

## CRIMINAL PROCEDURE

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### I. INTRODUCTION

During this *Survey* period, the U.S. Supreme Court, Michigan Supreme Court and the Michigan Court of Appeals decided cases that will have a significant impact on Michigan criminal procedure jurisprudence. The decisions run the gamut from the scope of a search of an automobile following a lawful arrest; application of the good-faith exception to the exclusionary rule; post-arrest, post-*Miranda* interrogation issues; joinder of offenses; right-to-counsel claims; as well as several significant sentencing decisions.

In particular, the U.S. Supreme Court decided three cases arising out of Michigan. In *Berghuis v. Thompkins*,<sup>1</sup> the Court held a defendant's invocation of the right to remain silent following his *Miranda*<sup>2</sup> warnings must be unambiguous to be effective. This is consistent with the standard imposed on a defendant who invokes his right to counsel.<sup>3</sup> The Court concluded there was no principled basis for distinguishing between the two rights.<sup>4</sup> The Court also determined that the defendant knowingly and intelligently waived his right to remain silent when he made a statement to the police.<sup>5</sup> This decision will make it substantially easier for police to obtain a post-arrest, post-*Miranda* statement from a suspect.

In *Renico v. Lett*,<sup>6</sup> the Court reiterated the long standing principle that the double jeopardy clause will not bar a retrial because of a deadlocked jury.<sup>7</sup> Trial courts are granted substantial discretion in granting a mistrial when a determination is made that a jury is deadlocked, even where, as in *Lett*, the deliberations were relatively short.<sup>8</sup> The Court specifically declined to impose a formalistic approach for how a trial court should make the decision to declare a mistrial.<sup>9</sup>

In *Berghuis v. Smith*,<sup>10</sup> the Court determined that the jury selection process employed in Kent County, Mich., was not a violation of the Sixth Amendment's fair cross-section requirement.<sup>11</sup> The Court made clear it was not going to micromanage a state's jury selection process.<sup>12</sup>

In a case that will likely have a very substantial impact on the system for the appointment of counsel for indigent defendants, the Michigan Court of Appeals determined that a class-action lawsuit brought by

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1. 130 S. Ct. 2250, 2259-60 (2010).

2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

3. *Berghuis*, 130 S. Ct. at 2259-60 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)).

4. *Id.* at 2260.

5. *Id.* at 2262-63.

6. 130 S. Ct. 1855 (2010).

7. *Id.* at 1862-64.

8. *See id.* at 1860-61, 63-64.

9. *Id.* at 1863-64.

10. 130 S. Ct. 1382 (2010).

11. *Id.* at 1395-96.

12. *Id.*

indigent defendants seeking a statewide administered system for the appointment of counsel, as opposed to the current one which is administered by local governments, was properly certified by the trial court and is ripe for adjudication.<sup>13</sup> The Michigan courts continue to address issues involving the confrontation clause of the Sixth Amendment in the wake of *Crawford v. Washington*<sup>14</sup> and the recent decision of *Melendez-Diaz v. Massachusetts*.<sup>15</sup> The courts have also considered several significant sentencing issues, including sex offender registration, the limits of a court's continuing jurisdiction to revoke parole and probation, the application of sentence enhancements, limits on awarding jail credit to parolees who commit new crimes while on parole, and finally, the limits of lifetime electronic monitoring. These and other cases having a significant impact in Michigan are addressed below.

## II. FOURTH AMENDMENT

### A. Search of a Vehicle Incident to a Lawful Arrest

In *People v. Mungo*,<sup>16</sup> a significant case decided after *Arizona v. Gant*,<sup>17</sup> the Michigan Court of Appeals considered not only whether a search of a vehicle incident to a lawful arrest was consistent with the rule announced in *Gant*, but also whether the good-faith exception to the exclusionary rule applied inasmuch as the officer's conduct was based upon pre-*Gant* law.<sup>18</sup>

In *Gant*, the Court reexamined the law as it concerned the search of a vehicle following a lawful arrest.<sup>19</sup> In *New York v. Belton*,<sup>20</sup> the U.S. Supreme Court developed a bright-line rule regarding the search of a

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13. *Duncan v. Michigan*, 284 Mich. App. 246 (2009). On April 30, 2010, the Michigan Supreme Court vacated the trial court's order granting plaintiff's motion for class certification and remanded the case for consideration of plaintiff's motion for class certification in light of the Court's opinion in *Henry v. Dow Chemical Co.*, 484 Mich. 483 (2009). In the same order, the Michigan Supreme Court also affirmed the decision that the defendants were not entitled to summary disposition. *Duncan v. State*, 486 Mich. 906 (2010). This order was vacated July 16, 2010, but then subsequently reinstated by the court. See *Duncan v. State*, 486 Mich. 1071 (2010); *Duncan v. State*, 488 Mich. 957 (2010).

14. 541 U.S. 36 (2004).

15. 129 S. Ct. 2527 (2009).

16. 288 Mich. App. 167 (2010).

17. 129 S. Ct. 1710 (2009).

18. *People v. Mungo*, 288 Mich. App. at 169 (2010).

19. *Id.* (citing *Gant*, 129 S. Ct. at 1716).

20. 453 U.S. 454 (1981).

person arrested in his car.<sup>21</sup> The rule provided that the police, contemporaneous with the arrest, may conduct a search of the passenger compartment and all containers, open or closed, found therein.<sup>22</sup> Over time, the *Belton* rule has been interpreted by lower courts to “allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.”<sup>23</sup>

In *Gant*, the court determined that such a broad reading of *Belton* was incorrect.<sup>24</sup> The effect was to “untether” the rule and rationale justifying the search incident to a lawful arrest exception to the warrant requirement.<sup>25</sup> As a result, the Court held the following:

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. 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.<sup>26</sup>

In *Mungo*, a deputy sheriff stopped the defendant in connection with a routine traffic stop.<sup>27</sup> After determining that the passenger had two outstanding warrants, he arrested the passenger and requested back-up.<sup>28</sup> The deputy conducted a pat-down search of the defendant and then searched the passenger compartment of the car, uncovering a gun and ammunition.<sup>29</sup> Because the defendant was unable to produce a concealed weapons permit, he was arrested for unlawfully carrying a concealed weapon.<sup>30</sup>

The defendant moved to quash the charges and suppress the gun found by the police.<sup>31</sup> The trial court granted the suppression motion, agreeing with the court in *Missouri v. Bradshaw*,<sup>32</sup> which, in a decision

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21. *Mungo*, 288 Mich. App. at 172 (citing *Gant*, 129 S. Ct. at 1717).

22. *Id.*

23. *Id.* at 173.

24. *Id.* (citing *Gant*, 129 S. Ct. at 1718).

25. *Id.* (citing *Gant*, 129 S. Ct. at 1719).

26. *Id.* at 174 (citing *Gant*, 129 S. Ct. at 1723-24).

27. *Mungo*, 288 Mich. App. at 170.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. 99 S.W.3d 73 (Mo. App. 2003).

that presaged *Gant*, held the *Belton* rule inapplicable when the arrestee was secured and thus unable to access the vehicle.<sup>33</sup> The court further found that the deputy lacked probable cause to arrest the defendant and, as a result, the search of his car was impermissible.<sup>34</sup>

In this second, post-*Gant* review of the circumstances surrounding the search of the defendant's car, the court concluded that inasmuch as neither the defendant nor the driver of the vehicle were in a position to reach the car, the first prong of the *Gant* rule has not been met.<sup>35</sup> Thus, there was no legitimate concern for the deputy's safety.<sup>36</sup> The court then turned its attention to whether the exclusionary rule, specifically the good-faith exception, should be applied retroactively despite *Gant*.<sup>37</sup> Initially, the court recognized that the retroactivity doctrine provides that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."<sup>38</sup> A number of cases have considered the interaction and application of the exclusionary rule and the retroactivity doctrine.<sup>39</sup>

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33. *Mungo*, 288 Mich. App. at 170.

