CRIMINAL PROCEDURE

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I. INTRODUCTION

As in past *Survey* periods, the Michigan appellate courts continue to make prosecutor-friendly rulings. Of the notable decisions discussed herein, the defendant prevailed in only a single instance, *People v. Fonville*.[1] Another trend that continues from past *Survey* periods is that a majority of the significant published decisions are in appeals taken by prosecutors.

The opinions in this period include broad approval of the use of *Terry* stops[2] by the police and a notable reinterpretation of the holding in *People v. Bender*[3] that requires the police to notify defendants in custody that they have counsel trying to reach them. The 180-day rule continues to be of interest to the Michigan Supreme Court, as are the requirements of the Sex Offender Registration Act.[4] With respect to the latter, the court of appeals issued two opinions holding that the listing of particular defendants on the sex offenders' registry was not cruel or unusual

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1. 291 Mich. App. 363, 804 N.W.2d 878 (2011).
2. Terry v. Ohio, 392 U.S. 1 (1968).
3. People v. Bender, 452 Mich. 594, 618, 551 N.W.2d 71 (1996).
4. MICH. COMP. LAWS. ANN. § 28.721 (West 2004).

punishment under the Michigan Constitution.[5] In so doing, the court of appeals limited the scope of an earlier published opinion holding that SORA was cruel or unusual punishment under the facts of that case.[6] In another opinion, the court held that to render constitutionally sufficient representation, counsel must advise defendants whether they will be listed on the sex offender registry before they plead guilty to an offense.[7] Finally, the Michigan Court of Appeals issued a single opinion on what constitutes newly discovered evidence for purposes of new trial motions.[8]

II. SEARCH AND SEIZURE

The Fourth Amendment to the U.S. Constitution guarantees people the right to be free from unreasonable searches and seizures.[9] As part of that protection, a police officer may make a brief investigatory stop, known as a *Terry* stop, only if the officer can point to "specific and articulable facts" that would indicate to a reasonable person that a crime has been, is being, or is about to be committed.[10] During the *Survey* period, the Michigan Court of Appeals issued two opinions addressing the amount of evidence necessary to support *Terry* stops of a motor vehicle.[11] In both instances, the court found sufficient evidence to support the stop and reversed the trial court's suppression of evidence obtained as a result.[12]

A. People v. Barbarich

The first, and more significant, case decided during the period involved how much information is sufficient to support a stop where the person providing the information is an anonymous informant, specifically a person driving in another vehicle.[13] In *People v. Barbarich*, a woman in a pickup truck made eye contact with a police officer passing her in a marked patrol car, pointed at the vehicle in front of her, and

5. MICH. CONST. art. 1, § 16. *See Fonville*, 291 Mich. App. at 380; People v. TD, 292 Mich. App. 678, --N.W.2d -- (2011).

6. People v. Dipiazza, 286 Mich. App. 137, 153, 778 N.W.2d 264 (2009).

7. *Fonville*, 291 Mich. App. at 380.

8. People v. Terrell, 289 Mich. App. 553, 797 N.W.2d 684 (2010).

9. U.S. CONST. amend. IV.

10. *Terry*, 392 U.S. at 21.

11. People v. Barbarich, 291 Mich. App. 468, 469, 807 N.W.2d 56 (2011); People v. Steele, 292 Mich. App. 308, 313-14, 806 N.W.2d 753 (2011).

12. *Barbarich*, 291 Mich. App. at 480; *Steele*, 292 Mich. App. at 315-16.

13. *Barbarich*, 291 Mich. App. at 469.

mouthed "[a]lmost hit me."[14] The officer immediately made a U-turn, turned on the car's emergency lights and sirens, and pulled over the defendant whom the officer discovered to be intoxicated.[15]

Analyzing the encounter as a *Terry* stop, the majority held that the woman's "tip" was sufficient to support the stop of the vehicle.[16] In reaching this conclusion, the majority relied upon an Eighth Circuit Court of Appeals decision, *United States v. Wheat*,[17] and a Michigan Court of Appeals decision, *People v. Estabrooks*.[18] In *Wheat*, the federal court held that less information is necessary to justify an investigative stop based on an anonymous tip of erratic driving than "for other types of criminal activity that pose less immediate danger."[19] The dissent questioned the majority's reliance on *Wheat* because the information given in *Wheat* was far more specific and detailed.[20] In *Wheat*, the 9-1-1 caller described the car as passing on the wrong side of the road and "being driven as if by a 'complete maniac.'"[21] The *Wheat* court had emphasized the importance that the tip include "a sufficient quantity of information to support an inference" of an actual traffic violation, because just as an officer's hunch was not reasonable suspicion to support a stop, neither is a private citizen's.[22]

The other case relied upon by the majority, *Estabrooks*, also involved what the court described as a "tip" from an informant, namely a citizen who approached an officer and told him that the defendant had rear-ended him multiple times.[23] Relying on a Michigan Supreme Court case, *People v. Tooks*, [24] the *Estabrooks* court held that the tip was sufficiently reliable to justify the stop.[25]

The majority in *Barbarich* noted that when a tip involves "erratic and possibly drunk driving" the threat of an imminent danger is actually higher than when the tip involves a person armed with a gun.[26] Because of this higher danger, "less information is required from citizen informants reporting contemporaneous incidents of erratic or potentially

