from two robberies that he "claim[ed] to have committed at the behest of two unknown men who chained a remote-controlled bomb to his chest." The Court of Appeals reversed the defendant's convictions and remanded the case for a new trial "[b]ecause the jury was inadvertently permitted to see a portion of [the defendant's] police statement in which he apparently admitted that the bomb was not real, thus prejudicing his duress defense." *Id*. The Court specifically noted that "neither the trial court nor the prosecution made any effort to purge the jury deliberations of this error through the removal of the objectionable exhibit, the use of cautionary instructions, and further jury deliberations." *Id*. at slip op p 6.

To establish that the jury's exposure to the extraneous evidence was error requiring reversal, a defendant must prove that the jury was exposed to extraneous influences, and that the extraneous influences created a real and substantial possibility of affecting the jury's verdict (i.e., that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict). *Budzyn*, 456 Mich at 88-89. If the defendant establishes his or her initial burden, the burden shifts to the prosecution to demonstrate that the error was harmless beyond a reasonable doubt, by proving that the extraneous evidence was duplicative of evidence produced at trial, or that the evidence of guilt was overwhelming. *Id*. at 89-90.

The jury's use of a dictionary to define a relevant legal term is error, but is not per se prejudicial. *People v Messenger*, 221 Mich App 171, 175-177 (1997) (jury's use of dictionary definition of "premeditation"

[81] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

did not constitute prejudicial error, "because the trial court's instructions regarding premeditation were substantively identical to the dictionary definition").

A collective reenactment by the jury with a gun as to where the victim was likely sitting and where the gun should have fallen was not a sufficient basis for a new trial. *People v Fletcher*, 260 Mich App 531, 541-544 (2004). The Court of Appeals distinguished this conduct from a reenactment or experiment outside of the jury room by a juror or group of jurors. *Id*. at 543. However, in *Stokes*, 312 Mich App at 186, 189, the Court of Appeals held that the defendant was not "entitled to a new trial [on the ground that] a juror engaged in misconduct" by "conduct[ing] an experiment" in which he, in his own home and before deliberations were complete, "attempted to recreate the crime scene by pointing his own gun at a mirror." As in *Fletcher*, the juror's "experiment was not an extraneous influence and [could not] be a basis for attacking the jury's verdict[,]" because it "was closely intertwined with [the juror's] deliberative process[]" and was not "premised on anything beyond [the] juror's memory of the testimony[;]" moreover, because "[t]he juror . . . did not share the results of his experiment with any other jurors, . . . no extraneous facts were brought into the jury room." *Stokes*, 312 Mich App at 188-189, citing *Fletcher*, 260 Mich App at 537, 539, 541-543 (additional citations omitted).

D. Requests to Review Testimony or Evidence

If, after retiring to deliberate, the jury requests to review any testimony or evidence that has not been allowed into the jury room under MCR 2.513(O), "the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request." MCR 2.513(P).

If a court decides to permit the jury to review requested testimony or evidence, it may "make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration." MCR 2.513(P).

If a court decides not to permit the jury to review requested testimony or evidence, it may order the jury to continue deliberating, "as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." MCR 2.513(P).

It may not constitute an abuse of discretion for a trial court to deny a jury's request for a copy of the entire transcript after deliberating for only a short time. *People v Holmes*, 482 Mich 1105 (2008). Where "the jury requested the entire transcript and did not request 'a review of

certain testimony or evidence,' the trial court did not violate [former] MCR 6.414(J)[82]." *Holmes*, 482 Mich at 1105. See also *People v McDonald (Deandre)*, 293 Mich App 292, 297 (2011) (trial court did not violate former MCR 6.414(J) or deprive the defendant of due process when it denied jury's request, made one hour into deliberations, to review certain testimony; although "[i]t might have been better practice to have told the jury explicitly that if they continued to feel a need for a transcript in the future, they could make another request[,]" the trial court "did not foreclose the possibility of the jury obtaining transcripts in the future"); see also *Bourne v Curtin*, 666 F3d 411, 412-414 (CA 6, 2012)[83] (trial court did not reversibly err by failing to consult with the parties before denying the jury's request to review trial testimony; the court's ex parte communication with the jury concerning its request "to review material it had already received during the trial[]" did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings, "[a]nd the trial court had good reason to conclude that [the] jury's request—to re-hear the testimony of *five* witnesses after deliberating for barely more than an hour—was unreasonable[]").

E. Requests to Clarify Instructions

Jurors may submit questions about the court's jury instructions. See MCR 2.513(N)(2). As part of its final instructions, the court must "advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations." *Id.* In addition, after giving its final instructions, the court must "invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate." *Id.* If the jurors have questions, "the court and the parties shall convene, in the courtroom or by other agreed-upon means." *Id.* The question must be read aloud on the record, and the attorneys must offer suggestions for an appropriate response. *Id.* The court has discretion whether to provide the jury with a specific response. *Id.* No matter what it decides, the court must respond to all questions asked by the jury, "even if the response consists of a directive for the jury to continue its deliberations." *Id.*

Additionally, "[w]hen it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the

[82] Effective September 1, 2011, ADM 2005-19 deleted MCR 6.414 and created MCR 2.513(P), which contains language similar to former MCR 6.414(J).

[83] Though persuasive, Michigan state courts "are not . . . bound by the decisions of lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

event that the judge can be of assistance in clarifying or amplifying the final instructions." MCR 2.513(N)(4).

"'There is no requirement that when a jury has asked for supplemental instruction on specific areas that the trial judge is obligated to give all the instructions previously given. The trial judge need only give those instructions specifically asked.'" *People v Katt*, 248 Mich App 282, 311 (2001), quoting *People v Darwall*, 82 Mich App 652, 663 (1978). If a juror exhibits confusion, the trial court is obligated to provide guidance by stating the relevant legal criteria in an understandable manner. *People v Martin (Walter)*, 392 Mich 553, 558 (1974). The decision to provide additional instructions at the request of the jury is within the discretion of the trial court. *Id.* at 558. If there is confusion about the verdict and the jury has not been discharged, the court has the authority to reinstruct the jury and have it clarify, after further deliberation, its intended verdict. *People v Henry (Rahiem)*, 248 Mich App 313, 320 n 20 (2001).

F. Hung Jury

Before the jury begins deliberating, the judge should instruct the jury pursuant to M Crim JI 3.11.[84] See *People v Galloway (John)*, 307 Mich App 151, 158 (2014), rev'd in part on other grounds 498 Mich 902 (2015). "When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions." MCR 2.513(N)(4). See also Principle 16 of the Principles for Juries and Jury Trials, Commission on the American Jury Project,[85] which states that "deliberating jurors should be offered assistance when an apparent impasse is reported":

> "(A) If the jury advises the court that it has reached an impasse in its deliberations, the court may, after consultation with the parties, inquiry the jurors in writing to determine whether and how the court and the parties can assist them in their deliberative process. After receiving the jurors' response, if any, and consulting with the parties, the judge may direct that further proceedings occur as appropriate.
>
> (B) If it appears to the court that the jury has been unable to agree, the court may require the jury to

[84] M Crim JI 3.11 is a derivation of the American Bar Association Standard 5.4, which was adopted by the Michigan Supreme Court in *People v Sullivan (Charles)*, 392 Mich 324, 342 (1974).

[85] http://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf.

> continue its deliberations. The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (C) If there is no reasonable probability of agreement, the jury may be discharged."

Upon indication that the jury is deadlocked, the judge should instruct the jury pursuant to M Crim JI 3.12. *Galloway (John)*, 307 Mich App at 152, 158-159, 166 (noting that "the trial court unnecessarily supplemented the standard deadlocked-jury instruction[]" when it "advis[ed] the jury that it could conduct an internal poll to determine whether its members believed they could reach a verdict[,]" and cautioning that "the safest course to avoid juror coercion [under these circumstances] is to read the standard jury instructions[]") (citations omitted).

If it appears the jury is unable to reach a verdict after having been given M Crim JI 3.12, the court should have the jury return and then question the foreperson on the record to determine whether it appears that it is impossible for the jury to reach a verdict. The trial court should not ask how the jury's voting stands. *People v Hickey*, 103 Mich App 350, 353 (1981). However, "[t]he [United States] Supreme Court has long maintained that a trial judge may properly encourage a deadlocked jury to continue deliberating by issuing a supplemental instruction that urges the jury to reach a unanimous verdict." *Hardaway v Robinson*, 637 F3d 640, 643 (CA 6, 2011), citing *Allen v United States*, 164 US 492, 501-502 (1896). "These so-called *Allen* charges serve the important purpose of avoiding the social costs of a retrial, including the time, expense, and potential loss of evidence that a new trial would entail." *Hardaway*, 637 F3d at 643. However, "[a]ny substantial departure [from the model jury instruction] shall be grounds for reversible error." *People v Sullivan (Charles)*, 392 Mich 324, 342 (1984). "The significance of a 'substantial *departure*' – i.e., one which is grounds for reversible error – is not just a difference in language, style, or syntax. The significance of a 'substantial departure' is the risk that the resultant instruction will be more coercive than [the model] instruction." *People v Hardin*, 421 Mich 296, 314 (1984); see also *Galloway (John)*, 307 Mich App at 152, 158, 166 ("[a]lthough the trial court unnecessarily supplemented the standard deadlocked-jury instruction[]" in "advising the jury that it could conduct an internal poll to determine whether its members believed they could reach a verdict[,]" the supplemental instruction "in no way sought to reveal the numerical split of the jury" and therefore did not constitute "a reversible 'substantial departure[]'" from the standard jury instructions) (citations omitted).

Committee Tip:

Possible questions include:

- *Is the jury deadlocked?*
- *How long has it been deadlocked?*
- *Has there been any change in the voting one way or the other?*
- *Do the jurors appear to have fundamental differences that cannot be resolved?*
- *Also, ask counsel if they wish to inquire of the foreperson.*

Generally, comments made to the jury by the trial court *before* delivering M Crim JI 3.12 that do not represent a substantial departure from the instruction will not require reversal of a defendant's conviction. *People v Rouse (Rouse II)*, 477 Mich 1063 (2007). In *Rouse (John)*, the judge's extraneous comments included reference to the fact that if the jury was unable to reach a verdict, the defendant would have to be retried and all involved would be required to "go[] through this entire process again with another jury." *People v Rouse (Rouse I)*, 272 Mich App 665, 667 (2006). The Court of Appeals concluded that the trial court's comments constituted a coercive supplemental instruction. *Id.* at 672-673. In *Rouse II*, the Michigan Supreme Court reversed the Court of Appeals "for the reasons stated in the Court of Appeals dissenting opinion[.]" *Rouse II*, 477 Mich at 1063. In concluding that the trial court's comments did *not* represent a substantial departure from the standard instruction, the dissenting judge stated:

> "Before reading [M Crim JI 3.12] to the jury, the trial court advised the jury that if it did not reach a verdict, a new trial would be required. However, immediately thereafter, the trial court emphasized that no juror should change his or her honest beliefs simply for the sake of reaching a verdict. The trial court then read [M Crim JI 3.12], which also cautions that a juror should not relinquish his or her honest beliefs simply to reach a verdict. Contrary to defendant's assertion, the jury did not return its verdict shortly after hearing these instructions. Instead, the jury deliberated for approximately five more hours. During this time span, the jury responded to an inquiry from the trial court by indicating that it wished to continue deliberating.

> "The trial court's remarks did not appeal to the jury's sense of civic duty and did not suggest a failure of purpose. Nor did the trial court's remarks coerce the jurors by informing them that they were *required* to reach a verdict. Quite simply, the trial court's statement that another trial would be necessary if the jury could not reach a verdict did not suggest that the jury should take a different approach to its deliberations. Accordingly, the remarks did not constitute a substantial departure from the instruction mandated by [*Sullivan (Charles)*, 392 Mich at 341-342]." *Rouse II*, 477 Mich at 676-677 (internal citations omitted).

"The court may discharge a jury from the action . . . whenever the jurors have deliberated and it appears that they cannot agree." MCR 2.514(C)(4). If the jury is discharged, the court may order a new trial before a new jury. MCR 2.514(C). "[A] trial court, before declaring a mistrial because of a hung jury, [is not required] to consider any particular means of breaking the impasse[or] to consider giving the jury new options for a verdict." *Blueford v Arkansas*, 566 US ___, ___ (2012), citing *Renico v Lett*, 559 US 766, ___ (2010).

Committee Tip:

If the trial court decides to declare a mistrial, explain to the jury on the record that the declaration of a mistrial is discretionary with the court, and that the court is exercising its discretion in light of the information received regarding the state of the jury deliberations.

G. Multiple Charges—Verdict on One or More Counts But Not All

Where a defendant is charged with multiple counts and the jury reaches a unanimous verdict on any of the counts, the court may accept the jury's verdict with regard to that count or those counts, even if the jury is unable to reach a unanimous verdict on all counts charged against the defendant. Specifically, MCR 6.420(C) states:

> "If a defendant is charged with two or more counts, and the court determines that the jury is deadlocked so that a mistrial must be declared, the court may inquire of the jury whether it has reached a unanimous verdict on any

> of the counts charged, and, if so, may accept the jury's verdict on that count or counts."

Where a jury, before returning to deliberations, verbally reported that it had voted unanimously against guilt on two charges, was deadlocked on one lesser charge, and had not yet considered a fourth lesser charge, the jury's announcement did not constitute an acquittal of the greater charges, and retrial on all four charges was not barred after the trial court eventually declared a mistrial because the jury remained hopelessly deadlocked. *Blueford v Arkansas*, 566 US ___, ___ (2012). Although the jury was instructed to consider the offenses in order, from greater to lesser, and to proceed to each lesser offense only after agreeing that the defendant was not guilty of the greater offenses, "the foreperson's announcement of the jury's unanimous votes on capital and first-degree murder [did not] represent[] . . . a resolution of some or all of the elements of those offenses in [the defendant's] favor." *Id.* at ___. "The foreperson's report was not a final resolution of anything[,] . . . [and t]he jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report[;]" because it was possible for the "jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes[,] . . . the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses[.]" *Id.* at ___.

H. Standard of Review

A trial court's declaration of a mistrial on the basis that the jury is unable to reach a unanimous verdict is reviewed for an abuse of discretion. *People v Lett*, 466 Mich 206, 208 (2002), aff'd sub nom *Renico v Lett*, 559 US 766 (2010).

"Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered." *People v Malone*, 180 Mich App 347, 352 (1989).

A trial court's decisions with regard to jury communication and questions are reviewed for an abuse of discretion. *Fetterley*, 229 Mich App at 520.

10.15 Verdict

A. Unanimity Requirement

"A jury verdict must be unanimous." MCR 6.410(B). "This mandate implicitly prohibits a stipulation or waiver to a less than unanimous verdict." 1989 Staff Comment to MCR 6.410.

When the prosecution "offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." *People v Cooks*, 446 Mich 503, 530 (1994). "When neither of these factors is present . . . a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of his [or her] right to a unanimous verdict." *Id.* at 530.

In *Cooks*, 446 Mich at 505, the defendant was charged with CSC-I, but the victim's testimony referenced three instances of sexual penetration. The trial court provided the jury with a general instruction regarding jury unanimity, and the defendant was convicted of CSC-II. *Id*. The Michigan Supreme Court held that the trial court's general unanimity instruction was not error "[b]ecause materially identical evidence was offered with respect to each of the alleged acts of penetration and there [wa]s no reason to believe the jury was confused or disagreed about the basis of [the] defendant's guilt." *Id*. at 505-506. However, the Court cautioned that "in most cases, the evidence will be materially distinct regarding one of the multiple acts allegedly committed by the defendant." *Id*. at 530 n 34.

"The alternate theories of a defendant's state of mind relate to a single element of a single offense." *People v Johnson (William)*, 187 Mich App 621, 629 (1991). "When a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory." *Id*. at 629-630. For example, the mental state of malice necessary to support a conviction for second-degree murder may be established in three ways: (1) by proof that the defendant acted with an intent to kill; (2) by proof that the defendant acted with an intent to inflict great bodily harm; or (3) by proof that the defendant acted with wanton and willful disregard of the likelihood that the natural tendency of his behavior would cause death or great bodily harm. *Id*. at 629. Where the trial court instructed the jurors that it was unnecessary that they unanimously agree on *which* of those three alternative states of mind the defendant held so long as they unanimously agreed that the

defendant acted with *one* of those states of mind, the defendant's right to a unanimous verdict was not violated. *Id*. at 629-630.