34. *Id.* at 171. The Michigan Court of Appeals initially reversed the trial court's holding following the *Belton* rationale. *People v. Mungo*, 277 Mich. App. 577, 589 (2008), *vacated by* *People v. Mungo*, 483 Mich. 1091 (2009). The Michigan Supreme Court held the defendant's application for leave to appeal in abeyance pending *Gant*. *Mungo*, 483 Mich. 1091 (2009). After the *Gant* decision was released, the Michigan Supreme Court vacated the Court of Appeals decision and remanded the case for reconsideration in light of *Gant*. *Id.* at 1091.

35. *Mungo*, 288 Mich. App. at 175.

36. *Id.*

37. *Id.* The exclusionary rule provides that evidence seized in violation of the Fourth Amendment's ban on unreasonable searches and seizures may not be introduced in a state court. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). In *United States v. Leon*, 468 U.S. 897 (1984), the U.S. Supreme Court recognized a "good faith" exception to the exclusionary rule. *Id.* at 906-07. The exception provides that evidence seized pursuant to a search warrant later determined to be invalid will not result in suppression of the evidence if a reasonable, well-trained officer would have believed the warrant was valid. *Id.* at 922. Given the high costs associated with the application of the exclusionary rule (i.e. suppression of relevant and valid evidence), its application as a remedy must be balanced against the purpose of the rule, which is to deter unlawful police conduct. *Id.* at 918-921. The rule is limited to those instances where its application would deter unlawful police conduct. *Id.* at 918. Michigan has adopted a good-faith exception in *People v. Goldston*, 470 Mich. 523, 541-43 (2004).

38. *Mungo*, 288 Mich. App. at 177 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

39. See *United States v. Buford*, 623 F. Supp. 2d 923, 926-27 (M.D. Tenn. 2009) (retroactivity doctrine required rejection of the good-faith exception as it concerns pre-*Gant* conduct by the police); *United States v. Grote*, 629 F. Supp. 2d 1201, 1205-06 (E.D.

The court in *Mungo*, after a review of several cases addressing the exclusionary rule and retroactivity doctrine, concluded that *Gant* requires application of the retroactivity doctrine.<sup>40</sup> The court next determined whether, despite the violation of the Fourth Amendment, the court should refrain from applying the exclusionary rule because of the good-faith exception.<sup>41</sup> The court concluded the exception does not apply, because, unlike the situations presented in *Lopez* and *McCane*, where the existing case law in those jurisdictions clearly supported the exception, in Michigan the law was not so settled.<sup>42</sup> This case presented the first opportunity for the court to consider whether *Belton* permitted a search of a vehicle *solely* incident to a lawful arrest of a passenger.<sup>43</sup> As a result, there was no basis to conclude the search was made in good-faith reliance on existing case law.<sup>44</sup>

In *People v. Short*<sup>45</sup> the defendant was arrested by the Michigan State Police outside of his vehicle for not possessing a license plate and failure to have a driver's license or insurance.<sup>46</sup> The defendant was handcuffed and placed in the back of the patrol car.<sup>47</sup> The troopers subsequently searched the defendant's car and found two rifles and ammunition.<sup>48</sup> In response to a motion to suppress, the trial court held the search was lawful pursuant to *Belton*.<sup>49</sup> On the day of the suppression hearing *Gant* was decided.<sup>50</sup> As a result, the trial court reconsidered its ruling and held that while the search may have been unconstitutional under *Gant*, it was permissible under *Belton* and thus applied the good-faith exception to the exclusionary rule.<sup>51</sup>

The Michigan Court of Appeals agreed.<sup>52</sup> Although the *Gant* decision has retroactive effect, its application does not necessarily

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Wash. 2009) (the officer's reliance on *Belton* was in objective good faith and thus the exclusionary rule was not applied). Decisions in accord with *Grote* include *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009) and *United States v. Lopez*, No. 6:06-120-DCR, 2009 WL 3112127 (E.D. Ky. Sept. 23, 2009).

40. *Mungo*, 288 Mich. App. at 182.

41. *Id.* at 183.

42. *Id.* at 184.

43. *Id.*

44. *Id.* The court accepted the argument that the retroactivity doctrine does not preclude application of the good-faith exception to the exclusionary rule. *Id.*

45. \_\_\_ N.W.2d \_\_\_, No. 292288, 2010 WL 3389252 (Mich. Ct. App. Aug. 26, 2010), *appeal granted*, 488 Mich. 921 (2010).

46. *Id.* at \*1.

47. *Id.*

48. *Id.*

49. *Id.* at \*2.

50. *Id.*

51. *Short*, 2010 WL 3389252, at \*2.

52. *Id.*

preclude application of the good-faith exception.<sup>53</sup> The court considered whether reasonable reliance on existing case law can provide the foundation for the good-faith exception.<sup>54</sup> The court concluded it could, inasmuch as the trooper's search was consistent with the long-standing interpretation of *Belton*.<sup>55</sup> Under the circumstances, it would not be consistent with the rationale of the exclusionary rule, which is to deter unlawful police conduct.<sup>56</sup>

The U.S. Supreme Court has agreed to resolve this issue.<sup>57</sup> Specifically, the question presented is "[w]hether the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional."<sup>58</sup>

The facts in *Davis* are similar to the situations presented in *Mungo* and *Short*. Davis was arrested following a traffic stop.<sup>59</sup> In response to questioning by the officers, Davis gave a false name.<sup>60</sup> After they discovered his real name, he was arrested and secured in the back of a patrol vehicle.<sup>61</sup> The officers subsequently searched his vehicle and found a gun in his jacket which was inside the vehicle.<sup>62</sup> The Eleventh Circuit determined that under *Gant* the search was unconstitutional.<sup>63</sup> However, the court noted that the determination as to whether the exclusionary rule should apply to an unconstitutional search is a separate inquiry. In *Davis*, the officers were objectively on well-settled precedent authorizing the search in question.<sup>64</sup> The court refused to apply the exclusionary rule. The court reasoned that the purpose of the rule was to deter police misconduct and, in this case, application of the exclusionary rule would not result in measurable deterrence.<sup>65</sup> It is noteworthy that the Michigan Supreme Court in both *Mungo* and *Short* granted leave to

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53. *Id.* at \*3.

54. *Id.*

55. *Id.* ("[W]hen the troopers searched defendant's vehicle in this case, the law in this state . . . was well-established and abundantly clear: Under *Belton* and its progeny, the search of defendant's vehicle was lawful incident to defendant's arrest."); *see also* *Thornton v. United States*, 541 U.S. 615, 623-24 (2004) (holding that the *Belton* rationale applies to a recent occupant of a vehicle).

56. *Short*, 2010 WL 3389252.

57. *Davis v. United States*, 131 S. Ct. 502 (2010) (mem.).

58. Petition for Writ of Certiorari, *Davis*, 131 S. Ct. 502 (No. 09-11328).

59. *United States v. Davis*, 598 F.3d 1259, 1261 (11th Cir. 2010).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1263.