14. *Id.* at 470.
15. *Id.*
16. *Id.* at 480.
17. 278 F.3d 722 (8th Cir. 2001).
18. 175 Mich. App. 532, 438 N.W.2d 327 (1989).
19. *Barbarich*, 290 Mich. App. at 475 (citing *Wheat*, 278 F.3d at 729-39).
20. *Id.* at 492 (Gleicher, J., dissenting).
21. *Id.* (Gleicher, J., dissenting) (quoting *Wheat*, 278 F.3d at 724).
22. *Id.* at 493 (Gleicher, J., dissenting) (quoting *Wheat*, 278 F.3d at 732).
23. *Id.* at 476 (citing *Estabrooks*, 175 Mich. App. at 534).
24. 403 Mich. 568, 271 N.W.2d 503 (1978).
25. *Barbarich*, 291 Mich. App. at 476 (citing *Estabrooks*, 175 Mich. App. at 536-37).
26. *Id.* at 478 (quoting *Wheat*, 278 F.3d at 736).

dangerous driving to justify an investigative stop than a strict application of *Tooks* would suggest."[27] The *Barbarich* opinion continued, "while 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 with regard to a tip's reliability; as to the latter, it will suffice if law enforcement corroborates the tip's innocent details."[28]

The court found the tip in *Barbarich* to be sufficiently reliable to support the stop, asserting that if the officer had waited long enough to observe for himself whether the defendant was driving erratically, he would have had more than a reasonable suspicion of a crime being committed, he would have had "probable cause to seize defendant and issue an appropriate citation."[29] In the court's opinion, requiring this additional evidence would deprive police the ability to make investigatory stops altogether.[30]

Dissenting, Judge Gleicher termed the majority's opinion as "empower[ing] private citizens to select certain motorists for warrantless searches and seizures" by police officers without any reasonable suspicion or probable cause.[31] Judge Gleicher would have held "that an uncorroborated tip from an unidentifiable source lacking any pertinent detail and suggesting only an ordinary traffic violation cannot serve as a vehicle for violating the Fourth Amendment."[32]

In reaching this conclusion, Judge Gleicher discussed and described the tests used by the United States and Michigan Supreme Courts to determine whether anonymous tips are sufficiently reliable to provide police officers with reasonable suspicion to support a stop.[33] In particular, in *Florida v. JL*,[34] the United States Supreme Court held that to be sufficient to support a stop, an anonymous tip must "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."[35]

In Judge Gleicher's view, the "tip" the officer received here contained far too little both in terms of content and reliability to support the traffic stop at issue.[36] The officer had no means to test her knowledge or credibility, as required by the Supreme Court in *JL*, because she drove

27. *Id.* at 479.
28. *Id.* at 479-80.
29. *Id.* at 481-82.
30. *Id.* at 482 (quoting *Wheat*, 278 F.3d at 733).
31. *Barbarich*, 291 Mich. App. at 482 (Gleicher, J., dissenting).
32. *Id.* at 494 (Gleicher, J., dissenting).
33. *Id.* at 485-87.
34. 529 U.S. 266 (2000).
35. *Barbarich*, 291 Mich. App. at 487 (quoting *JL*, 529 U.S. 272).
36. *Id.* at 490 (Gleicher, J., dissenting).

away.[37] The officer did not know the driver, nor could he find her again, so he could not determine her veracity or motive in accusing the other driver.[38] The fact that she left the scene distinguished the case from *Estabrooks*, on which the majority relied, because in that case the informant remained at the scene accusing the other driver.[39] Since he had only lip read the tip, the officer also had no basis to assess the informant's credibility.[40]

Judge Gleicher also took issue with whether saying someone "almost hit me" provided enough information for the officer to suspect the defendant had broken any law.[41] As anyone who drives knows, cars "almost hit" each other for a myriad of reasons, many of which are not criminal in nature.[42] Moreover, in the dissenter's view, the statement "'almost hit me,' without more," does not establish reasonable cause to believe the defendant had violated the reckless driving statute—which in any event is a civil infraction.[43] Judge Gleicher stated, "[i]n my view, the majority ignores the critical difference between stopping a vehicle on the basis of a tip suggesting a crime in progress and a tip hinting at the commission of a civil traffic offense."[44] A higher standard, probable cause, is required for stops for criminal infractions.[45]

B. People v. Steele

In the other case decided by the Michigan Court of Appeals during the *Survey* period, *People v. Steele*, the court also reversed a trial court order granting a motion to suppress evidence.[46] The police stopped the defendant's car based on information received from a loss prevention officer at a local Meijer store.[47] Meijer's pharmacists contact loss prevention officers when a person who does not live in the area buys certain items.[48] The Meijer employee called the police to report that the defendant had purchased "packages of Sudafed and one gallon of

37. *Id.* at 488 (Gleicher, J., dissenting).
38. *Id.* (Gleicher, J., dissenting).
39. *Id.* at 488-89 (Gleicher, J., dissenting) (quoting *Estabrooks*, 175 Mich. App. at 536-37).
40. *Id.* at 489 (Gleicher, J., dissenting).
41. *Barbarich*, 291 Mich. App. at 489 (Gleicher, J., dissenting).
42. *Id.* (Gleicher, J., dissenting).
43. *Id.* at 491 (Gleicher, J., dissenting).
44. *Id.* at 492 (Gleicher, J., dissenting).
45. *Id.* at 491-92 (Gleicher, J., dissenting) (quoting Whren v. United States, 517 U.S. 806, 810 (1996)).
46. *Steele*, 292 Mich. App. at 310.
47. *Id.*
48. *Id.* at 315.