Similarly, where the defendant was charged with unlawful imprisonment and the jury was given the option to convict "on the basis of either [the] defendant's restraint of the victim by means of a weapon or dangerous instrument, [MCL 750.349b(1)(a),] or on [the] defendant's restraint of the victim in order to facilitate the commission of another felony, [MCL 750.349b(1)(c),]" a specific unanimity instruction was not required because MCL 750.349b "expressly provides alternative theories under which a defendant may be convicted." *People v Chelmicki*, 305 Mich App 58, 67-68 (2014), citing *Cooks*, 446 Mich at 515, and *Johnson (William)*, 187 Mich App at 629-630.

Bodily injury, mental anguish, and the other conditions listed in the definition of *personal injury*, MCL 750.520a(n),[86] are merely different ways of defining the single element of personal injury for the crime of first-degree criminal sexual conduct; therefore, these listed conditions should not be construed to represent alternative theories upon which jury unanimity is required. *People v Acevedo*, 217 Mich App 393, 397 (1996). Accordingly, if the evidence of any one of the listed conditions is sufficient, then the element of personal injury has been proven. *Id.* at 397.

The jury does not have to unanimously decide whether the defendant was the principal or an aider and abettor where both theories are supported by the evidence. *People v Smielewski (Timothy Richard)*, 235 Mich App 196, 201-203 (1999).

B. Inconsistent Verdicts

"[C]onsistency in jury verdicts is not necessary." *People v Russell (Fred)*, 297 Mich App 707, 722 (2012), citing *People v Vaughn (Marcus)*, 409 Mich 463, 465-467 (1980); see also *Dunn v United States*, 284 US 390, 393 (1932). "Each count in an indictment is regarded as if it was a separate indictment." *Dunn*, 284 US at 393. "[A]n apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts [does not] affect[] the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment." *Yeager v United States*, 557 US 110, 112 (2009).

"Juries are not held to any rules of logic nor are they required to explain their decisions." *Vaughn (Marcus)*, 409 Mich at 466. "The ability to convict or acquit another individual of a crime is a grave

[86] Formerly MCL 750.520a(j).

responsibility and an awesome power." *Id.* at 466. "An element of this power is the jury's capacity for leniency." *Id*. Conversely, "a trial judge sitting as the trier of fact may not enter an inconsistent verdict." *People v Walker (Alonzo)*, 461 Mich 908 (1999).

C. Several Counts

A verdict must be returned on each count if there is more than one count; a general verdict of guilty cannot be received. *People v Huffman*, 315 Mich 134, 137-139 (1946).

MCR 6.420(C) allows a jury deadlocked on one or more of multiple charges to issue verdicts on those counts on which it can reach a unanimous verdict.

A verdict form is defective if it does not give the jury the opportunity to return a general verdict of not guilty. *People v Wade (Michael)*, 283 Mich App 462, 468 (2009) (defendant's conviction was reversed where the verdict form only gave the jury the options of finding the defendant guilty or not guilty of first-degree murder, guilty of second-degree murder, or guilty of involuntary manslaughter; the jury was not given the opportunity to find the defendant generally not guilty, or not guilty of the lesser included offenses).

D. Use of Special Verdicts

"The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict." MCR 2.515(A). The form of a special verdict must be settled on the record or in writing, "in advance of argument and in the absence of the jury[.]" *Id.* "The court may submit to the jury:

> "(1) written questions that may be answered categorically and briefly;
>
> "(2) written forms of the several special findings that might properly be made under the pleadings or evidence; or
>
> "(3) the issues by another method, and require the written findings it deems most appropriate." *Id.*

The court must adequately instruct the jury on the matter submitted so that the jury is able to make findings on each issue. *Id.*

The court must enter judgment in accordance with the special verdict. MCR 2.515(B).

Where the court omits from the special verdict form an issue of fact that was raised in the pleadings or the evidence, a party must demand its submission before the jury retires, or else the party is deemed to have waived the right to a jury trial on that issue. MCR 2.515(C). "The court may make a finding as to an issue omitted without a demand; or, if the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict." *Id.*

E. Polling

After returning its verdict and before the jury is discharged,

> "the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury." MCR 6.420(D).
>
> "The option . . . permitting the court to 'discontinue the poll and order the jury to retire for further deliberations' requires the court to cut off the polling as soon as disagreement is disclosed. The court should not allow the polling to continue because of its potentially coercive effect. Nor, for the same reason, should the court question the jury to determine where the jury stands numerically. See *People v Wilson (Albert)*, 390 Mich 689[, 692] (1973)." 1989 Staff Comment to MCR 6.420.

F. Reconvening Jury

A jury verdict in a criminal case becomes final when it is announced in open court, assented to by the jury, and accepted by the trial court. *People v Henry (Rahiem)*, 248 Mich App 313, 319-320 n 19 (2001); MCR 6.420(A). But a jury may change the form and substance of its verdict to coincide with its intent if the jury has not yet been discharged. *Henry (Rahiem)*, 248 Mich App at 320 n 20. Before being discharged, a jury may return to deliberations after announcing a verdict and polling discloses lack of unanimity. MCR 6.420(D). The jury cannot be reconvened after being discharged in a criminal case. *Henry (Rahiem)*, 248 Mich App at 320.

Committee Tip:

Because the jury cannot be reconvened after being discharged, trial judges should individually poll jurors in every case, even if the attorneys do not request it.

G. Meeting With Jury After Verdict

A judge may meet with the jury informally after the jury returns its verdict. The judge should be careful not to commend or condemn the jury's verdict. Principles for Juries and Jury Trials, Commission on the American Jury Project, Principle 18(B)[87]. A postverdict discussion with the jury is an opportunity to address concerns about confidentiality, contacts from parties and counsel, media contacts, and security concerns. Jurors may also be curious about the rules of law and evidence that apply to criminal proceedings and possible sentencing if the jury returned a guilty verdict. There are potential pitfalls, such as where information may surface that could trigger a motion for a new trial, or where the jurors ascertain information that would impact their return for further service.

10.16 Mistrial

A. Determination

A motion for mistrial raises the issue of double jeopardy. The federal and state constitutions prohibit twice placing an individual in jeopardy of life or limb for the same offense. US Const, Am V; Const 1963, art 1, § 15. The declaration of a mistrial is an extreme remedy that should only be granted once all other options are explored and exhausted. Unless the defendant has consented, a mistrial should only be granted for "manifest necessity." *People v Hicks (Tyrone)*, 447 Mich 819, 828-829 (1994). The defendant's consent to a mistrial cannot be implied and must be expressly obtained on the record. *People v Anglin*, 6 Mich App 666, 671-675 (1967).

A mistrial granted on the defendant's motion or with his consent waives double jeopardy protections unless the motion or consent is prompted by prosecutorial conduct intended to goad the defendant

[87] http://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf.

into the mistrial request. *Oregon v Kennedy*, 456 US 667, 669, 675-676, 679 (1982) (where the prosecutor did not intend to provoke a mistrial when he asked a prosecution witness if the reason the witness had not done business with the defendant was because the defendant was "a crook," the double jeopardy clause did not bar retrial after the defendant successfully moved for a mistrial).

"[A] trial court, before declaring a mistrial because of a hung jury, [is not required] to consider any particular means of breaking the impasse[or] to consider giving the jury new options for a verdict." *Blueford v Arkansas*, 566 US ___, ___ (2012), citing *Renico v Lett*, 559 US 766, ___ (2010).

B. Attachment of Jeopardy

"Jeopardy attaches 'once the defendant is put to trial before the trier of fact, whether [it] be a jury or a judge.'" *Hicks (Tyrone)*, 447 Mich at 826, quoting *United States v Jorn*, 400 US 470, 479 (1971). When a defendant is tried by a jury, jeopardy attaches when the jury is impaneled and sworn. *Hicks (Tyrone)*, 447 Mich at 827 n 13. When a defendant is tried by a judge, jeopardy attaches when the judge begins to hear the evidence of the case. *Id*. at 826-827.

C. Permissible Retrials

A defendant may be retried when the first trial is interrupted and the defendant agreed to the interruption or when manifest necessity results in a mistrial being declared. *People v Mehall*, 454 Mich 1, 4 (1997). A defendant may be retried, and there is no violation of the protection against double jeopardy, when the defendant either moves for or consents to the declaration of a mistrial. *Hicks (Tyrone)*, 447 Mich at 827. A manifest necessity may be declared when a jury is unable to reach a unanimous verdict. *Mehall*, 454 Mich at 4-5. Retrial on the same offense is permissible in this situation because the sufficiency of the evidence had not been evaluated. *Id*. at 5.

Retrial after a mistrial due to a deadlocked jury does not violate the Double Jeopardy Clause. *Renico v Lett*, 559 US 766, 773 (2010). "A 'mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.'" *Id*. at 774, quoting *Arizona v Washington*, 434 US 497, 509 (1978).[88] In *Renico*, 559 US at 775, quoting *Washington*, 434 US at 517, the United States Supreme Court reiterated its holding "that a trial judge declaring a mistrial is not required to make

[88] "[A] trial court, before declaring a mistrial because of a hung jury, [is not required] to consider any particular means of breaking the impasse[or] to consider giving the jury new options for a verdict." *Blueford v Arkansas*, 566 US ___, ___ (2012), citing *Renico*, 559 US at ___.

explicit findings of "'"manifest necessity"'" nor to 'articulate on the record all the factors which informed the deliberate exercise of his [or her] discretion.'" The United States Supreme Court has "never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse." *Id*. In fact, the United States Supreme Court has never "'overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the "manifest necessity" standard had not been met.'" *Id.*, quoting *Winston v Moore*, 452 US 944, 947 (1981).

Where, "[b]efore the jury concluded deliberations . . . , [the jury foreperson] reported that [the jury] was unanimous against guilt on charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide[,]" and where the jury then continued deliberations before a mistrial was declared because the jury remained hopelessly deadlocked, the Double Jeopardy Clause did not bar the defendant's retrial on all of the charged offenses. *Blueford v Arkansas*, 566 US ___, ___ (2012). Although the jury was instructed to consider the offenses in order, from greater to lesser, and to proceed to each lesser offense only after agreeing that the defendant was not guilty of the greater offenses, "the foreperson's announcement of the jury's unanimous votes on capital and first-degree murder [did not] represent[] . . . a resolution of some or all of the elements of those offenses in [the defendant's] favor." *Id.* at ___. "The foreperson's report was not a final resolution of anything[,] . . . [and t]he jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report[;]" because it was possible for the "jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes[,] . . . the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses[.]" *Id*. at ___.

A defendant's protection against double jeopardy was not violated and the defendant may be retried when the defendant was not implicitly acquitted of the charge at issue in the second prosecution. *People v Garcia*, 448 Mich 442, 449 (1995). A defendant is implicitly acquitted of the greater charged offense when the fact-finder is given the opportunity to choose to convict the defendant of a lesser included offense and either convicts or acquits the defendant of the lesser offense. *Id.* at 450-451.

D. Example—Polygraph Test Results

Reference to a polygraph test is normally inadmissible before a jury. *People v Nash*, 244 Mich App 93, 97 (2000). However, an inadvertent, unsolicited mention by a witness that a polygraph was administered does not necessarily require a mistrial. *People v Ortiz-Kehoe*, 237 Mich App 508, 514 (1999). Factors to be considered in determining whether the mention of a polygraph was grounds for a mistrial include:

> "(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." *People v Rocha*, 110 Mich App 1, 9 (1981).

1. Mention of Polygraph Required Reversal

Where the prosecutor mentioned a polygraph examination of the defendant during a bench trial, the defendant's conviction was reversed and the case was remanded for a new trial, because the prosecutor's injection of the polygraph testing and results was unfairly prejudicial to the defendant's case, despite the court's finding that it was not influenced by the information. *People v Smith (Kerry)*, 211 Mich App 233, 234-235 (1995).

In *People v Brocato*, 17 Mich App 277, 291-294 (1969), a prosecutor's repeated references to polygraph tests, after a warning by the court, were held improper and contemptuous. Due to the prosecutorial misconduct and numerous other trial errors, the case was reversed and remanded for a new trial. *Id.* at 305.

In *Nash*, 244 Mich App at 96, in response to the prosecutor's question, "[s]o, then, why should we believe you?" a key prosecution witness, who was the only witness who directly implicated the defendant during a jury trial for murder and felony firearm, stated, "That's up to you. I took a lie detector test." The Court of Appeals, after analyzing the foregoing factors, concluded that the reference to a lie detector test seriously affected the fairness of the trial and constituted reversible error:

> "Where the reference to the polygraph test was brought out by the prosecutor, not as a matter of

> defense strategy, and where the key prosecution witness, who was involved in the crime and was the crucial witness against defendant, gave a responsive answer to the prosecutor's question that was posed with the intent of bolstering the witness'[s] credibility and was later repeated before the jury during deliberations, we believe that prejudice to defendant occurred." *Nash*, 244 Mich App at 101.

2. Mention of Polygraph Did Not Require Reversal

In *People v Triplett*, 163 Mich App 339, 343 (1987), remanded on other grounds 432 Mich 568 (1989), a witness's reference to a "specialized interview" was not considered improper or inadmissible because there was no specific reference to the fact that the defendant had failed a polygraph examination.

In *People v Tyrer*, 19 Mich App 48, 50 (1969), a police officer's comment that the defendant said he would take a polygraph examination if his attorney advised him to do so was not prejudicial when the defendant was aware of the possible error and chose to waive his objection and proceed with the trial.

In *People v Kosters*, 175 Mich App 748, 755 (1989), a prosecution witness's cross-examination testimony in a CSC jury trial that the defendant had taken a polygraph in conjunction with a previous sexual abuse charge was "brief and inadvertent and . . . therefore harmless."

In *People v Kahley*, 277 Mich App 182, 183-184 (2007), a police officer's testimony that the defendant refused to take a polygraph examination did not require reversal because the officer's reference was singular and brief; the prosecutor did not argue that the defendant's failure to take a polygraph examination was evidence of the defendant's guilt; the defendant himself testified that he asked to take a polygraph test but was never given one; and the defendant confessed to the crime.

E. Juror Conduct

Possible issues that may warrant a mistrial:

- Juror engages in premature discussion or forms opinion before deliberation (*People v Bergin*, 16 Mich App 443, 448 (1969) (no abuse of discretion in trial court's denial of the defendant's motion for mistrial where trial court investigated the matter and two jurors denied discussing

the defendant's guilt during a trial lunch break, and a third juror confirmed as much, contrary to the defendant's mother's claim that she overheard such a conversation));

- Juror has preconceived notion (*People v Bigge*, 297 Mich 58, 61, 64-67 (1941) (no abuse of discretion in declaring a mistrial where the defendant engaged in a private conversation with a juror during a break));
- Juror not paying attention or sleeping;
- Juror fails to return;
- Juror sick (MCL 768.17); or
- Juror has outside contact.

MRE 606(b)[89] provides:

> "Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."

F. Standard of Review

The trial court's decision on a motion for mistrial is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194 (2005). A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his or her ability to get a fair trial. *Id*.

[89] Effective January 1, 2012, ADM 2010-12 amended MRE 606 ("Competency of Juror as Witness[]") by adding subsection (b) to address the permissible scope of a juror's testimony upon inquiry into the validity of a verdict or an indictment.

Appendix: Practical Resources for Courts

Checklists, Scripts, & Flowcharts[1]

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Defendant's Waiver of Right to Attorney Appx-5

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Checklist for Guilty and No Contest Pleas Appx-58

Flowchart for Guilty & No Contest Pleas Appx-62

Flowchart for Not Guilty Pleas Appx-64

Part F: Trial

Jury Waiver in Criminal Case Appx-65

[1] In 2013, MJI reorganized some of its publications so that the former *Criminal Procedure Monograph Series* and the *Michigan Circuit Court Benchbook: Criminal Proceedings* were combined into two publications. Many of the resources found in this appendix were formerly located in one or more monographs. When the chapter that discusses that particular topic is revised, the relevant resources will also be revised.

Bench Trial Decision Checklist Appx-67
Trial Outline—Criminal Case Appx-69
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Final Instructions Checklist—Criminal Appx-73
Verdict Checklist Appx-75

Part A: Attorney Waiver

Attorney Waiver Script

MCR 6.005

QUESTIONING THE DEFENDANT:

Do you understand that you are entitled to a lawyer's assistance at all subsequent court proceedings?

Do you understand that if you want a lawyer and are financially unable to retain one, one will be appointed for you at public expense?

If the defendant wants to waive the right to be represented by a lawyer, the court must advise the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation AND give the defendant the opportunity to consult with a retained lawyer or the opportunity to consult with an appointed lawyer if the defendant is indigent.

Question the defendant, at a minimum, on the following to determine the waiver is unequivocal and that he or she understands the risks of self-representation, MCR 6.005(D)(1):

a.The defendant's educational background;

b.Have they represented themselves before;

c.Why do they wish to represent themselves; and,

d.Elaborate on risks of self-representation:

(1)Elements of offense.