64. *Id.* at 1264.

65. *Davis*, 598 F.3d at 1265, 1266.

appeal on the sole issue whether the “good-faith exception to the exclusionary rule allows admission of evidence that was seized pursuant to a warrantless search that was valid under cases interpreting *New York v. Belton* . . . as a bright-line rule.”<sup>66</sup>

Thus, the Court’s decision in *Davis* will inform the Michigan Supreme Court’s decisions in *Mungo* and *Short*. Although *Gant* is a substantive Fourth Amendment decision that has retroactive effect,<sup>67</sup> the application of the good-faith exception to the exclusionary rule requires a separate analysis. It is likely the *Davis* Court will consider competing Fourth Amendment interests. On the one hand is whether application of the rule is consistent with its long-standing deterrence rationale against an expected argument that a failure to apply the exclusionary rule will provide a disincentive to defendants to challenge existing precedent and, thus, inhibit the development of Fourth Amendment jurisprudence.

### III. FIFTH AMENDMENT

#### A. *Invocation of the Right to Remain Silent*

In *Berghuis v. Thompson*<sup>68</sup> the U.S. Supreme Court held that a suspect’s invocation of his right to remain silent following *Miranda* warnings must be unambiguous in order to be effective, but that a waiver of this right may be inferred from the fact that the defendant made a statement to the police.<sup>69</sup> This decision makes it substantially easier for prosecutors to use statements obtained during custodial interrogations.

*Berghuis* arose from a shooting in Southfield, Michigan, on January 10, 2010.<sup>70</sup> Thompson, a suspect, fled to Ohio where he was arrested.<sup>71</sup> While waiting transfer back to Michigan, two Southfield Police Department detectives began an interrogation that lasted approximately three hours.<sup>72</sup> Before the interrogation began, the detectives gave Thompson a form listing each *Miranda* warning beside a number.<sup>73</sup> One of the detectives asked him to read aloud the fifth warning to ensure that

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66. *People v. Mungo*, 488 Mich. 920 (2010); *People v. Short*, 488 Mich. 921 (Mich. 2010) (stating the issue as “whether the good-faith exception to the exclusionary rule applies to a warrantless vehicle search that was conducted under the authority of *New York v. Belton*, but that would be unconstitutional under *Arizona v. Gant*”).

67. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

68. 130 S. Ct. 2250 (2010).

69. *Id.* at 2262-64.

70. *Id.* at 2256.

71. *Id.*

72. *Id.*

73. *Id.*



Thompkins understood English.<sup>74</sup> The detective proceeded to read the other four warnings and asked Thompkins to sign the form in order to demonstrate that Thompkins understood his rights.<sup>75</sup> Thompkins refused to sign the form.<sup>76</sup> Then the interrogation began.<sup>77</sup>

There is no indication that at any time during the interrogation Thompkins invoked his right to remain silent or requested an attorney.<sup>78</sup> He was mostly silent during the three-hour interrogation, only occasionally responding with limited responses such as “yeah,” “no,” or “I don’t know.”<sup>79</sup> At times he communicated by nodding his head.<sup>80</sup> After approximately 2 hours and 45 minutes one of the detectives asked Thompkins, “Do you believe in God?”<sup>81</sup> Thompkins said “Yes.”<sup>82</sup> The detective countered by asking, “Do you pray to God to forgive you for shooting that boy down?”<sup>83</sup> Thompkins answered “Yes.”<sup>84</sup> He refused to make a written confession and the interrogation ended shortly thereafter.<sup>85</sup>

Thompkins was charged with several felonies, including first-degree murder.<sup>86</sup> He filed a motion to suppress the statements he made during the interrogation.<sup>87</sup> He claimed he had invoked his right to remain silent, which required the police to immediately end the interrogation.<sup>88</sup> He further argued that he had not waived his right to remain silent; thus, the statements were involuntary.<sup>89</sup> The trial court denied the motion, and a

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74. *Berghuis*, 130 S. Ct. at 2256. This fifth warning consisted of the following statement: “You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk to a lawyer while you are being questioned.” *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Berghuis*, 130 S. Ct. at 2256-57.

81. *Id.* at 2257.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Berghuis*, 130 S. Ct. at 2257.

87. *Id.*

88. *Id.* Thompkins relied on *Michigan v. Mosley*, 423 U.S. 96 (1975), where the Court held that the police must “scrupulously honor” a suspect’s invocation of his right to remain silent by ceasing the interrogation. *Id.* at 104. Thompkins also alleged ineffective assistance of counsel due to counsel’s failure to request a limiting instruction after the prosecution elicited evidence concerning the outcome of the trial of another individual who was with Thompkins when the shooting occurred. The Supreme Court rejected this claim finding a lack of prejudice. *Berghuis*, 130 S. Ct. at 2264-65.

89. *Berghuis*, 130 S. Ct. at 2257.

jury found Thompson guilty on all counts, resulting in a sentence of life without the possibility of parole.<sup>90</sup>

The Michigan Court of Appeals held that "Thompson had not invoked his right to remain silent and had waived it."<sup>91</sup> The Michigan Supreme Court denied leave to appeal.<sup>92</sup> Thompson then filed a petition in the U.S. District Court for the Eastern District of Michigan for a writ of habeas corpus. The district court also rejected his *Miranda* claims, finding that a federal court cannot grant a writ of habeas corpus unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law."<sup>93</sup> The district court concluded that Thompson "did not invoke his right to remain silent," and his subsequent statements were not coerced.<sup>94</sup> The district court held that the decision of the Michigan Court of Appeals "was not unreasonable in determining that Thompson had waived his right to remain silent."<sup>95</sup>

The Sixth Circuit Court of Appeals reversed the district court decision.<sup>96</sup> It concluded that the Michigan Court of Appeals' decision, holding that Thompson had waived his right to remain silent in the face of almost three hours of interrogation, was an unreasonable application of clearly established federal law and did not reflect a waiver of his right to remain silent.<sup>97</sup> The Supreme Court reversed the decision of the Sixth Circuit.<sup>98</sup>

While the U.S. Supreme Court has previously held that a suspect's invocation of the right to counsel must be "unambiguous,"<sup>99</sup> it has never determined whether the invocation of the right to remain silent should be held to the same standard.<sup>100</sup> The Court held that there is no principled basis for treating the two rights differently.<sup>101</sup> (I agree.) This standard will largely eliminate the uncertainty regarding whether the police should terminate an interview because they will not have to determine whether ambiguous conduct by a suspect is indicative of an invocation of the

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90. *Id.* at 2257-58.

91. *Id.* at 2258.

92. *Id.*; see also *People v. Thompson*, 471 Mich. 866 (2004).

93. *Berghuis*, 130 S. Ct. at 2258 (citing 22 U.S.C. § 2254(d)(1) (1996)).

94. *Id.* at 2258.

95. *Id.*

96. *Id.*; see also *Thompson v. Berghuis*, 547 F.3d 572 (6th Cir. 2008).

97. *Berghuis*, 130 S. Ct. at 2258-59.

98. *Id.* at 2265.

99. *Davis v. United States*, 512 U.S. 452, 459 (1994).

100. *Berghuis*, 130 S. Ct. at 2260.