Coleman fuel, both of which are known precursors for methamphetamine."[49] The loss prevention officer followed the defendant out of the store and watched him drive away.[50] The police had previously been given information from the officer that was "always . . . spot on."[51]

When the defendant's car was stopped, the defendant told the officer that he did not have a driver's license.[52] The officer ordered the defendant to get out of his car, and after telling the defendant that he had information that the defendant possessed drugs, the officer asked him if he had any narcotics in the vehicle.[53] In an ill-advised move, the defendant told the officer that there were drugs in the vehicle, and during a "brief conversation" with the officer, admitted that he used and/or cooked methamphetamine, and had components to manufacture the same.[54] Not surprisingly, the defendant was arrested for possession of methamphetamine and driving without a license.[55] As the defendant sat cuffed in the backseat of the squad car, the officer searched his car and found methamphetamine.[56] During a subsequent interrogation at the police station, the defendant waived his *Miranda* rights[57] and repeated what he had told the officer on the scene.[58]

The court of appeals held that the defendant's legal purchase of "a combination of methamphetamine precursors [the Sudafed and Coleman fuel] from one store, when considered in totality with [the officer's] training and experience . . . formed a solid basis . . . to justify the *Terry* stop."[59] The court further held the "brief questioning" to be within the scope of the stop, and so also constitutional.[60]

As the court of appeals explained in *Barbarich* and *Steele*, the *Terry* standard requires a very low level of evidence to support traffic stops.[61] In *Steele*, the defendant had made perfectly legal purchases of two common items—cold medicine and stove fuel—while travelling.[62] Nonetheless, the officer's "training and experience" turned this legal

49. *Id.* at 310.
50. *Id.*
51. *Id.* at 311.
52. *Steele*, 292 Mich. App. at 311.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. Miranda v. Arizona, 384 U.S. 436 (1966).
58. *Steele*, 292 Mich. App. at 312.
59. *Id.* at 316.
60. *Id.* at 319.
61. *Barbarich*, 291 Mich. App. at 473; *Steele*, 292 Mich. App. at 314.
62. *Steele*, 292 Mich. App. at 310.

purchase into a "solid basis" for the stop.[63] In *Barbarich*, the stop was justified based solely on the officer lip reading "almost hit me" from a passing driver.[64] Thus, under *Barbarich*, drivers on Michigan roads can be pulled over based on nothing more than the barest descriptions of their conduct by fellow drivers.

III. RIGHT TO COUNSEL

A. Waiver of Right To Counsel: People v. Crockran

In *People v. Bender*,[65] the Michigan Supreme Court held that the police must inform a suspect when retained counsel is available for consultation, otherwise any statement made by the defendant after the attorney's arrival would be suppressed.[66] In *People v. Crockran*,[67] the court of appeals reversed the trial court's order suppressing the defendant's statement after the police failed to inform him that his attorney had called the station attempting to contact him.[68]

Examining *Bender*, the court of appeals in *Crockran* explained that the lower court and a previous panel of the court of appeals had erred because they used the wrong opinion from *Bender*.[69] Specifically, the courts had mistakenly relied upon the opinion of Justice Cavanagh, which is printed first in the reporter and referred to as the lead opinion by the dissent, instead of what is titled the concurring opinion of Justice Brickley.[70] In making this determination, the court of appeals relied upon the Michigan Supreme Court's later reference to the concurring opinion as stating the "ultimate holding" in *Bender*.[71]

The *Crockran* court held that *Bender*'s prophylactic rule applies only if the interrogating officer actually knew and concealed from the defendant the fact that his attorney had attempted to contact him.[72] The court dismissed as dicta an earlier decision of another panel of the court of appeals announcing a broader rule which required only that contact be

63. *Id.* at 312, 316.
64. *Barbarich*, 291 Mich. App. at 481-82.
65. 452 Mich. 594; 551 N.W.2d 71 (1996).
66. *Id.* at 618. In contrast, the United States Supreme Court has held that a suspect's *Miranda* waiver was valid despite the police's failure to inform a suspect that a third party has retained counsel for him. Moran v. Burbine, 475 U.S. 412, 421 (1986).
67. 292 Mich. App. 253, 808 N.W.2d 499 (2011).
68. *Id.* at 254-55.
69. *Id.* at 257.
70. *Id.*
71. *Id.* (citing People v. Sexton, 458 Mich. 43, 53, 580 N.W.2d 404 (1998)).
72. *Id.* at 258.

made with someone in the police station in order to invoke the protections of *Bender*.[73]

The court of appeals held that in this case the police had not concealed from the defendant the fact that he had an attorney, even though he was never told that the attorney had made numerous calls to the stationhouse in an effort to reach him.[74] The court based its determination on facts that showed that the defendant actually knew he had an attorney.[75] First, although counsel had not been paid before defendant's arrest, the court held that an attorney-client relationship existed.[76] Among other things, the defendant had consulted with him twenty times before his arrest, and in fact was on the phone with him at the moment of arrest.[77] The attorney had told the defendant to let the police know that he wanted to speak with them, but the phone went dead before the attorney was able to do so.[78] The defendant repeatedly asked for his attorney and told the interrogating officer that he needed his attorney.[79] The court held that these facts proved that the defendant knew he had an attorney.[80] Thus, the statement should not have been suppressed under *Bender* and was admissible.[81]

B. Effective Assistance of Counsel—Collateral Consequences

In *Padilla v. Kentucky*,[82] the United States Supreme Court held that defense counsel must inform her client whether his plea carries a risk of deportation.[83] If counsel fails to do so, her performance falls below "prevailing professional norms."[84] In *People v. Fonville*,[85] the Michigan Court of Appeals reached the same conclusion with respect to advising defendants that their pleas will require them to register as sex

73. *Id.* at 257-58 (citing People v. Leversee, 243 Mich. App. 337; 622 N.W.2d 325 (2000)).