(2)Rules of procedure.

(3)Rules of evidence.

(4)Jury selection and instructions.

(5)Preservation of issues for appeal.

(6)Self-representation is almost always unwise.

(7)He or she will receive no special treatment and can receive no help from the judge.

(8)The prosecutor is an experienced trial lawyer who is unlikely to give the defendant any special consideration.

(9)He or she will receive no special help from the court staff and will be expected to follow the same requirements that apply to practicing lawyers.

Ask the prosecuting attorney if the court has complied with MCR 6.005. While not required, this may be advisable.

DETERMINATION:

a. The waiver is knowingly, intelligently, and voluntarily made;

b. The waiver is unequivocal;

c. The defendant understands the disadvantages of self-representation; and self representation will not disrupt, unduly inconvenience, or burden the court.

Defendant's Waiver of Right to Attorney

WAIVER OF RIGHT TO ATTORNEY AND ACKNOWLEDGMENT OF DANGERS OF SELF-REPRESENTATION	CASE NO.

COURT ADDRESS COURT PHONE NO.

THE PEOPLE OF THE STATE OF MICHIGAN	V	DEFENDANT

I have been accused of a crime and I have read or have had read to me the charge or charges. The judge has told me the nature of the charges and that there may be lesser included offenses, defenses, or mitigating circumstances about which I should know. I understand the maximum possible sentence.

I know I have the right to a lawyer and the right to be my own lawyer. I understand the court will appoint a lawyer for me at public expense if I cannot afford one. The judge has warned me that it is dangerous and unwise to be my own lawyer, because I will be held to the same standards of law and procedure as a lawyer and will not get any special treatment from the court. The judge has warned me that I may hurt my own case and that the State has an experienced lawyer. I understand I have the right to consult with a lawyer that I hire or the court appoints. I understand the risks of being my own lawyer.

The judge has warned me that a lawyer has skills and expertise that I do not have in preparing for and conducting a criminal defense. The court has told me that I will have to abide by the same rules in court as lawyers do. Even if I make mistakes, I will be given no special privileges or benefits, and the judge will not help me. The government is represented by a trained, skilled prosecutor who is experienced in criminal law and court

procedures. Unlike the prosecutor I will face in this case, I will be exposed to the dangers and disadvantages of not knowing the complexities of jury selection, what is appropriate direct and cross-examination of witnesses, what motions I must make and when to make them during the trial to permit me to make posttrial motions and protect my rights on appeal, and what constitutes appropriate closing argument to the jury.

I have _____ years of education. I read English and am mentally sound.

I am ☐ very ☐ somewhat ☐ not familiar with the rules of evidence and procedure.

DESPITE THE WARNINGS I HAVE BEEN GIVEN, I DO NOT WANT TO HIRE A LAWYER OR HAVE ONE APPOINTED FOR ME. I DO NOT WANT STANDBY COUNSEL. I WANT TO BE MY OWN LAWYER. I HAVE NO DOUBT ABOUT MY DECISION.

Dated: _____ _____

Defendant's Signature

Part B: Arrest Warrants

Checklist for Issuing Arrest Warrant

This checklist applies to both misdemeanor and felony offenses. Any differences in the method of treating misdemeanor and felony offenses are denoted in the checklist.

□ 1. Ensure that the clerk has prepared a file and has assigned a case number. **Note:** If the defendant is already in custody pursuant to a warrantless arrest, you may issue a warrant or endorse on the complaint a finding of probable cause.

□ 2. Ensure that the complaint is in proper form and includes a signed authorization by the prosecutor or security for costs filed by the complainant.

□ 3. Examine the complaint to determine that it:

- □ names or describes the person alleged to have committed an offense;
- □ alleges the commission of an offense and, for felonies, states the name of the offense and the statutory or local ordinance citation of the offense;
- □ specifies with reasonable specificity the time and date of the offense;
- □ specifies the place where the offense occurred;[2] and
- □ includes, if required under the Crime Victim's Rights Act, a statement "that the offense resulted in damage to another individual's property or physical injury or death to another individual."

□ 4. Swear and examine the complaining witness. Additionally, in felony cases, make a record of any testimony used in the probable cause determination.

□ 5. Determine whether there is probable cause to believe that the person accused in the complaint committed the alleged offense. This determination may be based on hearsay evidence and may rely on the factual allegations in the complaint, the complainant's sworn testimony, affidavit, or any supplemental sworn testimony or affidavits of other persons presented by the complainant or required by the court.

□ 6. Have the complaining witness sign the complaint before the court.

□ 7. Ensure that the warrant:

[2]The complaint must provide sufficient geographical specificity to support the court's jurisdiction.

- □ names or identifies the accused;
- □ describes the offense charged in the complaint; and
- □ commands a peace officer or other authorized person to arrest and bring the accused before the court.

□ 8. If permitted and desired, specify on the warrant the interim bail amount for the accused to post to obtain release before arraignment. Consider including a bail condition that the arrest must occur before a specified date or within a specified period of time after the issuance of the warrant.

□ 9. Sign and date both the complaint (if not already signed by the court clerk) and warrant.

□ 10. Enter the warrant into the LEIN if the court has assumed this responsibility.

□ 11. If the person for whom the warrant is sought is a parolee, inform the law enforcement agency of any delay in entering or issuing the warrant.

□ 12. Give the warrant to the officer to execute and return the court file, if any, to the clerk.

Checklist for Issuing Arrest Warrant by Electronic Transmission

This checklist applies to both misdemeanor and felony offenses. Any differences in the method of treating misdemeanor and felony offenses are denoted in the checklist.

□ 1. Upon receipt of a telephone call or other electronic transmission making a complaint and requesting that a warrant be issued, ensure that the prosecutor has authorized the complaint.

□ 2. Telephonically administer the oath or affirmation to the applicant.

□ 3. If the request is made by telephone, ask the applicant to recite the facts alleged in the complaint or, if the request is made electronically or by facsimile, read the facts, to determine that the complaint:

- □ names or describes the person alleged to have committed the offense;
- □ alleges the commission of an offense and, for felonies, the name and statutory or local ordinance citation of the offense;
- □ specifies with reasonable specificity the time and date of the offense;
- □ specifies the place where the offense occurred;[3] and
- □ includes, if required under the Crime Victim's Rights Act, a statement "that the offense resulted in damage to another individual's property or physical injury or death to another individual."

□ 4. Determine whether there is probable cause to believe that the person accused in the complaint committed the alleged offense. This determination may be based on hearsay evidence and rely on the factual allegations in the complaint, the applicant's or complainant's affidavit, or any supplemental affidavits of other persons presented by the applicant or required by the court.

□ 5. Ensure that the complaining witness has signed the complaint before electronic transmission to the court.

□ 6. Ensure that the warrant:

- □ names or identifies the accused;
- □ describes the offense charged in the complaint; and

[3]The complaint must provide sufficient geographical specificity to support the court's jurisdiction.

- □ commands a peace officer or other authorized person to arrest and bring the accused before the court.

□ 7. Upon receipt of the transmitted complaint, endorse on the warrant, if permitted and desired, the interim bail amount that the accused must post to obtain release before arraignment. Consider including a bail condition that the arrest occur on a specified date or within a specified period of time after issuance of the warrant.

□ 8. Sign and date the complaint and warrant, and then fax them or otherwise transmit them electronically to the applicant.

□ 9. Enter the warrant into the LEIN if the court has assumed this responsibility.

□ 10. If the person for whom the warrant is sought is a parolee, inform the law enforcement agency of any delay in entering or issuing the warrant.

□ 11. Ensure that the signed warrant is filed with the clerk as soon as possible.

□ 12. If the person is in custody, set bond and notify the authorities where the person is being held that the warrant has issued.

Part C: Search Warrants

Checklist for Issuing Search Warrant[4]

□ 1. Examine the affidavit and search warrant.

□ 2. Determine that the person, place, or thing to be searched is described with particularity.

□ 3. Determine that the property to be seized is described with particularity.

□ 4. Determine that the property is a proper subject for seizure.

□ 5. Determine that the affidavit establishes probable cause to believe that the articles to be seized may be found in the place to be searched.

□ 6. If the affidavit is based on information supplied to the affiant by a *named person*, determine that the affidavit contains affirmative allegations from which the magistrate may conclude that the named person spoke with personal knowledge of the information.

□ 7. If the affidavit is based on information supplied to the affiant by an *unnamed person*, determine that the affidavit contains affirmative allegations from which the magistrate may conclude:

- □ a. that the unnamed person spoke with personal knowledge; AND
- □ b. that the unnamed person is credible OR that the information is reliable.

□ 8. Swear affiant:

- □ a. administer oath.
- □ b. ask if averments in affidavit are true to the best of affiant's information and belief.
- □ c. ask affiant to sign affidavit.

□ 9. Sign and date the affidavit and original copy of search warrant.

□ 10. Retain original affidavit and original copy of search warrant.

□ 11. Direct the police officer to leave a completed copy of the return to the search warrant at the place to be searched.

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[4]See MCL 780.651 *et seq.* and SCAO Form MC 231.

□ 12. Ensure that a filled-out return to the search warrant is promptly filed with the court after the search warrant is executed.

Checklist for Issuing Search Warrant by Electronic Device[5]

□ 1. Upon receipt of a telephone call requesting that a warrant be issued, ask the police officer to read the affidavit and search warrant.

□ 2. Determine that the person, place, or thing to be searched is described with particularity.

□ 3. Determine that the property to be seized is described with particularity.

□ 4. Determine that the property is a proper subject for seizure.

□ 5. Determine that the affidavit establishes probable cause to believe that the articles to be seized may be found in the place to be searched.

□ 6. If the affidavit is based on information supplied to the affiant by a *named person*, determine that the affidavit contains affirmative allegations from which the magistrate may conclude that the named person spoke with personal knowledge of the information.

□ 7. If the affidavit is based on information supplied to the affiant by an *unnamed person*, determine that the affidavit contains affirmative allegations from which the magistrate may conclude:

- □ a. that the unnamed person spoke with personal knowledge; AND
- □ b. that the unnamed person is credible OR that the information is reliable.

□ 8. Swear affiant:

- □ a. orally administer oath.
- □ b. ask if averments in affidavit are true to the best of affiant's information and belief.
- □ c. ask affiant to sign affidavit.

□ 9. Sign and date the affidavit and search warrant and fax them to affiant.[6]

□ 10. Retain original affidavit and original copy of search warrant.

□ 11. Direct the police officer to leave a completed copy of the return to the search warrant at the place to be searched.

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[5] See MCL 780.651 *et seq.* and SCAO Form MC 231.

[6] "A judge or district court magistrate may sign an electronically issued search warrant when he or she is at any location in this state." MCL 780.651(4).

□ 12. Ensure that a filled-out return to the search warrant is promptly filed with the court after the search warrant is executed.

Part D: Preliminary Examinations

District Court Jurisdiction Over Pretrial Proceedings

Note: The information contained in this section is in table form. However, some e-reader programs or apps do not properly display tables. If the table below appears to have poor formatting or is illegible, you may access the PDF version of this table by clicking here.

This table incorporates statutory amendments effectuated by 2014 PA 123 and 2014 PA 124, both effective May 20, 2014, that are applicable only to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015. See 2014 PA 123, enacting section 1; 2014 PA 124, enacting section 2. For cases in which arraignment occurs prior to January 1, 2015, do not refer to this table.

This table contains information concerning the types of preliminary criminal proceedings over which district court judges and magistrates have jurisdiction, with cross-references to the relevant authorities and appropriate sections of this benchbook for more complete discussion. For discussion of arraignments and pleas, see Chapter 5 (misdemeanors) and

Chapter 6 (felonies). For discussion of preliminary examinations and probable cause conferences, see Chapter 4.

Table 1: District Court Jurisdiction Over Pretrial Proceedings

Type of Proceeding	District Court Judge Jurisdiction and Requirements	District Court Magistrate Jurisdiction and Requirements	Authorities and Cross-References
Issuance of Search Warrants	All	As authorized by the chief judge of the district or division	MCL 780.651 MCL 600.8511(g) MCR 4.401(B) Chapter 2
Issuance of Arrest Warrants	All	As authorized by the chief judge of the district or division May issue upon written authorization of prosecuting or municipal attorney (however, such authorization is **not** required for vehicle law or ordinance violation if police officer issued traffic citation under MCL 257.728 and defendant failed to appear)	MCL 764.1 MCL 600.8511(e) MCR 4.401(B) Chapter 2

Table 1: District Court Jurisdiction Over Pretrial Proceedings

Type of Proceeding	District Court Judge Jurisdiction and Requirements	District Court Magistrate Jurisdiction and Requirements	Authorities and Cross-References
First Appearance	All	"When authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination and acceptance of any written demand or waiver of jury trial. However, this section does not authorize a district court magistrate to accept a plea of guilty or nolo contendere not expressly authorized under [MCL 600.8511 or MCL 600.8512a]. A defendant neither demanding nor waiving preliminary examination in writing is deemed to have demanded preliminary examination and a defendant neither demanding nor waiving jury trial in writing is considered to have demanded a jury trial."	MCL 600.8513(1) MCR 4.401(B) Chapter 4 Chapter 5

Table 1: District Court Jurisdiction Over Pretrial Proceedings

Type of Proceeding	District Court Judge Jurisdiction and Requirements	District Court Magistrate Jurisdiction and Requirements	Authorities and Cross-References
District Court Arraignment	All	• If authorized by chief judge, offenses listed in MCL 600.8511(a), if maximum punishment does not exceed 90 days in jail • If authorized by chief judge, offenses listed in MCL 600.8511(b) (certain Motor Vehicle Code violations or corresponding ordinance violations) and MCL 600.8511(c) (certain NREPA violations), if maximum punishment does not exceed 93 days in jail • If authorized by chief judge, violations of MCL 257.625 and MCL 257.625m (or corresponding ordinance) (may **not** sentence for these offenses) • If authorized by chief judge, certain additional NREPA violations (may **not** sentence for these offenses) • If authorized by chief judge, contempt or probation violation arising directly out of case for which a judge or magistrate conducted arraignment under MCL 600.8511(a), (b), or (c), or the first appearance under MCL 600.8513, involving the same defendant, if offense is punishable by imprisonment for not more than 1 year or a fine, or both (may **not** conduct violation hearing or sentencing)	MCL 600.8311(c) MCL 600.8511(a)-(c) MCL 600.8511(d) MCR 4.401(B) Chapter 5 Chapter 6

Table 1: District Court Jurisdiction Over Pretrial Proceedings

Type of Proceeding	District Court Judge Jurisdiction and Requirements	District Court Magistrate Jurisdiction and Requirements	Authorities and Cross-References
Setting of Bail and Acceptance of Bond	All	As authorized by the chief judge of the district or division	MCL 600.8311(c) MCL 600.8511(f) MCR 4.401(B) Chapter 7
Probable Cause Conferences (Felonies and Misdemeanors Not Cognizable by District Court)	All matters allowed at all probable cause conferences	If authorized by chief judge, may conduct all matters allowed at probable cause conference, except taking of pleas and sentencing	MCL 600.8311(d) MCL 600.8511(h) MCL 766.4 Chapter 4

Table 1: District Court Jurisdiction Over Pretrial Proceedings

Type of Proceeding	District Court Judge Jurisdiction and Requirements	District Court Magistrate Jurisdiction and Requirements	Authorities and Cross-References
Acceptance of Misdemeanor Plea	All misdemeanors cognizable by district court and all ordinance and charter violations MUST take a plea to a misdemeanor as provided by court rule if a plea agreement is reached between the parties	• To the extent expressly authorized by the chief judge, presiding judge, or only judge of the district court district, misdemeanor or ordinance violations punishable by a fine and not punishable by imprisonment • If authorized by chief judge, offenses listed in MCL 600.8511(a), if maximum punishment does not exceed 90 days in jail • If authorized by chief judge, offenses listed in MCL 600.8511(b) (certain Motor Vehicle Code violations or corresponding ordinance violations) and MCL 600.8511(c) (certain NREPA violations), if maximum punishment does not exceed 93 days in jail	MCL 600.8311(a)-(b) MCL 766.4(3) MCL 600.8512a(b) MCL 600.8511(a)-(c) MCL 766.1 MCR 4.401(B) Chapter 5
Acceptance of Felony Plea	Authority to accept felony plea, but may **not** sentence (sentencing must be conducted by a circuit court judge, who must be assigned and known to the parties before the plea is taken) MUST take a plea to a felony as provided by court rule if a plea agreement is reached between the parties	Not permitted	MCL 766.4(3) MCL 766.1 MCL 600.8511(h) Chapter 6