101. *Id.*

right to remain silent.<sup>102</sup> The consequences of an incorrect assessment by the police are significant since an otherwise valid confession may not be obtained.<sup>103</sup> In this case there is no evidence that Thompson invoked his right to remain silent.<sup>104</sup> All he was required to say was that he did not want to talk to the police.<sup>105</sup> If he had done so, he would have invoked his right to remain silent and the Southfield police officers would have had to “scrupulously honor” the invocation.<sup>106</sup>

The next issue the Court considered was whether Thompson waived his right to remain silent.<sup>107</sup> It is axiomatic that even in the absence of an assertion by the suspect that he wishes to remain silent, any statements made during custodial interrogation are inadmissible unless the suspect “knowingly and voluntarily waived [*Miranda*] rights.”<sup>108</sup> Waiver cannot be presumed from the silence of the suspect following the advice of rights.<sup>109</sup> The prosecutor has a “heavy burden” to demonstrate that the suspect “knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”<sup>110</sup> The Court has previously held that an express waiver does not have to be “specifically made.”<sup>111</sup> An implied waiver can be established through “the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.”<sup>112</sup>

The Court determined that Thompson understood his rights and thereafter waived his right to remain silent through a course of conduct.<sup>113</sup> As to the first determination, his rights were read aloud to him, and he received a copy of his rights.<sup>114</sup> There was also ample evidence that he could read and understand English, given the fact that Thompson read aloud the fifth warning which provided that “you have the right to decide at any time before or during questioning to use your

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102. *See id.* at 2260-61.

103. *Id.* at 2260.

104. *Id.*

105. *Id.*

106. *Berghuis*, 130 S. Ct. at 2260. *See also* *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (holding that after a person in custody invokes his right to remain silent and then police obtain statements, the admissibility of those statements hinges on whether “his right to cut off questioning was scrupulously honored.”).

107. *Berghuis*, 130 S. Ct. at 2260.

108. *Id.*

109. *Id.* at 2261 (citing *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)).

110. *Id.* at 2261 (quoting *Miranda*, 384 U.S. at 475).

111. *Id.* at 2261 (quoting *Connecticut v. Barrett*, 479 U.S. 523, 531-32 (1987)).

112. *Id.* at 2261 (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)).

113. *Berghuis*, 130 S. Ct. at 2262.

114. *Id.*

right to remain silent and your right to talk with a lawyer while you are being questioned.”<sup>115</sup>

As to the waiver issue, his response to the officer's question about whether he, Thompkins, “prayed to God for forgiveness” is illustrative of conduct demonstrating a waiver of his right to remain silent.<sup>116</sup> This conclusion is further supported by Thompkins’ “sporadic answers to questions throughout the interrogation.”<sup>117</sup> If he wished to remain silent, he could have elected to say nothing.<sup>118</sup> The fact that his statements occurred almost three hours into the interview is not dispositive of a lack of waiver.<sup>119</sup> The police are not required to periodically rewarn a suspect of his *Miranda* warnings.<sup>120</sup>

Additionally, there was no evidence that his statements were involuntary.<sup>121</sup> The typical indicia of coercion (e.g. deprivation of basic needs, threats, etc.) were absent.<sup>122</sup> Finally, the Court rejected Thompkins’s argument that even if his comments to the officers demonstrated a waiver of his right to remain silent, the officers were not permitted to question him until they first obtained a waiver.<sup>123</sup> This contention is inconsistent with *North Carolina v. Butler*,<sup>124</sup> which held that an implied waiver can be demonstrated by the conduct of the suspect.<sup>125</sup> Where, as here, Thompkins knew he could invoke his *Miranda* rights at any time during the interrogation, the detectives were permitted to question him without first obtaining a waiver.<sup>126</sup>

This decision has expanded the ability of the police to obtain a confession. For the first time, the Court has held that suspects must “unambiguously” exercise their right to remain silent as is required with respect to the right to counsel.<sup>127</sup> Thus, in the face of uncertainty or ambiguity, the police are not required to cease their questioning. Arguably, the Court has taken a step back from its previous rulings regarding the “heavy burden” on the prosecution to establish waiver of

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115. *Id.*

116. *Id.* at 2263.

117. *Id.*

118. *Id.*

119. *Berghuis*, 130 S. Ct. at 2263.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. 441 U.S. 369 (1979).

125. *Berghuis*, 130 S. Ct. at 2263 (citing *Butler*, 441 U.S. at 373).

126. *Id.* at 2263-64.

127. *See id.* at 2260.

the right to remain silent, which ordinarily cannot be established by post-warnings silence.<sup>128</sup>

The facts in *Butler* were more compelling concerning a course of conduct demonstrating waiver.<sup>129</sup> Has the burden effectively shifted to a suspect to speak before invoking the right to remain silent? Alternatively, has the Court created a bright-line rule for the police *and* criminal suspects regarding the right to remain silent, since the police now do not have to second guess whether a suspect has invoked this right? The suspect has the ability to control whether to accede to an interrogation by clearly stating whether he or she wishes to remain silent. As a consequence of this decision, will police departments revise their training protocol as to how to administer their *Miranda* warnings? It certainly seems likely.

### *B. Double Jeopardy*

This term arose in *Renico v. Lett*,<sup>130</sup> a case originating in Michigan, in which the Supreme Court held that no double jeopardy occurred when a defendant was retried on a murder charge after his first trial resulted in a hung jury.<sup>131</sup> At trial, the jury sent seven questions to the judge, despite deliberating for only four hours.<sup>132</sup> During a colloquy with the trial judge, the foreperson indicated that the jury would not be able to reach a unanimous verdict.<sup>133</sup> The judge later declared a mistrial, and neither the prosecutor nor the defendant's attorney objected.<sup>134</sup> The defendant, Lett, was tried a second time before a different judge six months later. After deliberating for just over three hours, the jury unanimously found him guilty of second-degree murder.<sup>135</sup>

On appeal to the Michigan Court of Appeals, Lett argued that the judge in his first trial declared a mistrial in the absence of manifest necessity.<sup>136</sup> As a result, Lett argued, the Double Jeopardy Clause of the

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128. *See id.* at 2261.

129. In *Butler*, following his advice of rights, the suspect said "I will talk to you but I am not signing any [waiver] form." *Butler*, 441 U.S. at 370.

130. 130 S. Ct. 1855 (2010).

131. *Renico*, 130 S. Ct. at 1864.

132. *Id.* at 1860.

133. *Id.* at 1861.

134. *Id.*

135. *Id.*

136. *Id.*

Fifth Amendment barred retrial.<sup>137</sup> The court agreed and reversed his conviction.<sup>138</sup>

The Michigan Supreme Court reversed the decision of the Michigan Court of Appeals, finding that a deadlocked jury is the classic situation, which constitutes manifest necessity allowing for a retrial as recognized by the U.S. Supreme Court.<sup>139</sup> Notwithstanding the relatively short amount of time spent by the jury, the record demonstrated heated deliberations and an inability to reach a unanimous verdict.<sup>140</sup>

The defendant thereafter sought habeas corpus review, again arguing that the trial court abused its discretion in declaring a mistrial because there was no manifest necessity.<sup>141</sup> He further contended that the Michigan Supreme Court's decision was "an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States, and thus [his claim] was not barred by the AEDPA."<sup>142</sup> "The District Court agreed and granted the writ."<sup>143</sup> The U.S. Court of Appeals for the Sixth Circuit affirmed.<sup>144</sup>

The U.S. Supreme Court defined the issue not as whether the trial court abused its discretion in declaring a mistrial, but whether, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the decision of the Michigan Supreme Court was "an unreasonable application of . . . clearly established Federal law."<sup>145</sup> A deadlocked jury

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137. *Renico*, 130 S. Ct. at 1861.