74. *Crockran*, 292 Mich. App. at 262-63.

75. *Id.*

76. *Id.* at 261.

77. *Id.* at 260.

78. *Id.*

79. *Id.* at 261.

80. *Crockran*, 292 Mich. App. at 261.

81. *Id.* at 263.

82. 130 S. Ct. 1473 (2010).

83. Padilla v. Kentucky, 130 S. Ct. 1473 (2010). The Michigan Court of Appeals reached a contradictory conclusion, holding that deportation was a collateral consequence of which counsel did not need to advise the defendant. People v. Davidovich, 238 Mich. App. 422, 606 N.W.2d 387 (1999).

84. *Padilla*, 130 S. Ct. at 1482.

85. 291 Mich. App. 363, 804 N.W.2d 878 (2011).

offenders.[86] Rejecting the prosecution's argument that it should follow an unpublished decision of that court and decisions of other state courts, the *Fonville* court held that the parallels between deportation and sex offender registration made the *Padilla* analysis most appropriate:

> Like the consequence of deportation, sex offender registration is not a criminal sanction, but it is a particularly severe penalty. In addition to the typical stigma that convicted criminals are subject to upon release from imprisonment, sexual offenders are subject to unique ramifications, including, for example, residency-reporting requirements and place-of-domicile restrictions. Moreover, sex offender registration is "intimately related to the criminal process." The "automatic result" of sex offender registration for certain defendants makes it difficult "to divorce the penalty from the conviction."[87]

Accordingly, as in *Padilla*, defense counsel must inform the defendant before he pleads guilty if he will be subject to sex offender registration.[88] If counsel fails to do so, this failure affects whether a plea is knowingly made. This fact is significant because defendants may withdraw their pleas if they were not knowingly, voluntarily, and intelligently made.[89]

The court of appeals specifically limited its decision to the sex offender registration requirement, distinguishing it from the "common, potential, and incidental consequences associated with criminal convictions."[90] Nonetheless, *Fonville* is the only case in the *Survey* period in which the defense prevailed.

IV: MICHIGAN CONSTITUTION: CRUEL OR UNUSUAL PUNISHMENT

While the U.S. Constitution bans cruel *and* unusual punishment, the Michigan Constitution more broadly prohibits cruel *or* unusual

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86. *Id.* at 363. In *People v. Freeze*, the Michigan Supreme Court directed the prosecutor to answer a leave application and address whether *Fonville* had been correctly decided. People v. Freeze, 796 N.W.2d 260 (Mich. 2011). The court subsequently elected not to grant leave in the case. People v. Freeze, 489 Mich. 986, 800 N.W.2d 62 (2011).

87. *Fonville*, 291 Mich. App. at 391-92 (quoting *Padilla*, 130 S. Ct. at 1481).

88. *Id.* at 392.

89. *See, e.g.*, Bousley v. United States, 523 U.S. 614, 618 (1998) ("A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'")

90. *Fonville*, 291 Mich. App. at 393.

punishment.[91] Two years ago, in *People v. Dipiazza*,[92] a panel of the court of appeals held that sex offender registration was unconstitutionally cruel or unusual punishment barred by the Michigan Constitution as applied in that case.[93] Several earlier opinions, issued when the registry was not as easily available on the internet, had rejected the notion that the Sex Offenders Registration Act ("SORA")[94] imposed punishment on people required to register as sex offenders.[95] In two cases during the *Survey* period, *People v. Fonville* and *People v. TD*, the court of appeals issued opinions distinguishing and limiting *Dipiazza*.[96] Given the split in the caselaw, it seems likely that the Michigan Supreme Court will address this issue in the next few years.

In *People v. TD*, a panel of the court of appeals held that SORA was not cruel or unusual punishment under the facts of that case.[97] TD was convicted of criminal sexual conduct in the second-degree (CSC II) for an incident involving a classmate when he was fifteen years old.[98] According to the majority opinion, TD and a male classmate approached a female classmate, TD punched her in the back, put her in a chokehold, fondled her breast, and lifted her shirt up while the other student pulled on her belt.[99] The trial court found that this act was "more of a prank than a predation."[100] When he turned eighteen, TD petitioned to be removed from the sex offender registry and presented evidence that he had been rehabilitated.[101] His motion was denied because the statute prohibits removal of juveniles convicted of certain offenses, including CSC II, from the registry.[102]

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91. *Compare* U.S. CONST. amend. VIII *with* MICH. CONST. 1963, art. 1, § 16. *See also* People v. Bullock, 440 Mich. 15; 485 N.W.2d 868 (1992).