Table 1: District Court Jurisdiction Over Pretrial Proceedings

Type of Proceeding	District Court Judge Jurisdiction and Requirements	District Court Magistrate Jurisdiction and Requirements	Authorities and Cross-References
Preliminary Examinations (Felonies and Misdemeanors Not Cognizable by District Court)	All matters allowed at all preliminary examinations	Not permitted	MCL 600.8311(e) MCL 766.1 *et seq.* MCL 766.4 MCL 766.1 Chapter 4
Circuit Court Arraignments (Felony Cases and Misdemeanor Cases Not Cognizable by District Court)	May conduct as provided by court rule, but may **not** sentence (sentencing must be conducted by circuit court judge)	Not permitted	MCL 600.8311(f) MCL 766.13 Chapter 6

Table 1: District Court Jurisdiction Over Pretrial Proceedings

Type of Proceeding	District Court Judge Jurisdiction and Requirements	District Court Magistrate Jurisdiction and Requirements	Authorities and Cross-References
Misdemeanor Sentencing (Misdemeanors Cognizable by District Court)	All misdemeanors cognizable by district court and all ordinance and charter violations	• To the extent expressly authorized by the chief judge, presiding judge, or only judge of the district court district, misdemeanor or ordinance violations punishable by a fine and not punishable by imprisonment • If authorized by chief judge, may sentence upon pleas of guilty or nolo contendere for offenses listed in MCL 600.8511(a), if maximum punishment does not exceed 90 days in jail • If authorized by chief judge, may sentence upon pleas of guilty or nolo contendere for offenses listed in MCL 600.8511(b) (certain Motor Vehicle Code violations or corresponding ordinance violations) and MCL 600.8511(c) (certain NREPA violations), if maximum punishment does not exceed 93 days in jail	MCL 600.8311(a)-(b) MCL 600.8512a(b) MCL 600.8511(a) MCL 600.8511(b) MCL 600.8511(c) MCL 766.1 MCR 4.401(B) District Court Sentencing

Table 1: District Court Jurisdiction Over Pretrial Proceedings

Type of Proceeding	District Court Judge Jurisdiction and Requirements	District Court Magistrate Jurisdiction and Requirements	Authorities and Cross-References
Felony Sentencing (Felonies and Misdemeanors Not Cognizable by District Court)	Not permitted	Not permitted	MCL 600.8311(f) Criminal Proceedings Benchbook, Vol. 2
Entry of Nolle Prosequi	All	As authorized by the chief judge of the district or division "Upon written authorization of the prosecuting or city attorney, [the district court magistrate may] sign a nolle prosequi dismissing any criminal or ordinance violation case over which the district court has jurisdiction and release any bail bond or bail bond deposit to the persons entitled to the bail bond or deposit. However, if the preliminary examination or trial has commenced or a plea of guilty or nolo contendere has been accepted by a district court judge, the dismissal order may be entered only by that judge or his or her alternate."	MCL 600.8311(a)-(b) MCL 767.29 MCL 600.8513(2)(c) MCR 4.401(B) Chapter 8

Checklist for Conducting a Probable Cause Conference[7]

> **NOTE:** The following requirements apply to cases in which the defendant is arraigned in district court on or after January 1, 2015.[8] For a chart outlining the differences in procedures before and after January 1, 2015, as a result of statutory reforms concerning probable cause conferences, preliminary examinations, and felony pleas, see SCAO Memorandum, July 23, 2014.

At the arraignment on a felony charge, the district court must schedule a probable cause conference,[9] unless waived by agreement of the parties,[10] to be held not less than 7 days or more than 14 days after the date of the arraignment.

In cases in which the complaint lists codefendants, a *joint* probable cause conference generally must be conducted for those defendants who have been arrested and arraigned at least 72 hours before the conference.[11]

"The district court judge must be available during the probable cause conference to take pleas, consider requests for modification of bond, and if requested by the prosecutor, take the testimony of a victim." MCR 6.108(D).

☐ 1. The probable cause conference must include all of the following:

☐ Discussions as to a possible plea agreement among the prosecuting attorney, the defendant, and the attorney for the defendant.

☐ Discussions regarding bail and the opportunity for the defendant to petition the judge for a bond modification.

☐ Discussions regarding stipulations and procedural aspects of the case.

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[7] See MCL 766.4. See Chapter 4 for discussion of probable cause conferences.

[8] See 2014 PA 123, enacting section 1, and 2014 PA 124, enacting section 2, both effective May 20, 2014.

[9] See MCR 6.104(E)(4). The district court has jurisdiction over probable cause conferences in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the probable cause conference under MCL 766.4. MCL 600.8311(d). If authorized by the chief judge, a district court magistrate may conduct probable cause conferences. MCL 600.8511(h); MCR 6.108(B).

[10] If the prosecuting attorney and defense counsel agree, the probable cause conference may be waived. The parties must notify the court of the waiver agreement and indicate whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea. MCL 766.4(2); MCR 6.108(A).

[11] Consolidation is not required if "the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the [judge] finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing." MCL 766.4(5).

☐ Discussions regarding any other matters relevant to the case as agreed upon by both parties.

☐ 2. If requested by the prosecuting attorney, and if a victim[12] is present, immediately commence the preliminary examination for the sole purpose of taking and preserving the victim's testimony. [NOTE: A district court magistrate may not conduct a preliminary examination.[13]]

☐ Immediately proceed according to the Checklist for Conducting a Preliminary Examination.

☐ If the victim's testimony is insufficient to establish probable cause to believe that the defendant committed the charged crime or crimes, adjourn the preliminary examination to the date set at arraignment.[14]

☐ 3. If a plea agreement is reached between the parties, proceed to take the plea.[15] [NOTE: A district court magistrate may not accept a felony plea.[16]]

☐ Verify that a circuit court judge has been assigned to the case for purposes of sentencing and other post-plea matters.

o Verify that the parties know the identity of the assigned circuit court judge.

☐ Proceed to take the plea according to the Felony Plea Script.

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[12] "'[V]ictim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." MCL 766.4(4).

[13] See MCL 766.1; MCL 600.8511. However, "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination and acceptance of any written demand or waiver of jury trial." MCL 600.8513(1).

[14] The victim "shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause." MCL 766.4(4).

[15] A district judge has the authority to accept a felony plea and *must* take a plea as provided by court rule if a plea agreement is reached between the parties. MCL 766.4(3). However, "[s]entencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken." *Id.*

[16] See MCL 766.1; MCL 600.8511.

Checklist for Conducting a Preliminary Examination in Cases Arraigned in District Court Before January 1, 2015[17]

> **NOTE:** The following requirements apply to cases in which the defendant was arraigned in district court **before January 1, 2015**. For cases in which the defendant is arraigned on or after January 1, 2015, see the Checklist for Conducting a Preliminary Examination in Cases Arraigned On or After January 1, 2015.[18] For a chart outlining the differences in procedures before and after January 1, 2015, as a result of statutory reforms concerning probable cause conferences, preliminary examinations, and felony pleas, see SCAO Memorandum, July 23, 2014.

A preliminary examination must be scheduled within 14 days of arraignment.

o 1. Call the case and ask for oral (or written) appearances of the prosecutor, defendant, and defense attorney (if present).

o 2. If defendant is not represented by counsel:

☐ Advise defendant of the right to an attorney at public expense if defendant is indigent.

☐ If defendant requests counsel, appoint counsel if defendant is indigent, or allow defendant a reasonable opportunity to retain counsel, or obtain a waiver of the right to counsel.

☐ Advise defendant that if he/she is going to retain counsel, this may be treated as "good cause" to adjourn the preliminary examination beyond 14 days.

☐ 3. If the defendant desires to waive counsel, the court must first:

☐ Advise defendant of the charge, the maximum possible penalties, any mandatory minimum sentence required by law, and the risk involved in self-representation; and

☐ Offer the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

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[17] See MCL 766.1 *et seq*. and MCR 6.110.

[18] See 2014 PA 123, enacting section 1, and 2014 PA 124, enacting section 2, both effective May 20, 2014.

☐ 4. Advise defendant that he/she has a right to a preliminary examination and ask if he/she wishes to have a preliminary examination conducted or to waive the examination.

☐ 5. If defendant wishes to proceed with a preliminary examination, the court:

☐ Should entertain any requested stipulations of the parties.

☐ Must ask the prosecutor to call witnesses for examination, subject to cross-examination by the defense.

☐ Must ask the defense if they have any witnesses to call for examination, subject to cross-examination by the prosecution.

☐ Must apply the Rules of Evidence to evidentiary issues.

☐ 6. Determine and state the basis for determining whether the evidence establishes:

☐ Probable cause that a felony or circuit court misdemeanor has been committed;

☐ Probable cause that defendant committed the felony or circuit court misdemeanor; and

☐ That venue is proper.

☐ 7. At the end of the preliminary examination, do ONE of the following:

☐ Discharge defendant, if there is no probable cause to believe that a felony or circuit court misdemeanor has been committed or that defendant committed it, or if venue has not been established.

☐ Bind defendant over for trial to the circuit court, if there is probable cause to believe that a felony or circuit court misdemeanor has been committed and that defendant committed it, and if venue has been established.

☐ Set case for pre-trial conference (or trial) in district court, if there is probable cause to believe that defendant committed an offense cognizable by the district court but not the circuit court.

☐ Transfer the case to the family division of circuit court, if there is no probable cause to believe that defendant committed a specified juvenile violation but there is probable cause to believe that defendant committed another crime.

☐ 8. Set, continue, deny, or revoke bail.

☐ 9. Execute the bindover form, SCAO Form MC 200, *Bind Over/ Transfer After Preliminary Examination Felony*, if defendant is bound over for trial to the criminal division of circuit court.

☐ 10. Schedule the arraignment in circuit court, or have defendant execute a written waiver of circuit court arraignment, SCAO Form CC 261, *Waiver of Arraignment and Election to Stand Mute or Enter Not Guilty Plea*, if defendant is bound over for trial.

☐ 11. Order the defendant to undergo venereal disease, hepatitis B, hepatitis C, and HIV testing in appropriate cases, SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

Checklist for Conducting a Preliminary Examination in Cases Arraigned in District Court On or After January 1, 2015[19]

> **NOTE:** The following requirements apply to cases in which the defendant is arraigned in district court **on or after January 1, 2015**. For cases in which the defendant is arraigned before January 1, 2015, see the Checklist for Conducting a Preliminary Examination in Cases Arraigned in District Court Before January 1, 2015.[20] For a chart outlining the differences in procedures before and after January 1, 2015, as a result of statutory reforms concerning probable cause conferences, preliminary examinations, and felony pleas, see SCAO Memorandum, July 23, 2014.

At the arraignment for a felony or a misdemeanor punishable by more than one year of imprisonment, the district court must schedule a preliminary examination, unless waived (with the prosecutor's consent)[21] or adjourned.[22] The preliminary examination must be scheduled for not less than five days or more than seven days after the date of the probable cause conference,[23] unless the parties, with the court's approval, agree to an earlier date.

If requested by the prosecutor, the preliminary examination must commence *immediately* for the sole purpose of taking and preserving the testimony of a victim if the victim is present, as long as the defendant is either present in the courtroom or has waived the right to be present.[24]

In cases in which the complaint lists codefendants, a *joint* preliminary examination generally must be conducted for those defendants who have been arrested and arraigned at least 72 hours before the probable cause conference.[25]

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[19] See MCL 766.1 *et seq*. and MCR 6.110. See Chapter 4 for discussion of preliminary examinations.

[20] See 2014 PA 123, enacting section 1, and 2014 PA 124, enacting section 2, both effective May 20, 2014.

[21] "The defendant may waive the preliminary examination with the consent of the prosecuting attorney." MCL 766.7; MCR 6.110(A).

[22] The preliminary examination may be adjourned, continued, or delayed without the consent of the defendant or the prosecuting attorney for good cause shown. MCL 766.7. Additionally, the judge may adjourn, continue, or delay the preliminary examination with the consent of the defendant and prosecuting attorney without a showing of good cause. *Id*. See also MCR 6.110(B)(1).

[23] The probable cause conference must be scheduled for a date not less than 7 or more than 14 days after the date of the arraignment. MCL 766.4(1); MCR 6.104(E)(4). See Chapter 4 for discussion of probable cause conferences.

[24] MCL 766.4(4); MCR 6.110(B)(2).

[25] Consolidation is not required if "the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the [judge] finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing." MCL 766.4(5).

Although a district court *magistrate*, if authorized by the chief judge, may conduct a probable cause conference, a district court *judge* must conduct all preliminary examinations. See MCL 766.1; MCL 600.8511.[26]

o 1. Call the case and ask for oral (or written) appearances of the prosecutor, defendant, and defense attorney (if present).

o 2. If defendant is not represented by counsel:

☐ Advise defendant of the right to an attorney at public expense if defendant is indigent.

☐ If defendant requests counsel, appoint counsel if defendant is indigent, or allow defendant a reasonable opportunity to retain counsel, or obtain a waiver of the right to counsel.

☐ Advise defendant that if he/she is going to retain counsel, this may be treated as "good cause" to adjourn the preliminary examination.

☐ 3. If the defendant desires to waive counsel, the court must first:

☐ Advise defendant of the charge, the maximum possible penalties, any mandatory minimum sentence required by law, and the risk involved in self-representation; and

☐ Offer the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

☐ 4. Advise defendant that he/she has a right to a preliminary examination and ask if he/she wishes to have a preliminary examination conducted or to waive the examination.

☐ If the defendant wishes to waive the examination, ensure that the prosecutor has consented to the waiver.

☐ Proceed to take the waiver using the Waiver of a Preliminary Examination Checklist.

☐ 5. If a plea agreement is reached between the parties, proceed to take the plea.[27] [NOTE: A district court magistrate may not accept a felony plea.[28]]

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[26] See MCL 766.1; MCL 600.8511. However, "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, including acceptance of any written demand or waiver of preliminary examination and acceptance of any written demand or waiver of jury trial." MCL 600.8513(1).

☐ Verify that a circuit court judge has been assigned to the case for purposes of sentencing and other post-plea matters.

o Verify that the parties know the identity of the assigned circuit court judge.

☐ Proceed to take the plea according to the Felony Plea Script.

☐ 6. If defendant wishes to proceed with a preliminary examination, the court:

☐ Should entertain any requested stipulations of the parties.

☐ Must ask the prosecutor to call witnesses for examination, subject to cross-examination by the defense.[29]

☐ Must ask the defense if they have any witnesses to call for examination, subject to cross-examination by the prosecution.

☐ Must apply the Rules of Evidence to evidentiary issues, with the exception of certain hearsay reports and records that may be admissible without live foundation testimony under MCL 766.11b.[30]

☐ 7. Determine and state the basis for determining whether the evidence establishes:

☐ Probable cause that a felony or circuit court misdemeanor has been committed;

☐ Probable cause that defendant committed the felony or circuit court misdemeanor; and

☐ That venue is proper.

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[27] A district judge has the authority to accept a felony plea and *must* take a plea as provided by court rule if a plea agreement is reached between the parties. MCL 766.4(3). However, "[s]entencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken." *Id*.

[28] See MCL 766.1; MCL 600.8511.

[29] "On motion of either party, the [judge] shall permit the testimony of any witness, except the complaining witness, an alleged eyewitness, or a law enforcement officer to whom the defendant is alleged to have made an incriminating statement, to be conducted by means of telephonic, voice, or video conferencing. The testimony taken by video conferencing shall be admissible in any subsequent trial or hearing as otherwise permitted by law." MCL 766.11a.

[30] See Section 4.24(C) for discussion of the admissibility of hearsay reports and records under MCL 766.11b.

☐ 8. At the end of the preliminary examination, if probable cause is not established, do ONE of the following:

☐ Discharge defendant, if there is no probable cause to believe that a felony or circuit court misdemeanor has been committed or that defendant committed it, or if venue has not been established.

☐ Reduce the charge to an offense that is not a felony and set case for pretrial conference (or trial) in district court, if there is no probable cause to believe that a felony or circuit court misdemeanor has been committed or that defendant committed it.

☐ Transfer the case to the family division of circuit court, if there is no probable cause to believe that defendant committed a specified juvenile violation but there is probable cause to believe that defendant committed another crime.

☐ Adjourn the preliminary examination to the date set at arraignment, if preliminary examination was "commence[d] immediately" at the probable cause conference under MCL 766.4(4) for purposes of preserving the victim's testimony, and if that testimony is insufficient to establish probable cause to believe that defendant committed the charged crime or crimes.[31]

☐ 9. At the end of the preliminary examination, if there is probable cause to believe that a felony or circuit court misdemeanor has been committed and that defendant committed it, and if venue has been established, do ONE of the following:

☐ Bind defendant over to appear within 14 days for arraignment before the circuit court, and execute the bindover form, SCAO Form MC 200, *Bind Over/Transfer After Preliminary Examination Felony*.