138. *Id.*

139. *Id.* at 1861-62. The Michigan Supreme Court, relying on *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), determined there is not double jeopardy in the circumstances presented in this case so "long as the trial court exercised its 'sound discretion' in concluding that the jury was deadlocked and thus there was a 'manifest necessity' for a mistrial." *Renico*, 130 S. Ct. at 1861 (quoting *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824)). The Michigan Supreme Court also observed the United Supreme Court's decision in *Arizona v. Washington*, 434 U.S. 497, 506-510 (1978), requiring a reviewing court to generally defer to a trial court's judgment that there was a deadlocked jury. *Renico*, 130 S. Ct. at 1861.

140. *Renico*, 130 S. Ct. at 1861-62.

141. *Id.* at 1862.

142. *Id.* "AEDPA . . . imposes a 'highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" *Id.* at 1862 (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); *Woodford v. Viscioti*, 537 U.S. 19, 24 (2002) (per curiam)).

143. *Renico*, 130 S. Ct. at 1862; see also *Lett v. Renico*, 507 F. Supp.2d 777 (E.D. Mich. 2007).

144. *Renico*, 130 S. Ct. at 1862; see also *Lett v. Renico*, 316 F. App'x 421 (6th Cir. 2007).

145. *Renico*, 130 S. Ct. at 1862 (quoting 28 U.S.C.A. § 2254(d)(1)). The Supreme Court has held the following:

"[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." Indeed, "a federal habeas court may not issue the writ simply because

constitutes “manifest necessity” and the decision to declare a mistrial is “accorded great deference by a reviewing court.”<sup>146</sup> Additionally, the Court has rejected a formalistic approach for making the decision.<sup>147</sup> In fact, a trial court is not required to make specific findings of “manifest necessity” informing its discretionary decision that the jury is deadlocked.<sup>148</sup>

Based upon the applicable standard of review under the AEDPA, the Michigan Supreme Court’s decision was not “unreasonable.”<sup>149</sup> The Michigan Supreme Court considered the relevant double jeopardy cases where a manifest necessity existed when a jury was deadlocked.<sup>150</sup> It applied those decisions to the facts presented at Lett’s trial and concluded that the decision passed muster under the AEDPA.<sup>151</sup> The U.S. Supreme Court specifically avoided a determination of whether the Michigan Supreme Court’s decision was right or wrong.<sup>152</sup> The Court held that “[g]iven the foregoing facts, the Michigan Supreme Court’s decision upholding the trial judge’s exercise of discretion—while not necessarily correct—was not objectively unreasonable.”<sup>153</sup>

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that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable.”

*Id.* (internal quotation marks omitted) (citations omitted).

In addition, in a case such as this where a court is given broad discretion, the Court has held that “[t]he more general the rule at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—the more leeway [state] courts have in reaching outcomes in case-by-case determinations.” *Id.* at 1864 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

146. *Renico*, 130 S. Ct. at 1863 (quoting *Arizona v. Washington*, 434 U.S. 497, 506, 510 (1978)).

147. *Id.* at 1863-64.

148. *Id.*

149. *Id.* at 1864.

150. *Id.*

151. *Id.*

152. *Renico*, 130 S. Ct. at 1865 n.3.

153. *Id.* at 1865. In addition to concluding that the Sixth Circuit erred in its application of the AEDPA, the Supreme Court also found that the Court of Appeals mistakenly relied on its earlier decision in *Fulton v. Moore*, 520 F.2d 522 (6th Cir. 2008), in holding that the U.S. Supreme Court in *Arizona v. Washington* required that a reviewing court, when evaluating whether a trial court properly exercised its discretion to declare a mistrial based upon a deadlocked jury, must consider the following three factors: “whether the judge (1) heard the opinions of the parties’ counsel about the propriety of the mistrial; (2) considered the alternatives to a mistrial; and (3) acted deliberately instead of abruptly.” *Renico*, 130 S. Ct. at 1865-66. The Court in *Renico* held that “the *Fulton* decision . . . does not constitute ‘clearly established Federal law, as determined by the Supreme Court,’ so any failure to apply that decision cannot independently authorize habeas relief under the AEDPA.” *Id.* at 1866 (quoting 28 U.S.C.A. § 2254(d)(1) (1996)).

The Court in *Renico* did observe that the trial court "could have been more thorough before declaring a mistrial."<sup>154</sup> Perhaps the colloquy with the foreperson could have been more complete, the jury could have been given additional time to deliberate, or the judge could have consulted with the parties.<sup>155</sup> Although the Supreme Court declined to second-guess the decision of the trial court, but for the very high standards established by the AEDPA, the Court may very well have reversed the decision to declare a mistrial.<sup>156</sup> In the future, Michigan appellate courts may expect trial courts to engage in a more searching decision-making process before concluding that manifest necessity exists to declare a mistrial when a jury declares it is deadlocked, especially in circumstances where, as in *Renico*, the jury's deliberations were of a relatively short duration.

### C. Impeachment

In *People v. Borgne*,<sup>157</sup> the Michigan Supreme Court considered whether the prosecutor violated the defendant's due-process rights by commenting on his post-arrest, post-*Miranda* silence.<sup>158</sup>

In *Borgne*, while fueling her car, the victim was robbed by the defendant.<sup>159</sup> The victim got a good look at the defendant and followed him.<sup>160</sup> The police eventually found him in an abandoned commercial building.<sup>161</sup> As he was being escorted out of the building, the victim identified him as her assailant.<sup>162</sup> At the station house, the defendant was

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154. *Renico*, 130 S. Ct. at 1866.

155. *Id.*

156. *Id.*

157. 483 Mich. 178 (2009).

158. *Borgne*, 483 Mich. at 180-81. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the U.S. Supreme Court held that a defendant's post-arrest silence cannot be used against him following *Miranda* warnings. *Id.* at 618. However, impeachment is permissible when a defendant falsely testifies that he provided an exculpatory story to the police; under those circumstances the prosecutor may impeach the defendant with the fact that he remained silent after being advised of his rights. *Doyle*, 426 U.S. at 620 n.11. In other words, before the impeachment exception can be triggered, the defendant must first "open the door." Since *Doyle*, the Court has articulated several instances where the rule of *Doyle* does not apply. See *Fletcher v. Weir*, 455 U.S. 603, 605-07 (1982) (per curiam) (holding that a defendant can be impeached by his pre-arrest silence); see also *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) (holding that a defendant can be impeached by silence after arrest but prior to *Miranda* warnings).

159. *Borgne*, 483 Mich. at 181.

160. *Id.*

161. *Id.* at 182.