92. 286 Mich. App. 137, 778 N.W.2d 264 (2009).

93. People v. Dipiazza, 286 Mich. App. 137, 153, 778 N.W.2d 264 (2009). The author of this Article was counsel for the amicus curiae American Civil Liberties Union, The Jacob Wetterling Resource Center, Stop It Now!, The Association for the Treatment of Sexual Abusers, and the Professional Advisory Board to the Coalition for a Useful Registry in support of Mr. Dipiazza.

94. MICH. COMP. LAWS. ANN. §§ 28.721-.736 (West 2004).

95. *See, e.g.*, People v. Ayres, 239 Mich. App. 8, 608 N.W.2d 132 (1999); People v. Pennington, 240 Mich. App. 188, 610 N.W.2d 608 (2000); People v. Golba, 273 Mich. App. 603, 729 N.W.2d 916 (2007).

96. People v. Fonville, 291 Mich. App. 363, 804 N.W.2d 878; (2011); People v. TD, 292 Mich. App. 678, -- N.W.2d -- (2011).

97. *TD*, 292 Mich. App. at 691.

98. *Id.* at 680.

99. *Id.*

100. *Id.* at 696 n.3 (Krause, J., concurring).

101. *Id.* at 681.

102. *Id.* (citing MICH. COMP. LAWS ANN. § 28.728c(14)(c)(ii) (West 2004)).

The *TD* panel rejected the defendant's argument that SORA was cruel or unusual punishment. The court noted that two previous decisions had addressed the issue of whether SORA imposed a punishment on juveniles. *People v. Ayres*[103] held that it did not because the registry "does nothing more than create a mechanism for easier public access to compiled information that is otherwise available to the public only through arduous research in criminal court files."[104] *Dipiazza*, however, noted that the "essential underpinning" of the *Ayres* holding had been eviscerated because it had been premised on statutory protections that no longer existed.[105] The *TD* panel used the same four part test those courts used to analyze the issue of whether registration was punishment under the facts of the case. That test looks to "(1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation."[106]

Under the first factor, legislative intent, the statute itself contains a declaration of an intent to help prevent future sex crimes and to protect people from those crimes.[107] The *Dipiazza* court found, however, that registration of the defendant did not serve these purposes because his offense was "consensual sex during a Romeo and Juliet relationship."[108] The *Dipiazza* prosecution occurred after a teacher found pictures of the eighteen-year-old Dipiazza and his fifteen-year-old girlfriend and turned them over to the county prosecutor.[109] Dipiazza was adjudicated under the Holmes Youthful Trainee Act ("HYTA").[110] Under HYTA, defendants like Dipiazza who successfully complete their sentences have no convictions on their record.[111] In contrast, in *TD*, the offense was a "predatory sexual offense," the defendant had not been in the HYTA program, and also unlike in *Dipiazza*, no statutory amendment changing the registration obligations had occurred.[112] Thus, the *TD* court concluded the first factor favored a finding that SORA's registration requirement was not punishment.[113]

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103. 239 Mich. App. 8, 608 N.W.2d 132 (1999).
104. *TD*, 292 Mich. App. at 683-84 (quoting *Ayers*, 239 Mich. App. at 15).
105. *Id.* at 685-86 (quoting *Dipiazza*, 286 Mich. App. at 146-53).
106. *Id.* at 686 (quoting *Dipiazza*, 286 Mich. App. at 147).
107. *Id.* (quoting MICH. COMP. LAWS ANN. § 28.721a).
108. *Id.* at 687 (quoting *Dipiazza*, 286 Mich. App. at 149).
109. *Dipiazza*, 286 Mich. App. at 140.
110. *Id.*; MICH. COMP. LAWS ANN. §§ 762.11-.16 (West 2000).
111. *Dipiazza*, 286 Mich. App. at 140.
112. *TD*, 292 Mich. App. at 687.
113. *Id.*

The second distinction between *Dipiazza* and *TD*, according to the *TD* court, was in the next factor, legislative design.[114] Here, the nonpublic nature of convictions subject to HYTA was dispositive to the court.[115] In *Dipiazza*, the court noted that SORA gave the public access to records sealed under HYTA, causing the loss of a right or privilege.[116] This loss meant that SORA caused a punishment not otherwise intended by the legislature.[117] Since no sealed information was being released in TD's case, the court reasoned that the notification scheme is regulatory and not punishment.[118] While the majority dealt with the generally non-public nature of juvenile proceedings in a footnote, in her concurring opinion Judge Krause wrote that the nature of juvenile proceedings made this issue a closer call than the majority.[119] She also expressed her belief that the increase of public access to the database in the years since *Ayres* should not be so easily dismissed.[120]

Where the *Dipiazza* court had found no analogous measures with which to compare the statute at issue,[121] the *TD* court noted that *Dipiazza* had limited itself to the circumstances of that particular case: teenagers engaging in consensual sex who were assigned to HYTA between October 1995 and October 2004.[122] Once again, the *TD* court viewed the *Ayres* decision as providing the appropriate analysis, distinguishing registration as a compilation of public information from "branding, shaming and banishment."[123] While some might question whether forcing an adulterer to wear a scarlet "A" is really that different from listing them as a sex offender on the internet, the *TD* court saw no parallel between the two.