☐ Conduct the circuit court arraignment as provided by court rule.

☐ Have defendant execute a written waiver of circuit court arraignment, SCAO Form CC 261, *Waiver of Arraignment and Election to Stand Mute or Enter Not Guilty Plea*.

☐ 10. Set, continue, deny, or revoke bail.

[31] The victim "shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause." MCL 766.4(4). See Section 4.12(A) for discussion of the immediate commencement of the preliminary examination for purposes of taking a victim's testimony.

☐ 11. Order the defendant to undergo venereal disease, hepatitis B, hepatitis C, and HIV testing in appropriate cases, SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

Waiver of a Preliminary Examination Checklist[32]

☐ 1. Call the case and ask for oral (or written) appearances of the prosecutor, defendant, and defense attorney (if present).

☐ 2. If defendant is not represented by counsel:

☐ Advise defendant of the right to an attorney at public expense if defendant is indigent.

☐ If defendant requests counsel, appoint counsel if defendant is indigent, or allow defendant a reasonable opportunity to retain counsel, or obtain a waiver of the right to counsel.

☐ Advise defendant that if he/she is going to retain counsel, this may be treated as "good cause" to adjourn the preliminary examination.

☐ 3. If the defendant desires to waive counsel, the court must first:

☐ advise defendant of the charge, the maximum possible penalties, any mandatory minimum sentence required by law, and the risk involved in self-representation; and

☐ offer the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

☐ 4. Advise defendant that he/she has a right to a preliminary examination and ask if he/she wishes to have a preliminary examination conducted or to waive the examination.

☐ 5. Advise a juvenile defendant that he/she may not waive a preliminary examination unless represented by an attorney.

☐ 6. Advise defendant:

☐ That he/she and the prosecutor both have a right to a preliminary examination, which is a hearing where the prosecutor must show two things: (1) probable cause to believe that a felony or circuit court misdemeanor was committed; (2) probable cause to believe that he/she committed it.

☐ That he/she will be bound over to circuit court on the charge(s) in the complaint and warrant if he/she waives the preliminary examination.

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[32] See MCL 767.42 and MCR 6.112(B).

☐ 7. Ask defendant if he/she wishes to waive the right to a preliminary examination. The waiver may be on the charge(s) in the complaint or amended complaint.

☐ 8. Determine and state for the record that defendant's waiver of the preliminary examination is freely, understandingly, and voluntarily given. The court should make such a determination in every case, regardless of whether defendant is represented by counsel.

☐ 9. Ask defendant (or defense counsel) and the prosecutor to state for the record:

☐ Any plea agreement made in exchange for the waiver of the preliminary examination; and

☐ Any promises made in exchange for the waiver.

☐ 10. If desired, ask defendant (and defense counsel) to read and sign the form pertaining to waivers of preliminary examinations, SCAO Form MC 200, *Bind Over/Transfer After Preliminary Examination Felony*. Although executing the form is optional for adult defendants, it is not optional for juvenile defendants.

☐ 11. Ask the prosecutor if he/she waives the People's right to a preliminary examination.

☐ 12. Accept defendant's waiver and, if a plea is not taken, bind him/her over to circuit court on the charge(s) contained in the complaint or amended complaint.

☐ 13. If a plea agreement is reached between the parties, proceed to take the plea.[33] [NOTE: A district court magistrate may not accept a felony plea.[34]]

☐ Verify that a circuit court judge has been assigned to the case for purposes of sentencing and other post-plea matters.

o Verify that the parties know the identity of the assigned circuit court judge.

☐ Proceed to take the plea according to the Felony Plea Script.

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[33] A district judge has the authority to accept a felony plea and *must* take a plea as provided by court rule if a plea agreement is reached between the parties. MCL 766.4(3). However, "[s]entencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken." *Id*.

[34] See MCL 766.1; MCL 600.8511.

☐ 14. Set, deny, continue, or revoke bail.

☐ 15. Execute the bindover form, SCAO Form MC 200, *Bind Over/ Transfer After Preliminary Examination Felony*, if defendant is bound over for trial to the criminal division of circuit court.

☐ 16. Schedule the arraignment in circuit court, or have defendant execute a written waiver of circuit court arraignment, SCAO Form CC 261, *Waiver of Arraignment and Election to Stand Mute or Enter Not Guilty Plea*, if defendant is bound over for trial.

☐ 17. Order the defendant to undergo venereal disease, hepatitis B, hepatitis C, and HIV testing in appropriate cases, SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

Part E: Arraignments & Pleas

Script for Arraignment on Warrant/Complaint

MCL 766.4; MCL 767.37

MCR 6.005, MCR 6.104(E), MCR 6.113(B)

Are you _____ ?

Have you been given a copy of the information? (Unless waived by the defendant, the court must either state to the defendant the substance of the charge contained in the information, or require the information to be read to the defendant).

You are charged with _____ (state the nature of the offense charged, the maximum possible prison sentence and any mandatory minimum sentence required by law).

(If defendant is not represented): You are entitled to a lawyer's assistance at all subsequent court proceedings. (Advise of the risk involved in self-representation).

Do you want a lawyer? You have the opportunity to consult with a retained lawyer. If you want a lawyer and are financially unable to retain one, you have the opportunity to consult with an appointed lawyer which the court will appoint at public expense.

If the defendant is not represented by a lawyer, must advise:

You have the right to remain silent.

Anything you say orally or in writing can be used against you in court.

You have the right to have a lawyer present during any questioning you consent to.

If you do not have the money to hire a lawyer, the Court will appoint a lawyer to represent you.

You have a right to have a lawyer represent you at all subsequent court proceedings.

If the defendant has waived legal representation, the court must advise the defendant of the pleading options.

If the defendant offers a plea other than not guilty, the court must proceed to take the plea using the Felony Plea Script. [NOTE: A district court magistrate may not accept a felony plea.] Otherwise, the court must enter a plea of not guilty on the record.

(Consider bond).

(Unless waived, schedule the **probable cause conference** to be held not less than 7 days or more than 14 days after the date of the arraignment, and schedule the **preliminary examination** for a date not less than five days or more than seven days after the date of the probable cause conference, unless the parties, with the court's approval, agree to an earlier date. In cases in which the complaint lists codefendants, a *joint* probable cause conference and preliminary examination generally must be conducted for those defendants who have been arrested and arraigned at least 72 hours before the conference.[35])

(If requested by the prosecutor, the preliminary examination must commence immediately at the date and time set for the probable cause conference for the sole purpose of taking and preserving the testimony of a victim if the victim is present, as long as the defendant is either present in the courtroom or has waived the right to be present.[36])

[35] Consolidation is not required if "the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the [judge] finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing." MCL 766.4(5).

[36] MCL 766.4(4); MCR 6.110(B)(2). See Section 4.12(A) for discussion of the immediate commencement of the preliminary examination for purposes of taking a victim's testimony.

Felony Arraignment in District Court Checklist

MCR 6.610(H); MCL 766.4

Date: _____ Offense: _____

Case No.: _____ Statute: _____

Defendant: _____ Min. Penalty: _____

Defense Atty: _____ Max. Penalty: _____

□ 1. Identify case number and parties for the record.

□ 2. Read the warrant/complaint into the record.

□ 3. Advise defendant of the nature of the charged offense, the maximum possible prison sentence for conviction of the offense, and any mandatory minimum sentence required by law.

□ 4. If defendant is not represented by counsel, advise defendant of the following:

a. the right to the assistance of an attorney.

b. the right to remain silent.

c. that anything defendant says orally or in writing can be used against him or her in court.

d. that defendant is entitled to have an attorney present during any questioning to which he or she consents.

e. that if defendant is indigent, the court will appoint an attorney to represent defendant.

□ 5. Advise defendant of his or her right to a probable cause conference and a preliminary examination.

□ 6. Unless the parties agree to waive the probable cause conference, set a date for the conference to be held not less than 7 days or more than 14 days after the date of the arraignment.

Consolidation for Codefendants: In cases in which the complaint lists codefendants, a *joint* probable cause conference generally must be conducted for those defendants who have been arrested and arraigned at least 72 hours before the conference.[37]

□ 7. Unless defendant waives a preliminary examination with the consent of the prosecutor, schedule the exam for a date not less than five days or more than seven days after the date of the probable cause conference, unless the parties, with the court's approval, agree to an earlier date.

Consolidation for Codefendants: In cases in which the complaint lists codefendants, a *joint* preliminary examination generally must be conducted for those defendants who have been arrested and arraigned at least 72 hours before the conference.[38]

Immediate Commencement of Exam to Preserve Victim's Testimony: If requested by the prosecutor, the preliminary examination must commence immediately at the date and time set for the probable cause conference for the sole purpose of taking and preserving the testimony of a victim if the victim is present, as long as the defendant is either present in the courtroom or has waived the right to be present.[39]

□ 8. If defendant waives a preliminary examination with the consent of the prosecutor, the court must determine that the waiver is given freely, understandingly, and voluntarily before accepting it.

□ 9. If a plea agreement is reached between the parties, proceed to take the plea.[40] [NOTE: A district court magistrate may not accept a felony plea.[41]]

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[37] Consolidation is not required if "the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the [judge] finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing." MCL 766.4(5); see also MCR 6.108(E).

[38] Consolidation is not required if "the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the [judge] finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing." MCL 766.4(5); see also MCR 6.110(A).

[39] MCL 766.4(4); MCR 6.110(B)(2). See Section 4.12(A) for discussion of the immediate commencement of the preliminary examination for purposes of taking a victim's testimony.

[40] A district judge has the authority to accept a felony plea and *must* take a plea as provided by court rule if a plea agreement is reached between the parties. MCL 766.4(3). However, "[s]entencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken." *Id*.

[41] See MCL 766.1; MCL 600.8511.

o Verify that a circuit court judge has been assigned to the case for purposes of sentencing and other post-plea matters.

o Verify that the parties know the identity of the assigned circuit court judge.

o Proceed to take the plea according to the Felony Plea Script.

□ 10. Advise defendant of the right to be released on bond if applicable.

□ 11. Determine whether pretrial release is appropriate and whether any conditions should be imposed on defendant's pretrial release.

□ 12. Confirm that defendant has been fingerprinted[42] as required by law.

A verbatim record must be made of felony arraignments in district court.

The court may not question defendant about the alleged crime or request that defendant enter a plea to the charged offense.

[42] See MCL 28.243 for information on the collection of biometric data, which includes fingerprints.

Misdemeanor Arraignment in District Court Checklist

MCR 6.610(D)

Date: _____ Offense: _____

Case No.: _____ Statute: _____

Defendant: _____ Min. Penalty: _____

Defense Atty: _____ Max. Penalty: _____

□ 1. Identify case number and parties for the record.[43]

□ 2. Advise defendant of the name of the charged offense.[44]

□ 3. Advise defendant of the maximum sentence possible for conviction of the offense.[45]

□ 4. Advise defendant of any mandatory minimum sentence required by law.

□ 5. Advise defendant of the following rights:[46]

a. the right to the assistance of an attorney at all proceedings.

b. the right to a trial.

c. the right to remain silent.

d. the right to be appointed an attorney at public expense if defendant is indigent and conviction could result in imprisonment.

e. the right to a jury trial, when required by law.

□ 6. Determine how defendant wishes to plead:

[43] This information may be given to defendant on the record or in a writing made part of the file.

[44] This information may be given to defendant on the record or in a writing made part of the file.

[45] This information may be given to defendant on the record or in a writing made part of the file.

[46] This information may be given to defendant on the record or in a writing made part of the file.

a. Not guilty or stands mute.

b. Guilty.[47]

b. No contest.[48]

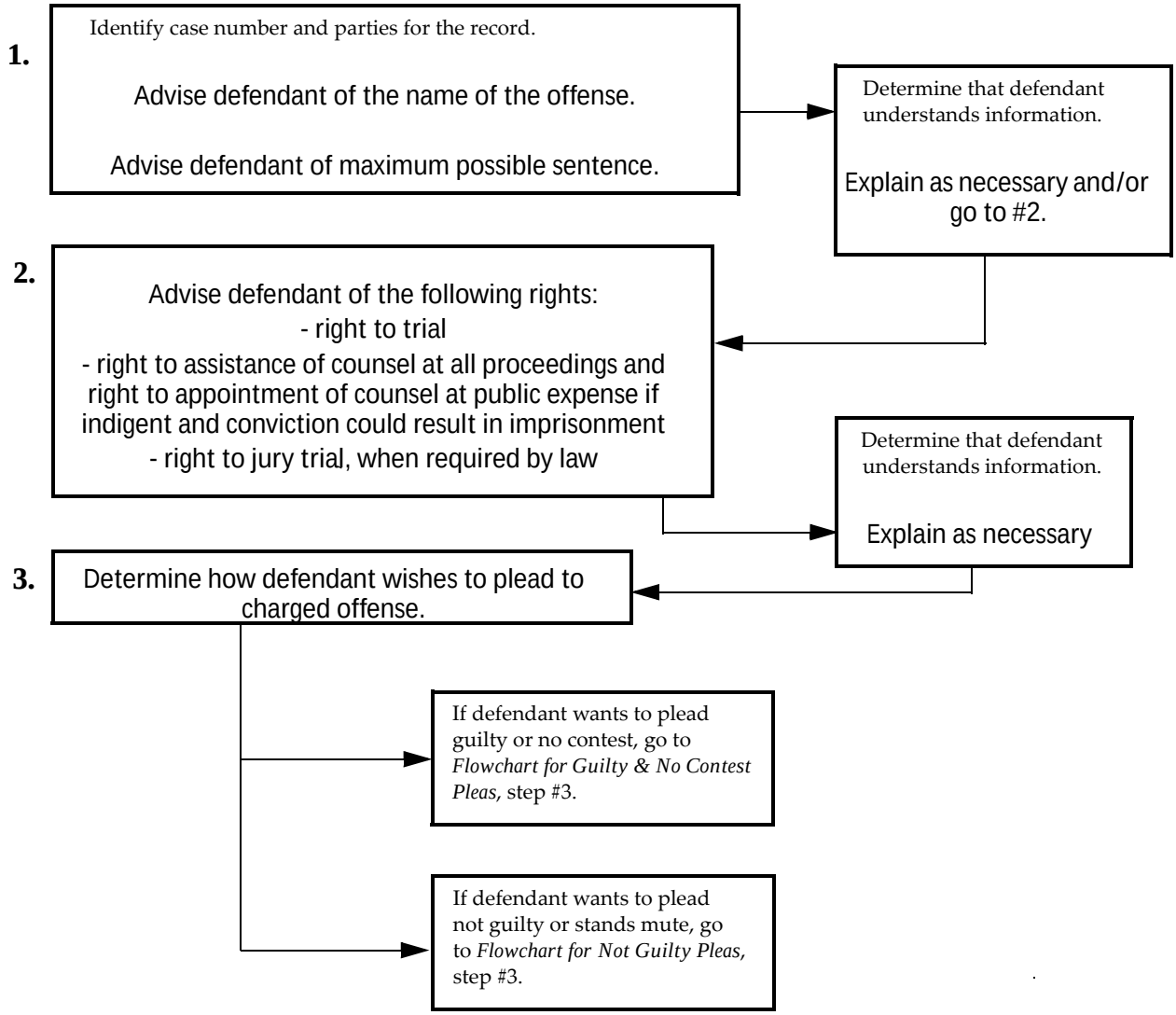
□ 7. Set bail.

□ 8. Advise defendant of any conditions attendant to his or her pretrial release.

[47] See *Checklist for Guilty and No Contest Pleas*.

[48] See *Checklist for Guilty and No Contest Pleas*.

Flowchart for Misdemeanor Arraignments



Checklist for Juvenile Arraignments in District Court

Date: _____ Offense: _____

Case No.: _____ Statute: _____

Defendant: _____ Min. Penalty: _____

Defense Atty: _____ Max. Penalty: _____

□ 1. Determine whether a parent, guardian, or adult relative of the juvenile is present. Arraignment may be conducted without the presence of a parent, guardian, or adult relative provided the magistrate appoints an attorney to appear at arraignment with the juvenile or an attorney has been retained and appears with the juvenile.

□ 2. Read the warrant/complaint into the record. A verbatim record must be made of felony arraignments in district court.

□ 3. Advise the juvenile of the nature of each charged offense, the maximum penalty and any mandatory minimum sentence for each offense. Advise the juvenile whether imposition of an adult sentence is required if the juvenile is convicted of the offense.

□ 4. If the juvenile is not represented by counsel, advise the juvenile that:

a. he or she has the right to the assistance of an attorney.

b. he or she has the right to remain silent.

c. anything the juvenile says orally or in writing can be used against him or her in court.

d. he or she is entitled to have an attorney present during any questioning to which he or she consents.

e. if the juvenile is indigent, the court will appoint an attorney to represent him or her.