162. *Id.*



advised of his *Miranda* rights; he “invoked his right to remain silent and asked for an attorney.”<sup>163</sup>

Approximately two weeks later, the victim was involved in a minor traffic accident.<sup>164</sup> While she was talking to the other driver involved in the accident, the defendant drove up and yelled through an open window, “I’m the motherfucker what robbed you, ha, ha, ha.”<sup>165</sup> The defendant was charged with armed robbery and possessing a firearm while committing a felony.<sup>166</sup> The defendant testified that following his arrest he unsuccessfully tried to tell the police what happened.<sup>167</sup>

The trial court found that the prosecution “made broad use of defendant’s post-*Miranda* silence during both its cross-examination of [the] defendant and its closing argument to impeach the defendant’s exculpatory testimony.”<sup>168</sup> The court further found that the defendant did not open the door to his being impeached because he did not testify that he attempted to tell the police his version of the events surrounding the robbery after being advised of his rights.<sup>169</sup> Significantly, the prosecutor *could* have impeached the defendant after he was arrested and was being taken out of the warehouse.<sup>170</sup> As noted, the *Doyle* rule is inapplicable to post-arrest, pre-*Miranda* silence.<sup>171</sup>

The court rejected the prosecutor’s argument that the situation was analogous to *People v. Allen*.<sup>172</sup> In *Allen*, the court extended the rule in *Doyle* to situations where a defendant falsely claims that the trial was his first opportunity to tell his story.<sup>173</sup> This is inapposite to the defendant’s situation in *Borgne* inasmuch as he maintained that he was unable to tell

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163. *Id.* at 183.

164. *Id.* at 182.

165. *Borgne*, 483 Mich. at 182.

166. *Id.*

167. *Id.* at 183.

168. *Id.* There can be little doubt that the prosecutor was improperly commenting on the defendant’s post-arrest, post-*Miranda* silence. For example, during cross-examination, after the prosecutor established that the defendant had been advised of his *Miranda* warnings, had exercised his right to remain silent, and invoked his right to counsel, the prosecutor asked the following question: “Q. And then when you had the chance to sit down with Sargent [sic] Dunbeck you didn’t say anything that [sic]? A. I wanted a lawyer present for any statement given.” *Id.* at 190.

During closing argument, the prosecutor stated “Mr. Borgne out that night [sic] and he sits down with Sargent [sic] Dunbeck in the police station, you’re under arrest for Armed Robbery, someone’s saying you robbed ‘em. What’s your side of the story? Well, nothing.” *Id.* at 191.

169. *Borgne*, 483 Mich. at 193-94.

170. *Id.* at 194-95.

171. *Fletcher v. Weir*, 455 U.S. 603, 604 (1982) (per curiam).

172. *Borgne*, 483 Mich. at 195 (citing *People v. Allen*, 201 Mich. App. 98 (1993)).

173. *Id.* at 195 (citing *Allen*, 201 Mich. App. At 102-03).

the police what happened when he was being escorted from the warehouse.<sup>174</sup> As noted, *Doyle* is not even applicable in *Borgne* because the defendant had not yet been given his *Miranda* warnings.<sup>175</sup> Thus, the prosecutor could have impeached him with his silence.<sup>176</sup>

Notwithstanding the due process violation, the court considered whether this constitutional error warranted reversal under a plain error analysis inasmuch as the defendant failed to object.<sup>177</sup> Although there was plain and obvious legal error, the Court found that the defendant failed to establish prejudice.<sup>178</sup> The prosecutor's references to the defendant's post-arrest, post-*Miranda* silence was not extensive and it was done under the mistaken belief that the defendant raised the issue in the police car following his arrest.<sup>179</sup> The prosecutor's intent was to impeach the defendant, not establish substantive guilt.<sup>180</sup> In addition, there was substantial evidence establishing the defendant's guilt.<sup>181</sup>

In *People v. Shafier*,<sup>182</sup> a related case decided the same day as *Borgne*, the Michigan Supreme Court again found that the prosecutor's repeated references to the defendant's post-arrest, post-*Miranda* silence constituted a due process violation.<sup>183</sup> However, unlike *Borgne*, the court found the errors could not survive a plain-error evaluation.<sup>184</sup> The court's analysis in *Shafier* and *Borgne* was substantially the same.<sup>185</sup>

A comparison of the facts in both *Borgne* and *Shafier* is instructive. The extent of the *Doyle* violations was more egregious in *Shafier*. In *Shafier* the defendant was charged with both first-degree and second-degree criminal sexual conduct for sexually assaulting his 13-year old daughter.<sup>186</sup> Immediately following his arrest he was given his *Miranda* warnings.<sup>187</sup> He exercised his right to remain silent.<sup>188</sup> At his trial, the

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174. *Id.* at 195.

175. *Id.*

176. *Id.*

177. *Id.* at 196-202. The plain-error analysis requires a reviewing court to consider four factors: "First, there must have been an error; Second, the error must be plain, meaning clear or obvious; Third, the error must have affected substantial rights; . . . Fourth, the error must have 'resulted in the conviction of an actually innocent defendant' or 'seriously affected the fairness, integrity or public reputation of judicial proceedings . . .'" *Id.* at 196-97 (citing *People v. Carines*, 460 Mich. 750, 763 (1999)).

178. *Borgne*, 483 Mich. at 201-202.

179. *Id.* at 198.

180. *Id.* at 198-99.

181. *Id.* at 199-201.

182. 483 Mich. 205 (2009).

183. *Shafier*, 483 Mich. at 218-19.

184. *Id.* at 221-23.

185. *See id.* at 211-24.

186. *Id.* at 208.

187. *Id.*

defendant testified that he had never sexually assaulted any of his daughters and that his wife encouraged their daughters to falsely accuse the defendant because she was jealous of the time he was spending with the girls.<sup>189</sup> The defendant was eventually convicted of two counts of second-degree criminal sexual conduct.<sup>190</sup>

During trial, “the prosecutor made repeated references to the defendant’s post-arrest, post-*Miranda* silence.”<sup>191</sup> In his opening statement the prosecutor said that, following the defendant’s arrest, he “didn’t say anything, not a word. [The officer] told him why he was being arrested, he was arrested and no statements were made.”<sup>192</sup> Similarly, during direct testimony by the arresting officer, after the officer testified that he gave the defendant his *Miranda* warnings, the prosecutor asked the following question: “So he never made any statements to you. He was fully aware of what you were arresting him for?”<sup>193</sup> This line of questioning was repeated during re-direct examination and specifically referred to during closing argument.<sup>194</sup>

After concluding that the prosecutor repeatedly used the defendant’s post-arrest, post-*Miranda* silence against him, the Michigan Supreme Court again considered whether there was plain error inasmuch as the defendant failed to object and preserve the issue.<sup>195</sup> In addition to the qualitative differences in the violation of *Doyle* between the cases, another distinguishing fact separating *Borgne* and *Shafier* can be seen when comparing the relative strength of the untainted evidence in both cases. In *Borgne*, there was significant independent and untainted evidence tying the defendant to the robbery, whereas in *Shafier*, the prosecutor’s case rested largely on the believability of the accuser and her sisters.<sup>196</sup> Thus the repeated references to his silence were used not only to impeach the defendant in *Shafier*, but also as substantive evidence to tie him to the crime.<sup>197</sup>

Thus, the total impact of the *Doyle* violations was greater in *Shafier* than in *Borgne* when evaluating both the pervasiveness of the prosecutor’s errors as well as the strength of the independent, untainted evidence. Despite the result in *Borgne*, a prosecutor’s commenting on a

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188. *Id.*

189. *Shafier*, 483 Mich. at 209-10.

190. *Id.* at 210.

191. *Id.* at 215.

192. *Id.*

193. *Id.* at 215-16.

194. *Id.* at 216.

195. *Shafier*, 483 Mich. at 217, 219-24.