Perhaps predictably, the *TD* court also saw no punishment in the effects of the legislation.[124] Distinguishing *Dipiazza* again on the basis that the offense in *Dipiazza* was consensual, the *TD* opinion stated that "much of the reasoning in *Dipiazza* is inapplicable."[125] Once again, the court turned to *Ayres* and found that actions the public might take upon learning that someone is on the registry are an "indirect consequence"

114. *Id.*
115. *Id.* at 688.
116. *Dipiazza*, 286 Mich. App. at 150-51.
117. *Id.*
118. *TD*, 292 Mich. App. at 688.
119. *Id.* at 695 (Krause, J., concurring).
120. *Id.* (Krause, J., concurring).
121. *Dipiazza*, 286 Mich. App. at 152.
122. *TD*, 292 Mich. App. at 689.
123. *Id.*
124. *Id.* at 690.
125. *Id.*

and cannot classify as punishment.[126] For some reason, however, the court of appeals did not address any of the direct, statutorily mandated consequences of sex offender registration enacted after the *Ayres* decision, nor did the court consider whether they could be considered punishment.[127]

Finding all of the factors identified in *Ayres* to favor a finding that SORA does not impose a punishment on a defendant, the court of appeals held that it could not be constitutionally-prohibited cruel or unusual punishment.[128] Going further, the *TD* court noted that *Dipiazza* "appears confined to the specific facts of that case."[129]

Judge Krause, however, took care to discuss the fact that SORA runs at cross-purposes with the law regarding juveniles.[130] Where, as with TD, there was good reason to believe he was not a predator, listing him on the registry "*actually undermines*" the stated purpose of SORA.[131] Judge Krause "urge[d]" the Legislature to amend SORA to allow judges discretion to remove people who are not likely to be sexual predators from the registry.[132]

The other decision in the *Survey* period to address this issue, *People v. Fonville*,[133] involved a guilty plea to the crime of enticing a child.[134] Fonville testified that he "pretty much endangered two young kids . . . by doing drugs and driving around with them in the car."[135] He also did not return them to their mother at the appointed time.[136] Despite the fact that there was no sexual element to the crime, because child enticement is a listed offense under SORA, Fonville was required to register as a sex offender.[137]

The court of appeals in *Fonville* rejected the defendant's argument that requiring him to register as a sex offender was cruel or unusual

126. *Id.*

127. For instance, in 2006 the Legislature amended SORA to prohibit registered sex offenders from living in certain places. MICH. COMP. LAWS ANN. § 28.735 (West 2006).

128. *TD*, 292 Mich. App. at 691.

129. *Id.*

130. *Id.* at 697 (Krause, J., concurring).

131. *Id.* (Krause, J., concurring).

132. *Id.* at 698 (Krause, J., concurring).

133. 291 Mich. App. 363, 804 N.W.2d 878 (2011).

134. *Id.* at 363.

135. *Id.* at 369.

136. *Id.*

137. *Id.* at 370. Fonville's required appearance on the registry raises some of the very issues identified by Judge Krause in her concurrence in *People v. TD*, namely the cluttering of the registry with non-sexual predators. *TD*, 292 Mich. App. at 697 (Krause, J., concurring).

punishment.[138] While acknowledging that there was no sexual component to his crime, the court stated, "the Legislature has nevertheless deemed registration for those convicted of that crime as a necessary measure to protect the safety and welfare of the children of this state."[139] Relying on *People v. Golba*,[140] an opinion that itself relied on federal opinions correctly distinguished by the *Dipiazza* court, the court of appeals held that registration under SORA is not punishment.[141] Rather, it is only a "remedial regulatory scheme furthering a legitimate state interest."[142] Since it is not punishment, it cannot be cruel or unusual punishment.[143] As did the *TD* court, the *Fonville* court distinguished *Dipiazza* because there had been no post-conviction amendment to SORA that removed people in similar circumstances from the sex offender registry.[144] Although the *Fonville* court did not elaborate on why this distinction is important, it would seem that the court viewed the amendment in *Dipiazza* as a legislative indication that there was no legitimate state interest in requiring people to register who were sentenced under HYTA before the amendment.[145]

V. PROCEDURAL RULES

A. New Trial: Newly Discovered Evidence

The Michigan Court Rules allow criminal defendants to file post-conviction motions seeking a new trial.[146] Under current law, in order to be granted a new trial based on newly discovered evidence, defendants must satisfy the four part test most recently iterated by the Michigan Supreme Court in *People v. Cress*.[147] That test requires that (1) the evidence be newly discovered; (2) "the newly discovered evidence [is] not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence

138. *Fonville*, 291 Mich. App. at 381-82.

139. *Id.* at 380.

140. 273 Mich. App. 603, 729 N.W.2d 916 (2007).

141. *Fonville*, 291 Mich. App. at 381.

142. *Id.* (quoting *Golba*, 273 Mich. App. at 617; 729 N.W.2d at 925) (internal quotation marks omitted).

143. *Id.* at 381-82. The opinion in *Fonville* repeatedly and mistakenly refers to the Michigan Constitution as prohibiting cruel *and* unusual punishment, as the Federal Constitution does. *See id.* at 379, 394, 395. The Michigan Constitution, however, bars cruel *or* unusual punishment. MICH. CONST. art. I, § 16.

144. *Fonville*, 291 Mich. App. at 381-82.