□ 5. A juvenile may waive his or her right to counsel if:

a. an attorney is appointed to give the juvenile advice about the waiver of counsel.

b. the magistrate or court finds that the juvenile is literate and competent to conduct a defense.

c. the magistrate or court advises the juvenile of the dangers and disadvantages of self-representation

d. the magistrate or court finds on the record that the waiver is voluntarily and understandingly made.

e. the court appoints standby counsel to assist the juvenile at trial and at his or her sentencing.

□ 6. Inform the juvenile of his or her right to a probable cause conference and a preliminary examination.

□ 7. Except as provided for traditional waiver cases under MCL 712A.4,[49] and unless the parties agree to waive the probable cause conference, set a date for the conference to be held not less than 7 days or more than 14 days after the date of the arraignment.

Consolidation for Codefendants: In cases in which the complaint lists codefendants, a *joint* probable cause conference generally must be conducted for those defendants who have been arrested and arraigned at least 72 hours before the conference.[50]

□ 8. Except as provided for traditional waiver cases under MCL 712A.4,[51] and unless the juvenile waives a preliminary examination with the consent of the prosecutor, schedule the exam for a date not less than five days or more than seven days after the date of the probable cause conference, unless the parties, with the court's approval, agree to an earlier date.

Consolidation for Codefendants: In cases in which the complaint lists codefendants, a *joint* preliminary examination generally must be conducted for those defendants who have been arrested and arraigned at least 72 hours before the conference.[52]

Immediate Commencement of Exam to Preserve Victim's Testimony: If requested by the prosecutor, the preliminary

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[49] See MCL 766.4(1).

[50] Consolidation is not required if "the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the [judge] finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing." MCL 766.4(5).

[51] See MCL 766.4(1).

[52] Consolidation is not required if "the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the [judge] finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing." MCL 766.4(5).

examination must commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present.[53]

□ 9. If the juvenile waives a preliminary examination with the consent of the prosecutor, the court must determine that the waiver is given freely, understandingly, and voluntarily before accepting it. A juvenile may waive the preliminary exam if:

a. the juvenile is represented by an attorney, and

b. the juvenile signs a written waiver in open court, and

c. the court determines on the record that the juvenile's waiver is freely, understandingly, and voluntarily made.

□ 10. If a plea agreement is reached between the parties, proceed to take the plea.[54] [NOTE: A district court magistrate may not accept a felony plea.[55]]

o Verify that a circuit court judge has been assigned to the case for purposes of sentencing and other post-plea matters.

o Verify that the parties know the identity of the assigned circuit court judge.

o Proceed to take the plea according to the Felony Plea Script.

□ 11. Unless detention without bail is allowed, advise the juvenile of the right to be released on bond. The magistrate or court may order the juvenile released to a parent or guardian, and the court may impose any lawful condition on the juvenile's release, including the requirement that bail be posted.

□ 12. If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or court may deny bail to a juvenile charged with:

a. first- or second-degree murder, or

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[53] MCL 766.4(4). See Section 4.12(A) for discussion of the immediate commencement of the preliminary examination for purposes of taking a victim's testimony.

[54] A district judge has the authority to accept a felony plea and *must* take a plea as provided by court rule if a plea agreement is reached between the parties. MCL 766.4(3). However, "[s]entencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken." *Id*.

[55] See MCL 766.1; MCL 600.8511.

b. first-degree criminal sexual conduct or armed robbery if the juvenile is likely to flee or clearly present a danger to others.

□ 13. If the juvenile is denied release, determine where the juvenile will be lodged while awaiting his or her preliminary examination and/or trial.

a. Unless a juvenile's conduct is a menace to other juveniles or the juvenile cannot safely be housed in a juvenile facility, a juvenile charged with a crime and denied bail must be placed in a juvenile facility. If a juvenile is lodged in a facility for adult offenders, the juvenile must be maintained separately from the adults.

b. A juvenile may not be placed in an institution operated by the family division of circuit court unless the family division consents to the placement or the circuit court orders the placement.

□ 14. Confirm that the defendant has been fingerprinted as required by law.

Felony Plea Script

MCL 768.35
MCR 6.111(A)
MCR 6.302
MCR 6.310

NOTE: A district judge has the authority to accept a felony plea, and *must* take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. MCL 766.4(3); MCR 6.111(A). A district court *magistrate* may not accept a felony plea.[56] For a chart outlining the differences in procedures before and after January 1, 2015, as a result of statutory reforms concerning probable cause conferences, preliminary examinations, and felony pleas, see SCAO Memorandum, July 23, 2014.

SWEAR THE DEFENDANT(S).

Are you _____?

Is Mr./Ms. _____ your lawyer?

Have you had a full and complete opportunity to consult with your lawyer about this case before coming into court today?

(To the prosecutor and defense attorney): Is there a plea agreement?

(If there is a written agreement, ensure that it has been signed by the parties and ensure that it is made part of the case file.[57] If there is no writing, the agreement must be stated on the record.)

(If the plea is being taken by the district court under MCL 766.4(3), verify that a circuit court judge has been assigned to the case and that the identity of the circuit court judge is known to the parties.)

[56] See MCL 766.1; MCL 600.8511.

[57] SCAO Form CC 414, *Plea Agreement*, may be used for this purpose.

(To the prosecutor or defense attorney(s)): What are the terms of the plea agreement? (Make sure to also waive reading of the Information, if there is a plea at the time of arraignment.)

(To the other attorney(s) and defendant(s)): Are those the terms of the agreement?

(To the defendant(s)): Did you hear and understand the plea agreement placed on the record by the lawyers?

Is this what you have agreed to do?

Do you ask that I accept the plea agreement?

(Address any *Cobbs* or *Killebrew* agreement. **[NOTE: A district court judge accepting a plea under MCL 766.4(3) should not accept a felony plea that is contingent upon a sentencing agreement or *Cobbs* proposal, unless there is an agreement between the circuit and district court judges on how this is to be done. If no such procedure is in place, the case should be bound over to circuit court and the assigned circuit court judge should consider any pleas pursuant to *Cobbs* or *Killebrew*.]** Confirm that the sentence discussions were initiated by one of the parties, and identify the party. Confirm that the other party was present for the discussions or agreed that they could occur. Confirm the maximum sentence agreed to by the court based on the preliminary evaluation of the case. Confirm that the defendant may withdraw the plea if the court decides to impose a sentence greater than that agreed upon.)

Are you presently on probation or parole? (If the answer is "yes," determine why and explain that this may have an impact on the probation or parole status and may also affect the possible sentence.)

You are charged with _____ (the court is not obliged to explain the elements of the offense, or possible defenses).

This felony carries a maximum possible prison sentence of _____. (NOTE: If the defendant is charged as an habitual offender, the maximum possible prison sentence is the maximum with habitual-offender enhancement.)[58]

(If applicable:) The mandatory minimum sentence for this offense is _____.

[58] *People v Brown (Shawn)*, 492 Mich 684, 687, 693-694 (2012), overruling *People v Boatman*, 273 Mich App 405, 406-410 (2006).

(If the defendant is charged with first-degree criminal sexual conduct, or if the defendant is charged with second-degree criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age[59]): The sentence for this offense must include lifetime electronic monitoring.[60]

(Explain the plea agreement to the defendant. In possible probation cases, may want to explain the possibility of up to one year in the county jail as a condition of probation.)

(To the defendant(s)): With all of this in mind how do you plead to the charge?

If your plea is accepted, you will not have a trial of any kind, and so you are giving up rights you would have had at a trial, including the right:

To be tried by a jury;

To be presumed innocent until proved guilty;

To have the prosecutor prove beyond a reasonable doubt that you are guilty;

To have the witnesses against you appear at the trial;

To question the witnesses against you;

To have the court order any witnesses you have for your defense to appear at the trial;

To remain silent during the trial;

To not have that silence used against you; and

To testify at the trial if you want to testify.

Do you understand each of these rights?

Do you understand that if I accept your plea, you will be giving up every one of these rights?

If I accept your plea, any appeal will be by leave of the Court of Appeals. That means there is no automatic right to appeal. Instead, you would have to ask the Court of

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[59] *People v Brantley*, 296 Mich App 546, 558-559 (2012).

[60] *People v Cole (David)*, 491 Mich 325, 327 (2012). See also MCR 6.302(B)(2).

Appeals to hear your case and the Court of Appeals would decide whether to hear your case. Do you understand that?

[Alternatively, if the court is using SCAO Form CC 291, *Advice of Rights (Circuit Court Plea)*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/felonycriminal/cc291.pdf, ask the defendant:

Have you read and do you understand the form explaining the rights you would have had at trial that you are giving up by pleading guilty (or no contest)?

Do you understand you are giving up every one of the rights described in that form if I accept your plea?]

There are some claims you will be giving up if I accept your plea. You will give up any claim that your plea was the result of promises or threats that I am not told about today and also give up any claim that it was not your own choice to plead guilty (or no contest). Do you understand that?

(If there is an agreement for a sentence for a specified term or within a specified range:) Do you understand that I am not bound to follow the sentence the prosecutor has agreed to (unless I have agreed to it) and that if I choose not to follow it, you will be allowed to withdraw from the plea agreement?

(If the agreement includes a prosecutorial sentence recommendation:)

Do you understand that I am not bound to follow the sentence the prosecutor has recommended? (May also advise the defendant(s) that if the court chooses not to follow the recommendation, the defendant(s) will NOT be allowed to withdraw from the plea agreement.)

(For no contest plea) Do you understand that for the purposes of sentencing, I will be treating you as though you were found guilty of this offense?

Other than what we have said in court today, has anyone promised you anything if you plead guilty (or no contest)?

Has anyone threatened you to get you to plead guilty (or no contest)?

Is it your own choice to plead guilty (or no contest) to this offense(s)?

Are you pleading guilty because you are, in fact, guilty? (if guilty plea)

On or about _____ (date) in the _____ of _____ , County of _____, did you (elements of offense)? (or, for elements of the offense, have the defendant describe what he or she did which leads him or her to believe he or she is guilty.)

No contest plea. A no contest plea requires the court's consent. If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. Instead, the court must state why a plea of nolo contendere is appropriate, and hold a hearing which can be done at that time, to establish support for a finding that the defendant is guilty of the offense. Ordinarily the attorneys will stipulate to the use of the police report or the transcript of the preliminary examination. It may also be a good idea to obtain the defendant's consent to this process.

Counsel, do you feel that the elements of the offense(s) charged have been fully covered by the defendant's statement of the facts?

Counsel, are either of you aware of any promises, threats, or inducements related to the defendant's plea other than those already disclosed on the record?

Counsel, has the court fully complied with MCR 6.302(B), (C), and (D)?

(To the defendant): Once again, how do you wish to plead?

The court believes that the defendant's plea is understanding, voluntary, and accurate. The court is also satisfied there is a factual basis to support a finding that you are guilty of the offense(s) charged. Therefore, the court (choose one):

a. Accepts the agreement without having considered the presentence report.

(If the agreement is for a sentence for a specified term or within a specified range:) I am not bound to follow the agreed-upon sentence. If I choose not to follow the agreed-upon sentence, you will be allowed to withdraw from the plea agreement.

(If the agreement involves a prosecutorial sentence recommendation:) I am not bound to follow the prosecutor's sentence recommendation. (May also advise the defendant that if the court chooses not to follow the recommendation, the defendant will NOT be allowed to withdraw from the plea agreement.)

b. Takes the plea agreement under advisement.

(If the agreement is for a sentence for a specified term or within a specified range:) I am not bound to follow the agreed-upon sentence. If I choose not to follow the agreed-upon sentence, you will be allowed to withdraw from the plea agreement.

(If the agreement involves a prosecutorial sentence recommendation:) I am not bound to follow the prosecutor's sentence recommendation. (May also advise the defendant that if the court chooses not to follow the recommendation, the defendant will NOT be allowed to withdraw from the plea agreement.)

c. Accepts the agreement after having considered the presentence report. (In which case the court must sentence the defendant to the sentence agreed to, if it is for a specified term or within a specified range.)

d. Rejects the agreement.

(Address bond).

Sentencing in this case will take place on _____. [NOTE: Sentencing for a felony must be conducted by a circuit judge, who must be assigned and whose name must be available to the litigants before a plea is taken.]

Address compliance with MCR 1.110, financial obligations due at sentencing.

Script for Misdemeanor Arraignment & Pleas

Procedure / Authority	Script
	1. This is case number _____.
1. Identify case number and confirm that defendant is the person referred to in title of the case. Ask the attorneys to identify themselves for the record.	People v _____. To defendant: Are you that person? Would the prosecutor and defense counsel please identify themselves for the record?
2. Advise defendant of the name of the offense. MCR 6.610(D)(1)(a). This may be done in writing or on the record.	2. You are charged with _____ (name of offense).
3. Advise defendant of the maximum possible sentence for conviction of the offense. MCR 6.610(D)(1)(b). This may be done in writing or on the record. (A defendant wishing to plead guilty or no contest to the charged offense must be advised of any mandatory minimum sentence required for conviction of the offense. See step #6. Although this advice is required only when a defendant pleads guilty or no contest, the court may find it more expedient to include advice of any mandatory minimum along with the required advice of the possible maximum sentence.)	3. The maximum penalty for this offense is _____.
4. Advise defendant of the following rights:	4. To defendant:
a. The right to the assistance of an attorney at all proceedings. MCR 6.610(D)(1)(c)(*i*).	a. You have the right to the assistance of an attorney at all proceedings.
b. The right to trial, MCR 6.610(D)(1)(c)(*i*), and the right to a jury trial when required by law, MCR 6.610(D)(1)(c)(*iii*).	b. You have the right to trial, including the right to a jury trial when required by law. (or) You have the right to trial before a judge, but the offense with which you are charged does not entitle you to a jury trial.
c. The right to an appointed attorney at public expense if defendant is indigent and conviction could result in imprisonment. MCR 6.610(D)(1)(c)(*ii*).	c. If you cannot afford to hire an attorney and conviction of the charged offense could result in incarceration, the court will appoint an attorney to represent you.

Procedure / Authority	Script
5. Determine how defendant wishes to plead. a. If defendant pleads guilty or no contest, go to step #6. b. If defendant pleads not guilty or stands mute, go to step #15.	5. How do you wish to plead?
6. Advise defendant wishing to plead guilty or no contest of any mandatory minimum sentence required for conviction of the charged offense. MCR 6.610(E)(3)(a).	6. Conviction of the offense with which you are charged requires a mandatory minimum sentence of imprisonment. If the court accepts your guilty or no contest plea you will be sentenced accordingly.
7. Advise defendant wishing to plead guilty or no contest to a misdemeanor violation of MCL 257.625 or an ordinance substantially corresponding to MCL 257.625(1), (2), (3), (6), or (8) of the maximum possible sentence/fine and inform defendant that maximum possible license sanctions imposed are based on the master driving record maintained by the Secretary of State.	7. The maximum possible sentence/fine for conviction of the violation with which you've been charged is _____. The maximum possible license sanctions for conviction will be determined based on the master driving record maintained by the Secretary of State. If the court accepts your guilty or no contest plea, you will be sentenced accordingly.

Procedure / Authority	Script
8. Advise defendant of the consequences of his or her plea if accepted:	8. To defendant:
a. defendant will not have a trial of any kind. MCR 6.610(E)(3)(b).	a. If the court accepts your plea, you will not have a trial of any kind for the charged offense.
b. defendant gives up the right to have witnesses called in his or her defense at trial.* MCR 6.610(E)(3)(b)(*i*).	b. If your plea is accepted, you give up the right to have witnesses called to testify in your defense at trial.
c. defendant gives up the right to cross-examine prosecution witnesses at trial.* MCR 6.610(E)(3)(b)(*ii*).	c. If your plea is accepted, you give up the right to cross-examine the prosecution's witnesses at trial.
d. defendant gives up the right to testify at trial or to remain silent at trial without any inference being drawn from his or her silence.* MCR 6.610(E)(3)(b)(*iii*).	d. If your plea is accepted, you give up the right to testify or remain silent at trial without any inference being drawn from the exercise of your right to remain silent.
e. defendant gives up the presumption of innocence and the requirement that his or her guilt be proved beyond a reasonable doubt.* MCR 6.610(E)(3)(b)(*iv*).	e. If your plea is accepted, you give up the presumption of innocence and the requirement that the prosecution must prove guilt beyond a reasonable doubt.
* This information may be given to defendant in writing.	
9. Obtain defendant's waiver of these trial rights on the record. MCR 6.610(E)(4). If defendant was informed of the rights in a writing, the court must obtain an oral statement from defendant that he or she read and understood the rights and waives them. The waiver may be obtained without repeating the individual rights. MCR 6.610(E)(4).	9. Do you understand that you will waive the right to trial and all the rights that accompany your right to trial if the court accepts your guilty or no contest plea? Do you wish to waive those rights as they were explained to you? (or) Have you read the written statement of trial rights? Do you understand the trial rights to which you are entitled? Is it your choice to waive those rights and enter a plea?
10. Determine that defendant's plea is understanding and voluntary. MCR 6.610(E)(1). Ask defendant whether anyone has threatened him or her and whether it is defendant's own choice to plead guilty. MCR 6.610(E)(6)(a) and (b).	10. Is it your voluntary choice to plead guilty/no contest? Has anyone threatened you about your plea?