196. Compare *Borgne*, 483 Mich. at 199-201, with *Shafier*, 483 Mich. at 222-23.

197. See *Shafier*, 483 Mich. at 222-23.

defendant's post-arrest, post-*Miranda* statement, regardless of a cautionary instruction by the trial court, will almost certainly have an impact on the jury. As a matter of fundamental fairness, prosecutors should generally avoid this tactic. In addition, it is a high-risk strategy that will be measured by an after-the-fact review of the existence of independent and untainted evidence. Finally, although not raised in either *Borgne* or *Shafier*, there are potential double jeopardy implications that could preclude a retrial if a court determines a defendant was provoked into making a motion for a mistrial based upon a *Doyle* violation.<sup>198</sup>

#### IV. SIXTH AMENDMENT

##### A. Confrontation

The Michigan Court of Appeals considered two cases regarding the application of *Crawford v. Washington*.<sup>199</sup> In the first case, *People v. Payne*, the defendant challenged, for the first time on appeal, the admissibility of DNA test results prepared by a non-testifying analyst and admitted into evidence under the business records exception to the hearsay rule.<sup>200</sup>

It was not contested that the laboratory report, because it 'was prepared by a nontestifying analyst, was hearsay.'<sup>201</sup> Further, the court held that these reports did not qualify under the business records exception to the hearsay rule "[b]ecause the laboratory reports at issue were adversarial and were intended to establish an element of the CSC charges against the defendant through the hearsay DNA evidence they

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198. See *Oregon v. Kennedy*, 456 U.S. 667, 672-79 (1982).

199. 541 U.S. 36 (2004). In *Crawford*, the Court held that the Sixth Amendment prohibits the admissibility of testimonial hearsay evidence unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. *Id.* at 68.

200. 285 Mich. App. 181, 194-95 (2009). The Michigan Rules of Evidence "except[] from the hearsay rule" the following:

A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

*Payne*, 285 Mich. App. at 195-96 (citing MICH. R. EVID. 803(6)).

201. *Payne*, 285 Mich. App. at 195. The Michigan Supreme Court has previously held that "a laboratory report prepared by a nontestifying analyst 'is, without question, hearsay.'" *Id.* at 196 (quoting *People v. McDaniel*, 469 Mich. 409, 412 (2003)).

contained.”<sup>202</sup> The court concluded the error “was not *harmless* because the reports were the only evidence that established an essential element of the CSC charges.”<sup>203</sup>

The court then turned its attention to whether the trial court’s decision to admit the reports violated the defendant’s Sixth Amendment right to confront the witnesses against him.<sup>204</sup> In *Melendez-Diaz v. Massachusetts*,<sup>205</sup> the U.S. Supreme Court held that the introduction of drug analysis certificates for use in a criminal prosecution violated *Crawford* because the reports were testimonial and the defendant did not have an opportunity to cross-examine the lab technician who analyzed the evidence.<sup>206</sup> Prior to *Melendez-Diaz*, the Michigan Court of Appeals, in *People v. Lonsby*,<sup>207</sup> considered whether a laboratory report prepared by a non-testifying analyst could survive a *Crawford* analysis.<sup>208</sup> The court concluded it could not.<sup>209</sup>

As a result, in *Payne*, despite the defendant’s failure to object to the admissibility of the DNA reports as a Confrontation Clause violation and absent a showing that the technician was unavailable and that the defendant had a prior opportunity to cross-examine the witness, it was error for the trial court to admit the reports.<sup>210</sup> The court observed that the DNA evidence was crucial to the prosecution’s case, and there was no other independent evidence of the defendant’s guilt; thus, there was “plain constitutional error.”<sup>211</sup>

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202. *Id.* at 196 (The court also rejected the reports as “public records” under MRE 803(8)).

203. *Id.* (emphasis added).

204. *Id.* at 196-97.

205. 129 S. Ct. 2527 (2009).

206. *Payne*, 285 Mich. App. at 196 (citing *Melendez-Diaz*, 129 S. Ct. at 2539-40).

207. 268 Mich. App. 375 (2005).

208. *Lonsby*, 268 Mich. App. at 377-78.

209. *Id.* at 378. The U.S. Supreme Court has agreed to consider whether the Confrontation Clause permits the prosecution to introduce testimonial statements of an analyst who did not observe or perform the analysis. *Bullcoming v. New Mexico*, 131 S. Ct. 62 (2010) (Mem.). In *Bullcoming*, the New Mexico Supreme Court concluded that allowing testimony regarding a blood-alcohol test through a qualified witness who did not perform the test was not a Confrontation Clause violation since the analyst merely transcribed the results from a gas chromatograph machine to a report. There was no need to interpret the results or otherwise exercise independent judgment on how the test was to be run. *State v. Bullcoming*, 226 P.3d 1, 8-9 (N.M. 2010).

210. *Payne*, 285 Mich. App. at 199-201.

211. *Id.* at 200. In *People v. Carines*, 460 Mich. 750 (1999), the Michigan Supreme Court held that when there is a failure by the defendant to object and the issue is a constitutional one, a court must ascertain whether the defendant is innocent or that the error has “seriously affect[ed] the fairness, integrity or public reputation of judicial

In another *Crawford*-related issue, the Michigan Court of Appeals, in *People v. Breeding*,<sup>212</sup> considered whether it was a violation of the Confrontation Clause to permit out-of-court testimonial evidence in a probation revocation proceeding.<sup>213</sup> In *Breeding*, the defendant was charged with first-degree CSC and two counts of distributing sexually explicit material to a minor.<sup>214</sup> The defendant pled no contest to second-degree CSC and was sentenced to five years of probation.<sup>215</sup> A condition of his probation precluded contact with children under sixteen as well as unsupervised contact with his children.<sup>216</sup> Following a second violation of probation, a warrant was issued for his arrest for having contact with a friend's two young children.<sup>217</sup>

At the defendant's violation hearing, his probation officer testified that she had investigated the allegations, which included a conversation with the children's mother, who stated that the defendant had contact with her children.<sup>218</sup> The mother did not testify.<sup>219</sup>

The Michigan Court of Appeals initially recognized that probation violation hearings are informal and a court has broad discretion regarding the admission of evidence at a probation violation hearing.<sup>220</sup> In addition, except for the rules regarding privileges, the rules of evidence do not apply.<sup>221</sup> With respect to *Crawford*'s applicability, it applies only to "criminal prosecutions" within the meaning of the Sixth Amendment.<sup>222</sup> The U.S. Supreme Court has held that a parole revocation proceeding is not a "criminal prosecution."<sup>223</sup> Other federal courts that have considered the *Crawford* issue as it concerns probation revocation proceedings have concluded that it does not apply.<sup>224</sup> The court in *Breeding* followed every other court to consider this issue and rejected the defendant's argument.<sup>225</sup>

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proceedings" independent of the defendant's innocence. *Carines*, 460 Mich. at 773 (citing *Johnson v. United States*, 520 U.S. 461, 469-70 (1997)).

212. 284 Mich. App. 471 (2009).

213. *Breeding*, 284 Mich. App. at 479.

214. *Id.* at 473.

215. *Id.* at 474.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Breeding*, 284 Mich. App. at 476.

220. *Id.* at 479 (citing MICH. CT. R. 6.445(E)(1)).

221. *Id.* (quoting MICH. CT. R. 6.445(E)(1)).

222. *Id.* at 480-81 (quoting U.S. CONST. amend. VI).

223. *Id.* at 481 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1980)).

224. *See, e.g., United States v. Kelly*, 446 F.3d 688, 691 (7th Cir. 2006) and *United States v. Rondeau*, 430 F.3d 44, 47 (1st Cir. 2005).