145. *See id.*

146. MICH. CT. R. 6.431(B).

147. 468 Mich. 678, 692, 664 N.W.2d 174 (2003).

makes a different result probable on retrial."[148] In *People v. Terrell*,[149] the Michigan Court of Appeals addressed the question of whether statements made by a co-defendant after trial exculpating the defendant are newly discovered evidence under *Cress*.[150] The majority held that "when a defendant knew or should have known that his codefendant could provide exculpatory testimony, but did not obtain that testimony because the codefendant invoked the privilege against self-incrimination, the codefendant's posttrial statements do not constitute newly discovered evidence, but are merely newly available evidence."[151] In so doing, the Michigan Court of Appeals followed the majority of the federal appellate courts.[152] The majority specifically noted, however, that their holding did not preclude the possibility that a co-defendant's posttrial statements could qualify as newly discovered evidence under some circumstances.[153]

Terrell involved a non-fatal shooting, for which the defendant was convicted and the co-defendant Hudson was acquitted.[154] The victim testified that the defendant shot him, another man named Myers also shot him, and Hudson drove the getaway vehicle.[155] Post-trial, Hudson testified that the alleged victim had a gun, that the victim pulled the gun out, and he dropped the gun after he and the defendant struggled for it.[156] Hudson testified that Myers then shot the victim with the gun he had dropped.[157] The trial court granted the new trial in the interests of justice, finding that the evidence was newly available, although not newly discovered.[158]

Although the trial court found that the interests of justice required a new trial, the court of appeals viewed the grant of a new trial as turning on the issue of whether the evidence was newly discovered.[159] Having

148. *Cress*, 468 Mich. at 692 (quoting People v. Johnson, 451 Mich. 115, 118 n.6, 545 N.W.2d 637 (1996)).

149. 289 Mich. App. 553, 797 N.W.2d 684 (2010). Interestingly, this rare published decision was issued in a case where the defendant's attorney did not file a brief in the court of appeals.

150. *Terrell*, 289 Mich. App. at 555.

151. *Id.* at 555.

152. *Id.*

153. *Id.* at 570.

154. *Id.* at 556.

155. *Id.* at 557.

156. *Terrell*, 289 Mich. App. at 557.

157. *Id.*

158. *Id.* at 558.

159. *Id.* at 559. The Michigan Court Rules allow new trials to be granted for any reason that would support appellate reversal of the conviction, or where the court "believes that the verdict has resulted in a miscarriage of justice." MICH. CT. R. 6.431(B).

restated the question, the court of appeals then reversed the trial court, as noted above, doing so in reliance on the majority of the federal circuit courts.[160]

Where the majority and concurrence parted ways was in whether the minority approach taken by the First Circuit should be used.[161] The First Circuit "held that 'the better rule is not to categorically exclude the testimony of a codefendant who asserted his Fifth Amendment privilege at trial under the first prong but to consider it, albeit with great skepticism . . . .'"[162] The majority explained that the First Circuit's test was not persuasive because evidence of which a defendant is aware cannot be newly discovered, even if that evidence was unavailable to the defendant because the co-defendant invoked his constitutional right to remain silent.[163] The majority noted that this position was consistent with both precedent and policy concerns about discouraging potential perjury and gamesmanship.[164] Since there was no question that both the defendant and co-defendant were at the scene, the court held there could be no question that the defendant was aware of his co-defendant's exculpatory testimony.[165]

Both the majority and the concurrence discussed the other options available to a criminal defendant who finds himself in a position of having a co-defendant whose testimony would be exculpatory, but is invoking his Fifth Amendment right not to testify. The majority suggested that the *prosecution* could grant limited immunity to the co-defendant, or the defendant himself could choose to testify.[166] The Michigan Court Rules also allow a defendant to seek to sever his trial from a co-defendant.[167] After the decision in *Terrell*, defense counsel would be wise to take these procedural steps to attempt to present exculpatory testimony from co-defendants.

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160. *Terrell*, 289 Mich. App. at 555.

161. *Id.* at 571 (Shapiro, J., concurring).

162. *Id.* (Shapiro, J., concurring) (quoting United States v. Montilla-Rivera, 115 F.3d 1060, 1066 (1st Cir. 1997)).

163. *Id.* at 567.

164. *Id.* at 565-67. The concerns about gamesmanship appear to be misplaced. A defendant who risks conviction in order to create an appellate parachute is playing very high stakes poker with his freedom. *See id.* at 573.

165. *Id.* at 570.

166. *Terrell*, 289 Mich. App. at 568 (citing United States v. Owen, 500 F.3d 83, 91 (2nd Cir. 2007)).

167. *Id.* (discussing MICH. CT. R. 6.121(c)). It is somewhat unclear how severance would assist a defendant in this circumstance, as his co-defendant could continue to invoke his Fifth Amendment rights until his conviction is final. *See* Mitchell v. United States, 526 U.S. 314, 326 (1999).

B. 180-day rule

In *People v. Lown*,[168] the Michigan Supreme Court dealt once again with what seems to be one of its favorite topics: the interpretation of the "180-day rule."[169] This rule applies only to criminal proceedings involving inmates in Michigan prisons.[170] Its purpose is to give inmates an opportunity to have sentences run concurrently, "consistent with the principle of law disfavoring accumulation of sentences."[171] Concurrent sentences also serve the public interest by minimizing the cost of incarceration. Despite the narrow application of the 180-day rule, the court has taken quite an interest in its interpretation; *Lown* marks the third time in five years that the court has heard oral argument in cases involving interpretation of the 180-day rule.[172]

The question in *Lown* was whether the statutory scheme requires dismissal if an inmate's trial does not begin within 180 days of the date that the prosecutor receives the required notice from the Department of Corrections.[173] The plain language of the statutes appear to require that result. Those statutes provide in pertinent part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, 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

168. 488 Mich. 242, 794 N.W.2d 9 (2011). Mr. Lown was represented in the Michigan Supreme Court by another attorney with the State Appellate Defender Office.