Procedure / Authority	Script
11. Determine whether there exists a plea agreement or sentence bargain.	11. Is there a plea agreement or sentence bargain at issue in this case?
No plea agreement. If no plea agreement exists, ask defendant whether anyone has promised him or her anything for the guilty plea. MCR 6.610(E)(6)(a). If no plea agreement exists, either party may ask the court to indicate on the record what sentence it believes is appropriate based on the information then available to it.	**No plea agreement is involved in this case.** Has anyone promised you anything in exchange for your guilty plea? (In the absence of an agreement, court may be asked to indicate an appropriate sentence.)
	(or)
Plea agreement. If there exists a plea agreement or sentence bargain, place its terms on the record and determine whether the parties agree to the terms. MCR 6.610(E)(5). Ask defendant whether anyone promised him or her anything outside of the terms of the agreement. MCR 6.610(E)(6)(a).	**There is a plea agreement in this case.** Explain the agreement to the court. Do both parties agree on the terms of the agreement? Has anyone promised you anything outside the terms of the agreement?
	12. The court accepts the plea agreement/ sentence bargain reached by the parties and is prepared to impose sentence in compliance with the terms of the agreement.
	(or)
12. Accept, reject, or conditionally accept the plea agreement/sentence bargain. MCR 6.610(E)(5); see also MCR 6.302; MCR 6.310.	The court rejects the plea agreement/ sentence bargain as proposed by the parties. You may affirm or withdraw your plea. (In cases involving non-binding prosecutorial sentence recommendations, the court must indicate what it considers a more appropriate sentence).
	(or)
	The court conditionally accepts the plea agreement/sentence bargain reached by the parties. I am not required to follow the sentence agreement (or sentence recommended by the prosecutor). If the agreed-upon sentence is for a specified term or within a specified range, and if, at sentencing, the court decides to impose a longer sentence than the one agreed on, you will have the right to withdraw your plea.

Procedure / Authority	Script
13. Determine that defendant's plea is accurate by establishing a factual basis for concluding that defendant is guilty of the offense to which he or she is pleading. MCR 6.610(E)(1).	13. **Guilty pleas only:** Did you commit the crime alleged in the complaint or warrant? Explain your involvement in the crime.
No contest pleas: the court may NOT question defendant about his or her involvement in the crime. A factual basis for defendant's guilt must be established by other available information. MCR 6.610(E)(1)(b).	**No contest pleas:** The court must establish a factual basis for your plea by using available information. (The court may review a police report or take testimony from an available witness to establish the factual basis.)
14. Set or continue bail. Impose sentence or schedule date for sentencing. Determine whether to impose conditions on defendant's presentencing release.	14. The court accepts your plea. Sentencing is set for (date and time). Bail is set/ continued at $____. You are ordered to comply/continue complying with the following conditions of your release. (or) The court accepts your plea. The court sentences you to _____.
15. Acknowledge defendant's not guilty plea or if defendant stands mute, enter a not guilty plea on his or her behalf. Determine whether defendant wishes the assistance of counsel and if so, whether counsel must be appointed.	15. You have pleaded not guilty to the charged offense (or a plea of not guilty has been entered for you). Therefore, the case will proceed to trial. Do you wish to have the assistance of an attorney?
a. If defendant is indigent and wants the assistance of counsel and a conviction could result in imprisonment, the court must appoint an attorney. MCR 6.610(D)(2).	a. You have asked for the assistance of counsel and qualify for a court-appointed attorney. The court appoints/will appoint (name of attorney or date set for appointment) to represent you.
b. If defendant can afford to retain an attorney, inform him or her of the time available before trial in which he or she must obtain representation.	b. You have expressed the desire for the assistance of counsel, and you do not qualify for a court-appointed lawyer. The court will allow you (length of time) to retain an attorney.
c. If defendant does not wish to be represented by an attorney, go to step # 17.	c. If defendant does not wish to be represented by an attorney, go to step # 17.

Procedure / Authority	Script
16. Set bail, determine whether defendant's pretrial release should be accompanied by conditions, schedule next court date, and adjourn proceedings.	16. Bail is set at $_____. As (a) condition(s) of bail, you are ordered to comply with the following conditions of bond: (list of conditions). You must appear with counsel (appointed or retained) before the court on (date) at (time). This hearing is adjourned.
17. If defendant does not wish the assistance of counsel:	17. To defendant:
a. Obtain defendant's waiver of counsel for the record. To waive counsel, defendant must be informed of right and waive it orally on the record or in a writing made part of the file. MCR 6.610(D)(3)(a)-(b).	a. You have indicated that you do not want the assistance of an attorney. Do you understand that you have the right to be represented by counsel, and that if you are indigent and conviction might result in imprisonment, you have the right to a court-appointed lawyer? Do you wish to waive these rights?
b. Determine whether defendant wants a jury trial. Waiver of jury trial must be on the record or in a writing made part of the file. MCR 6.610(D)(3)(b) and MCL 763.3(1)-(2). See SCAO Form MC 260.	b. You have pleaded not guilty and elected not to be represented by an attorney. Do you want a jury trial?

Checklist for Guilty and No Contest Pleas

Date:Offense: Case No.Statute: . Defendant:Min. Penalty: Defense Atty:Max. Penalty: .

NOTE: A district judge has the authority to accept a felony plea, and *must* take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. MCL 766.4(3); see also MCR 6.111(A). A district court *magistrate* may not accept a felony plea.[61] For a chart outlining the differences in procedures before and after January 1, 2015, as a result of statutory reforms concerning probable cause conferences, preliminary examinations, and felony pleas, see SCAO Memorandum, July 23, 2014.

If defendant's plea immediately follows his or her arraignment, begin with number 5 below. 1. ☐Identify case number and parties for the record.[62]

2. ☐ Advise defendant of the name of the offense.[63]

3. ☐ Advise defendant of the maximum sentence possible for conviction of the offense.[64]

4. ☐ Advise defendant of any mandatory minimum sentence required for conviction of the crime.

5. ☐ Before accepting defendant's plea in a case involving MCL 257.625 or an ordinance substantially corresponding to MCL 257.625(1), (2), (3), (6), or (8), advise defendant of maximum possible sentence/fine, and inform defendant that maximum possible license sanctions are based on master driving record maintained by Secretary of State.

6.☐Advise defendant of the following rights:[65]. a.☐the right to the assistance of an attorney at all proceedings.

b. ☐ the right to a trial.

c. ☐ the right to be appointed an attorney at public expense if defendant is indigent and conviction could result in imprisonment.

d. ☐ the right to a jury trial, when required by law.

7.☐Determine how defendant wishes to plead: a.☐Guilty.

b. ☐ No contest.

c. ☐ Not guilty or stands mute. See *Flowchart for Not Guilty Pleas*.

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[61] See MCL 766.1; MCL 600.8511.

[62] This information may be given to defendant on the record or in a writing made part of the file.

[63] This information may be given to defendant on the record or in a writing made part of the file.

[64] This information may be given to defendant on the record or in a writing made part of the file.

[65] This information may be given to defendant on the record or in a writing made part of the file.

8.☐If the plea is being taken by the district court under MCL 766.4(3), verify that a circuit court judge has been assigned to the case and that the identity of the circuit court judge is known to the parties. 9.☐Advise defendant of the consequences of his or her guilty or no contest plea if accepted: a.☐If plea is accepted, defendant will not have a trial of any kind.

b. ☐ If plea is accepted, defendant gives up right to have defense witnesses called at trial.[66]

c. ☐ If plea is accepted, defendant gives up right to cross-examine prosecution witnesses at trial.[67]

d. ☐ If plea is accepted, defendant gives up the right to testify or to remain silent without any inference being drawn from defendant's exercise of the right to remain silent.[68]

e. ☐ If plea is accepted, defendant gives up the presumption of innocence and the requirement that guilt be proved beyond a reasonable doubt.[69]

10. ☐ Obtain defendant's waiver of these trial rights on the record. If a writing was used to advise defendant of trial rights, defendant must state on the record that he or she read, understood, and waived the rights. The individual rights need not be repeated.

11. ☐ Determine that the plea is understanding and voluntary.

a. ☐ Ask the defendant whether anyone has threatened him or her.

b. ☐ Ask the defendant whether it is the defendant's own choice to plead guilty.

No plea agreement in place.

a. ☐ If there does not yet exist an agreement, either party may ask the court to indicate on the record what sentence it believes is appropriate based on the information then available to it.

b. ☐ If there is no plea agreement, ask the defendant whether anyone has promised him or her anything.

Plea agreement. [NOTE: A district court judge accepting a plea under MCL 766.4(3) should not accept a felony plea that is contingent upon a sentencing agreement or *Cobbs*[70] proposal, unless there is an agreement between the circuit and district court judges on how this is to be done. If no such procedure is in place, the case should be bound over to circuit court and the assigned circuit court judge should consider any pleas pursuant to *Cobbs* or *Killebrew*.]

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[66] This information may be given to defendant on the record, in a writing made part of the file, or in a writing referred to on the record.

[67] This information may be given to defendant on the record, in a writing made part of the file, or in a writing referred to on the record.

[68] This information may be given to defendant on the record, in a writing made part of the file, or in a writing referred to on the record.

[69] This information may be given to defendant on the record, in a writing made part of the file, or in a writing referred to on the record.

[70] *People v Cobbs*, 443 Mich 276 (1993).

a. ☐ If there is a plea agreement or sentence bargain, place the terms of the agreement on the record and determine that all parties agree. If there is a written agreement, it must be made part of the case file.[71]

b. ☐ If the agreement is for a sentence for a specified term or within a specified range, the court may:

i. ☐ reject the agreement and (unless this is a *Cobbs* plea) indicate what sentence the court believes is appropriate.

ii. ☐ accept the agreement after consideration of the presentence information report and sentence the defendant to a specified term or within a specified range as agreed to.

iii. ☐ accept the agreement subject to review of a presentence report or the receipt of additional information relevant to the defendant's sentence; explain to the defendant that the court is not bound to follow the sentence agreement, and that if the court chooses not to follow the agreement, the defendant will be allowed to withdraw from the agreement.

iv. ☐ take the plea under advisement; explain to the defendant that the court is not bound to follow the sentence agreement, and that if the court chooses not to follow the agreement, the defendant will be allowed to withdraw from the agreement.

c. ☐ If the agreement contains a non-binding prosecutorial sentence recommendation, the court may:

i. ☐ reject the agreement and indicate what sentence the court believes is appropriate.

ii. ☐ accept the agreement after consideration of the presentence information report.

iii. ☐ accept the agreement subject to review of a presentence report or the receipt of additional information relevant to the defendant's sentence; explain to the defendant that the court is not bound to follow the prosecutorial sentence recommendation. (May also advise the defendant that he or she will not be entitled to withdraw the plea if the court declines to follow the prosecutorial sentence recommendation.)

iv. ☐ take the plea under advisement; explain to the defendant that the court is not bound to follow the prosecutorial sentence recommendation. (May also advise the defendant that he or she will not be entitled to withdraw the plea if the court declines to follow the prosecutorial sentence recommendation.)

d. ☐ If there is a plea agreement, ask the defendant whether he or she has been promised anything outside what is reflected in the plea agreement.

12. ☐ Determine that the plea is accurate by establishing a factual basis for the plea:[72]

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[71] SCAO Form CC 414, *Plea Agreement*, may be used for this purpose.

[72] Venue may need to be verified as part of establishing a factual basis for the plea.

a. ☐ For no contest pleas, the court may not question defendant about his or her involvement in the charged crime. A factual basis for the plea must be established using other available information.

b. ☐ For guilty pleas, the court may question defendant about his or her role in the charged offense to establish a factual basis for the plea.

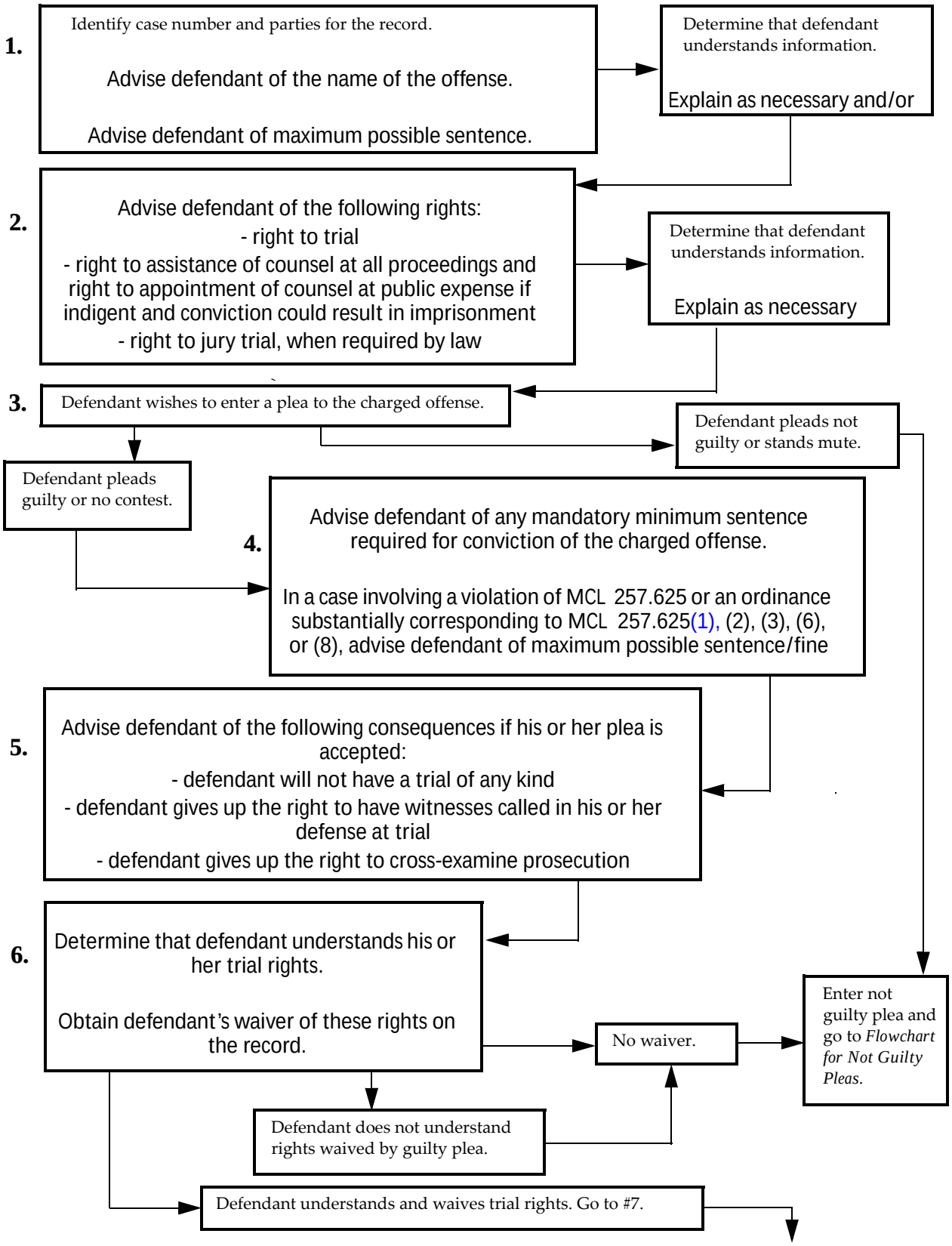
13. ☐ Set or continue bail.