169. *Id.* at 246; MICH. COMP. LAWS ANN. §§ 780.131-.133 (West 1998).

170. *Lown*, 488 Mich. at 246 ("The object of this rule is to dispose of new criminal charges against inmates in Michigan correctional facilities.").

171. *Id.* at 286 (quoting People v. Williams, 475 Mich. 245, 252, 716 N.W.2d 208 (2006)) (internal quotation marks omitted).

172. *Lown*, 488 Mich. 242. *See also* People v. Holt, 478 Mich. 851, 731 N.W.2d 93 (2007); People v. Williams, 475 Mich. 245, 716 N.W.2d 208 (2006).

173. *Lown*, 488 Mich. at 254-55. The court previously held that the 180-day period does not begin until the day after the prosecutor receives notice via certified mail from the Department of Corrections that the defendant is an inmate at one of its facilities. *Williams*, 475 Mich. at 256 n.4.

> of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.[174]

The statute continues:

> In the event that, within the time limitation set forth in [M.C.L. section 780.131], action is not commenced on the matter for which request for disposition was made, no court of this state shall any 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.[175]

As over 200 days had passed since the required notice was received, the pending criminal case against Lown would have to be dismissed if the statute were interpreted as he suggested.[176]

A divided court, however, rejected his interpretation.[177] Looking only to the language in MCL section 780.133, the majority noted that the statute states only that "action," not "trial," must be commenced within the time period required.[178] The court held that the statute would be satisfied so long as the prosecution commences the action within 180 days of receiving notice, and then proceeds "promptly and with dispatch," standing "ready for trial within the 180-day period."[179] The court further simplified the calculation of the 180-day period, making it clear that it is consecutive days without any regard to whose "fault" caused the delay during that period.[180] In addition, the court held that by either requesting a continuance or acquiescing in such a request, the defendant may forfeit his rights under the 180-day rule.[181]

The phrases regarding the prompt movement towards trial readiness appear nowhere in the statute, but rather are found in the 1959 decision, *People v. Hendershot*.[182] In importing this language from *Hendershot*, the court declared its dictionary definition approach to the interpretation

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174. MICH. COMP. LAWS ANN. § 780.131(1) (West 1998).
175. MICH. COMP. LAWS ANN. § 780.133 (West 1998).
176. *Lown*, 488 Mich. at 250 n.6, 252.
177. *Id.* at 255-57.
178. *Id.* at 256.
179. *Id.* at 260 (quoting People v. Hendershot, 357 Mich. 300, 304; 98 N.W.2d 568 (1959)) (internal quotation marks omitted).
180. *Id.* at 262-63.
181. *Id.* at 270.
182. *Hendershot*, 357 Mich. at 300.

of section 780.133 to be absolutely consistent with *Hendershot*.[183] This reconciliation is unusual for two reasons. First, *Hendershot* had been previously understood as creating a "good faith" exception not present in the statutory language.[184] Second, in recent years the court has been extremely willing to overrule long-standing precedent.[185]

As a practical matter, the result of *Lown* is that it will be truly the rare case that is dismissed based on a violation of the 180-day rule. As the law stands, a case may be dismissed under this rule only if (1) the defendant is an inmate in a Michigan prison (not the county jail); (2) the Department of Corrections has sent a certified letter to the prosecutor informing her of the defendant's status; (3) more than 180 days has passed since the receipt of that notice; (4) the prosecutor has not shown "commenced action" nor shown "ongoing, genuine intent" to bring the case to trial; *and* (5) the defendant has not forfeited his right to trial within 180 days by either requesting or consenting to delays.[186] As the dissent in *Lown* noted, the previous fifty years of caselaw under *Hendershot* had created a clear standard for determining whether the prosecutor has made sufficient efforts to bring a case to trial within 180 days.[187] "Ascertaining when a prosecutor should have been ready to proceed to trial will often be an insurmountable feat."[188]

183. *Lown*, 488 Mich. at 256-57.

184. *See, e.g., id.* at 252, 262-65.

185. *See* Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 WAYNE L. REV. 1911, 1929-30 (2009). The willingness to overrule previous decisions can be further seen in another court decision from this term, People v. Szalma, 487 Mich. 708, 790 N.W.2d 662 (2010). In *Szalma*, the majority opinion repeatedly explains that it would have "revisited" the correctness of its prior decision in People v. Nix, 453 Mich. 619, 556 N.W.2d 866 (1996), but the facts of the case did not allow it to do so. *Szalma*, 487 Mich. at 710 ("Had the prosecution not conceded the trial court's legal error, this case would have provided an opportunity to revisit the correctness of *Nix*.").

186. *Lown*, 488 Mich. at 243, 249-50, 270.

187. *Id.* at 282-84 (Kelly, J., dissenting).

188. *Id.* at 284 (Kelly, J., dissenting).