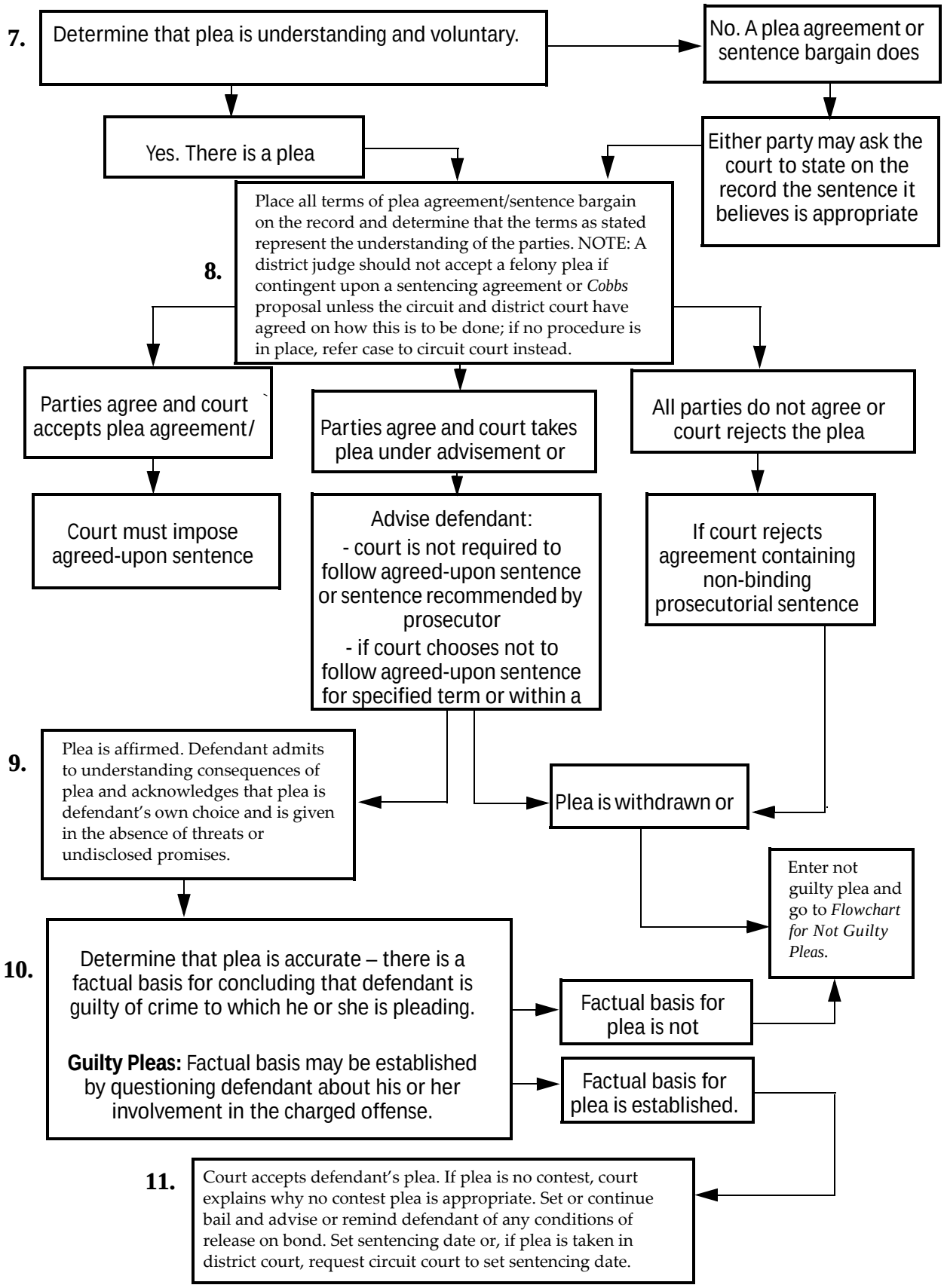
14. ☐ Advise or remind defendant of any conditions attendant to his or her release.

15. ☐ Set sentencing date or, if plea was taken in district court, request circuit court to set sentencing date.

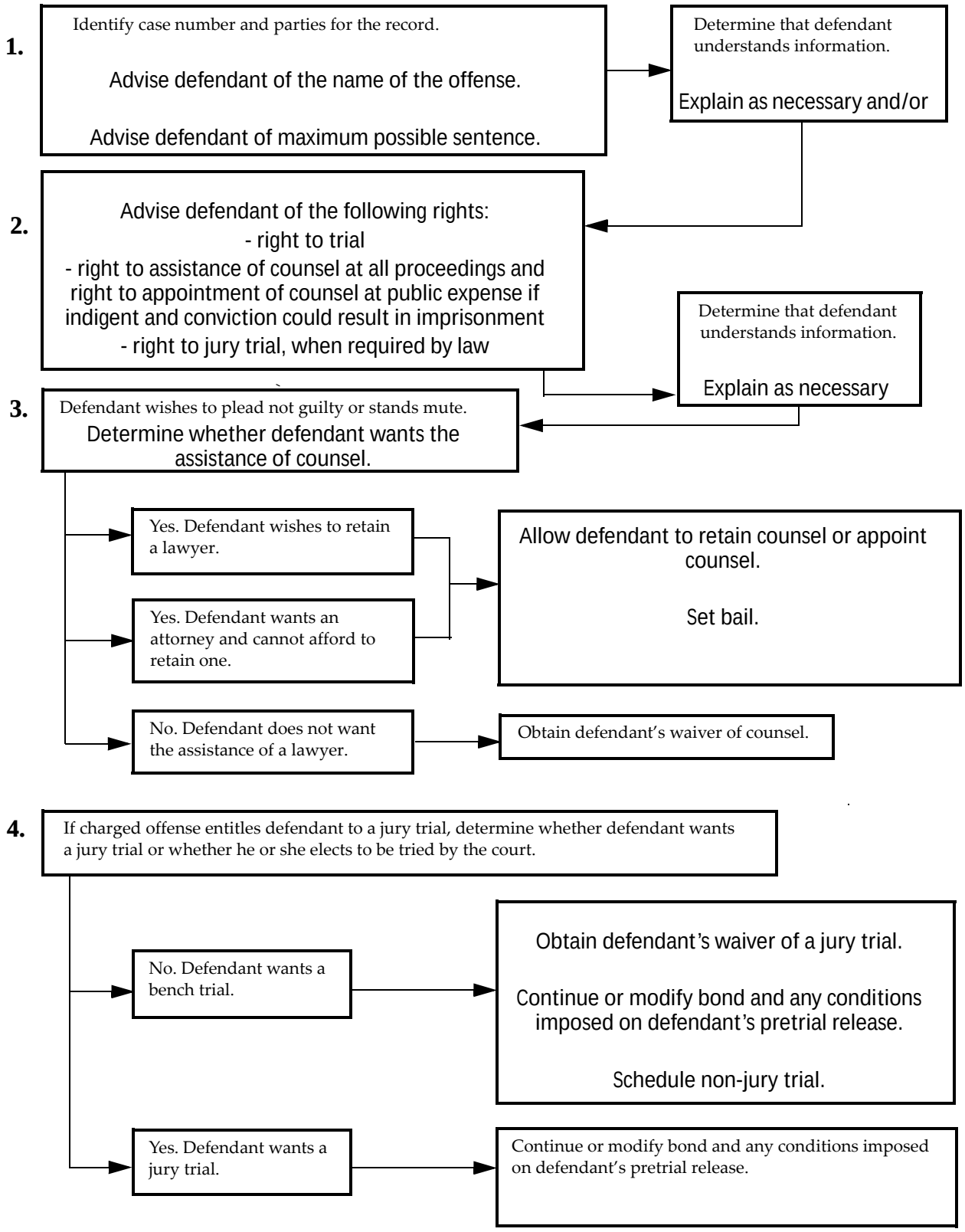
Flowchart for Guilty & No Contest Pleas

If defendant's plea immediately follows his or her arraignment, begin with #3 below.




7.
Determine that plea is understanding and voluntary.
No. A plea agreement or sentence bargain does
Yes. There is a plea
Either party may ask the court to state on the record the sentence it believes is appropriate
8.
Place all terms of plea agreement/sentence bargain on the record and determine that the terms as stated represent the understanding of the parties. NOTE: A district judge should not accept a felony plea if contingent upon a sentencing agreement or *Cobbs* proposal unless the circuit and district court have agreed on how this is to be done; if no procedure is in place, refer case to circuit court instead.
Parties agree and court accepts plea agreement/
Parties agree and court takes plea under advisement or
All parties do not agree or court rejects the plea
Court must impose agreed-upon sentence
Advise defendant:
- court is not required to follow agreed-upon sentence or sentence recommended by prosecutor
- if court chooses not to follow agreed-upon sentence for specified term or within a
If court rejects agreement containing non-binding prosecutorial sentence
9.
Plea is affirmed. Defendant admits to understanding consequences of plea and acknowledges that plea is defendant's own choice and is given in the absence of threats or undisclosed promises.
Plea is withdrawn or
Enter not guilty plea and go to *Flowchart for Not Guilty Pleas.*
10.
Determine that plea is accurate – there is a factual basis for concluding that defendant is guilty of crime to which he or she is pleading.
Guilty Pleas: Factual basis may be established by questioning defendant about his or her involvement in the charged offense.
Factual basis for plea is not
Factual basis for plea is established.
11.
Court accepts defendant's plea. If plea is no contest, court explains why no contest plea is appropriate. Set or continue bail and advise or remind defendant of any conditions of release on bond. Set sentencing date or, if plea is taken in district court, request circuit court to set sentencing date.

Flowchart for Not Guilty Pleas



Part F: Trial

Jury Waiver in Criminal Case

MCL 763.3
MCR 6.401 and 6.402

SWEAR THE DEFENDANT:

Advise the defendant of his or her constitutional right to a jury trial;

Address the defendant personally and ascertain whether:

(1)Defendant understands his/her right to have a jury trial;

(2)Defendant has consulted with his/her attorney (or had an opportunity to consult with an attorney);

(3)Defendant is voluntarily giving up his/her right to a jury trial and choosing to be tried by the court. Ask:

- Has anyone promised you anything to get you to waive a jury trial?

- Has anyone threatened you to get you to waive a jury trial?

- Is it your free choice to waive a jury trial in this case?

Note: MCL 763.3 provides language for a written waiver form, which has been incorporated into SCAO Form MC 260, *Waiver of Trial by Jury and Election to be Tried Without Jury*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/generalcriminal/mc260.pdf. A written waiver is not required by the court rule, MCR 6.402, which supersedes the statute. 1989 Staff Comment to MCR 6.402. However, it is good practice to use a written waiver.

OBTAIN CONSENT OF THE PROSECUTOR:

The statute and MCR 6.401 require the consent of the prosecutor and the approval of the court.

MAKE A RECORD OF PRIOR INVOLVEMENT:

Make a record of the court's prior involvement with the case and consider disqualification if the court is too familiar with the file. MCR 2.003. Consider obtaining express approval of parties to proceed if the court has had prior involvement. The case should be reassigned if the court has significant information regarding the case which would not be in evidence during the trial, such as defendant's failure of a lie detector test.

FIND:

Defendant has: (1) been arraigned; or (2) has waived an arraignment on the information; or (3) in a court where arraignment on the information has been eliminated under MCR 6.113(E), the defendant has otherwise been provided with a copy of the information and any notice of intent to seek an enhanced sentence pursuant to MCL 769.13.

Defendant has been properly advised of the right to a jury trial;

Defendant has had an opportunity to consult with counsel; and,

The waiver has occurred in open court as required by law.

The waiver has been made knowingly, voluntarily, and intelligently.

ACCEPT WAIVER.

Bench Trial Decision Checklist

MCL 600.2101; MCL 768.29
MCR 6.403

DECISION:

Generally. "When trial by jury has been waived, the court with jurisdiction must proceed with the trial. The court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record." MCR 6.403. See also *People v Robert Jackson*, 390 Mich 621, 627 (1973).

DECISION CHECKLIST:

Statement of Case;

Issues;

Applicable statutes, if any;

Applicable jury instructions (including elements of the offense in a criminal case);

Burden of proof;

Any presumptions which may apply;

Analysis;

Findings of fact ("Factual findings are sufficient as long as it appears that the trial court was aware of the issues and correctly applied the law." *People v Kemp*, 202 Mich App 318, 322 (1993). "[A] trial judge sitting as the trier of fact may not enter an inconsistent verdict." *People v Walker*, 461 Mich 908 (1999));

Conclusions of law; and

Direct entry of the appropriate judgment.

Trial Outline—Criminal Case

1.Have the case called for trial.

2.Before beginning voir dire, give prospective jurors appropriate preliminary instructions and swear them. MCR 6.412(B).

3.Voir dire prospective jurors. MCR 6.412(C).

4.Swear jury. MCR 6.412(F).

5.Ascertain whether any party wishes to invoke the rule to exclude witnesses scheduled to testify in the case from the courtroom. MRE 615.

6.Prosecutor makes opening statement. MCR 2.513(C).

7.Defense counsel makes opening statement (unless reserved). MCR 2.513(C).

8.Prosecutor calls witnesses.

9.Prosecutor rests.

10.Motion for directed verdict of acquittal. MCR 6.419.

11.Defense counsel makes opening statement if he or she has been permitted to reserve. MCR 2.513(C).

12.Defense counsel calls witnesses for the defense.

13.Defense rests.

14.Prosecutor rebuttal.

15.Out of the hearing of the jury, rule on counsel's requests for instructions and inform counsel of its proposed action on the requests before their closing arguments. MCR 2.512(A); see also MCR 2.513(N)(1).

16.Closing arguments by prosecution, closing argument by defense, rebuttal by prosecution. MCR 2.513(L).

17.If desired, fairly and impartially sum up the evidence without commenting on witness credibility and without stating a conclusion on the ultimate issue of fact; instruct the jury that it must determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation. MCR 2.513(M).

18.Instruct the jury; advise that the jury may submit any written questions about the instructions that arise during deliberations; invite the jury to ask any questions about the instructions before retiring to deliberate; and provide a written copy of the instructions to take into the jury room. MCR 2.513(N).

19.Excuse and thank alternate juror(s). MCR 6.411.

20.Swear bailiff. MCL 768.16.

21.Instruct the jury to go to the jury room and commence its deliberations, allowing the jurors to take into the jury room their notes and final instructions; may also allow jurors

to take the reference document, if one has been prepared, as well as any exhibits and writings admitted into evidence. MCR 2.513(O).

22.As applicable, have the clerk give the reference document, exhibits and verdict forms to the jury.

23.Recess court during the jury deliberations.

24.Before responding to any communications from the jury, consult with counsel on the record. MCR 2.513(N).

25.If the jury fails to arrive at a verdict before the conclusion of the first day's deliberations, provide either for their overnight sequestration or permit them to separate after admonishing them as to their conduct and fixing the time for their return to resume deliberations. Provide for safekeeping of exhibits.

26.When the jury has agreed on a verdict, reconvene court and take the verdict. MCR 6.420(A). Have foreperson read verdict. Compare verdict form to assure consistent with verdict.

27. Before the jury is discharged, the court on its own initiative may (or on the motion of a party must) poll each juror in open court as to whether the verdict announced is his or her verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury. MCR 6.420(D). The court is required to cut off polling as soon as disagreement is disclosed due to its potentially coercive effect. The court should not question the jury to determine where it stands numerically.

28.Accept verdict.

29. Thank and discharge the jury. Direct the parties to retrieve the exhibits submitted by them as provided in MCR 2.518(B).

30.If the verdict is "not guilty," discharge defendant.

31.If defendant has been found guilty, determine whether defendant should be committed to custody and schedule sentence.

32.Adjourn or recess court.

SOURCE: Benchbook for U.S. District Court Judges.

Voir Dire Questions for the Court in Criminal Case

Know anything about the case?

Personal concerns, commitments, or problems that would interfere?

Prior jury service? Type of case and result?

Ever been a witness in a case?

Ever been a party in a case?

Have they or a close relative or friend ever been a victim of crime?

Have they or a close relative or friend ever been accused of a crime?

Are they, or family, or friends involved in law enforcement?

Are they, or family, or friends involved in criminal defense?

Possible bias because of race, gender, or other reasons?

Member of any advocacy groups?

Able to sit in judgment of another person or persons?

[Can they be fair and impartial?]

[Elaborate on burden of proof?]

[Elaborate on any special claims or defenses?]

[Elaborate on right to remain silent?]

Final Instructions Checklist—Criminal

Explain how jury instructions are assembled. Parties request. Court ultimately selects.

Outline sections.

Introduction.

Evidence.

Elements of offense.

Deliberations.

Mark jury instructions as court's exhibit.

Read jury instructions.

Review and read verdict form.

Excuse juror(s).

Swear bailiff.

Bailiff takes:

Exhibits.

Jury instructions.

Verdict form.

Verdict Checklist

Confirm jury has reached verdict.

Have foreperson stand.

Read verdict - judicial aide or judge inquires.

Have bailiff take verdict form.

Confirm verdict form consistent with verdict announced.

Confirm unanimous verdict.

Poll?

Accept verdict.

Dismiss jury.

Preserve jury questions and any written jury instructions.

Destroy juror notes.

Direct entry of judgment.

Set sentencing if conviction.

Address bond.

Attorneys take exhibits and sign for them.

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