225. *Breeding*, 284 Mich. App. at 482.

The court then considered defendant's argument that even if *Crawford* does not apply, the defendant had a "due process right to confront the witnesses against him in a probation revocation proceeding."<sup>226</sup> Because the defendant failed to object to the probation officer's testimony, it was reviewed for plain error.<sup>227</sup>

Initially the court recognized that probationers have a right to confront and cross-examine witnesses in a probation violation hearing.<sup>228</sup> Similarly, the U.S. Supreme Court has enunciated certain minimum due process requirements in a *parole* revocation proceeding, including the "right to confront and cross-examine adverse witnesses."<sup>229</sup> Subsequently, the Court held certain due process requirements also apply to probation revocation proceedings.<sup>230</sup> In order to balance the line of cases that have held that *Crawford* does not apply in these post-conviction proceedings against the rules that defendants possess minimal due process rights, courts have developed two approaches to determine whether these minimal requirements have been met.<sup>231</sup> One approach is a balancing test, weighing "the probationer's interest in confronting a witness against the interests of the state in not producing the witness."<sup>232</sup> The other approach looks to "whether the evidence reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness."<sup>233</sup>

The defendant unsuccessfully urged the court to adopt the balancing approach, where the state is required to establish "good cause" for denying the probationer the right to confrontation.<sup>234</sup> Because the defendant failed to request the opportunity to cross-examine the probation officer and failed to object to the admission of the hearsay evidence, the court declined to adopt either approach to establish the admissibility of the probation officer's testimony.<sup>235</sup> As a result, the record was too sparse to decide whether either test was satisfied.<sup>236</sup> The plain-error test was also not satisfied.<sup>237</sup> Further, based upon the record,

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226. *Id.* at 483.

227. *Id.*

228. *Id.* at 483 (citing MICH. CT. R. 6.445(E)(1) (providing that "the probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses.")).

229. *Id.* at 484 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).

230. *Id.* (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)).

231. *Breeding*, 284 Mich. App. at 485.

232. *Id.* (quoting *Reyes v. State*, 868 N.E.2d 438, 441 (Ind. 2007)).

233. *Id.* (quoting *Reyes*, 868 N.E.2d at 441).

234. *Id.* (quoting *Reyes*, 868 N.E.2d at 441).

235. *Id.* at 486-87.

236. *Id.* at 486.

237. *Breeding*, 284 Mich. App. at 487.

reviewing the evidence in the light most favorable to the prosecution (as a reviewing court is required to do) there was sufficient evidence to enable a rational trier of fact to conclude that the probation violation was proven by a preponderance of the evidence.<sup>238</sup>

Although the court declined to adopt either test to determine whether a probationer's minimal due process rights have been satisfied, the better approach would be to require a reviewing court to determine whether the evidence presented by the state in a probation violation hearing was sufficiently reliable as opposed to simply considering whether the state had "good cause" for not producing a witness. The former test allows for a review of the full record when ascertaining whether minimal due process as required by *Morrissey* and *Gagnon* has been met. A "good cause" approach is too narrow in scope.

### *B. Right to Counsel*

In *Duncan v. State*,<sup>239</sup> a class action suit was brought against the State of Michigan by indigent defendants subject to felony prosecutions in Berrien, Genesee, and Muskegon counties.<sup>240</sup> They claimed that the current system<sup>241</sup> of court-appointed attorneys for indigent defendants violated their state and federal constitutional rights to the effective assistance of counsel.<sup>242</sup> They contended that the current system is underfunded, poorly administered, and fails to allow appointed counsel the necessary time to fully engage in an adversarial system.<sup>243</sup> They also alleged that the current system is deficient as it presents conflicts of interest, and lacks training, monitoring, and supervision protocols, as well as performance-based standards.<sup>244</sup>

The defendants claimed that the results of the indigent defense system include wrongful convictions, improper guilty pleas, prolonged and unnecessary pretrial detentions, and the introduction of inadmissible evidence due to the failure of counsel to file the necessary pretrial motions.<sup>245</sup> The Michigan Court of Appeals did not reach the merits of

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238. *Id.* at 487-89.

239. 284 Mich. App. 246 (2009).

240. *Duncan*, 284 Mich. App. at 253-54.

241. There is no state-wide defender system. Rather, pursuant to statute, appointments are made at the local level. The counties and chief judges have the responsibility for the creation of a system that allows for the appointment of counsel for indigent defendants. *See id.* at 253-54; *see also* MICH. CT. R. 8.123.

242. *Duncan*, 284 Mich. App. at 253-54.

243. *Id.* at 256-57.

244. *Id.* at 257.

245. *Id.* at 257-58.



the lawsuit.<sup>246</sup> Rather, the court held that the judiciary is empowered to evaluate whether the Legislative and Executive Branches are in constitutional compliance with respect to the methodology in the appointment of counsel for indigent defendants.<sup>247</sup> As a result, the trial court is authorized to fully consider the constitutionality of the current method for appointments.<sup>248</sup> The court found that the class was properly certified by the trial court, the plaintiffs had standing, and the matter was ripe for adjudication.<sup>249</sup>

This case will potentially have an enormous impact on the current method for the appointment of counsel for indigent defendants. This includes not only the process (since the plaintiffs are seeking a statewide administered system), but there are obvious substantial fiscal and budgetary issues. Given the delegation of the appointment process to local government and courts, there is a wide spectrum and divergence of process with respect to how counsel is appointed, the establishment of minimum qualifications, training, oversight, etc. There are legitimate concerns about the effectiveness of the existing system as well as appearance issues since a judge may appoint an attorney who was a contributor to his/her judicial campaign.

In another case involving indigent defendants, the Michigan Supreme Court in *People v. Jackson*<sup>250</sup> considered the process by which trial judges require indigent, convicted defendants to reimburse attorney costs.<sup>251</sup> Prior to *Jackson*, before a court could require an indigent defendant to repay costs associated with court appointed counsel, a presentence determination had to demonstrate that the defendant had the potential ability to pay the fees.<sup>252</sup> The court in *Jackson* concluded this presentence requirement was incorrectly decided.<sup>253</sup> As a result, *Dunbar* was overruled.<sup>254</sup>

In *Jackson*, the defendant was provided with court-appointed counsel and, after pleading guilty to several felonies, was sentenced to a

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246. *See id.* at 343.

247. *Id.* at 283.

248. *Duncan*, 284 Mich. App. at 283-84.

249. *Id.* at 254-55.

250. 483 Mich. 271 (2009).

251. *Jackson*, 483 Mich. at 274-75.

252. *See, e.g., People v. Dunbar*, 264 Mich. App. 240, 251-56 (2004), *overruled by Jackson*, 483 Mich. 271. After *Dunbar*, the Michigan Legislature enacted statutes giving a sentencing court the authority to require the collection of a court-appointed attorney fee as part of the sentence and to impose this requirement against an incarcerated defendant. *See* MICH. COMP. LAWS ANN. §§ 769.1k, 769.1l (West 2009).

253. *Jackson*, 483 Mich. at 290.

254. *Id.* at 293-99.

minimum of eight years.<sup>255</sup> In addition, the trial court imposed several financial requirements, including repayment of \$725 for "Initial Defense Costs."<sup>256</sup> The court did not indicate whether it considered the defendant's potential ability to pay the attorney fee as required by *Dunbar*.<sup>257</sup> Subsequently, the court issued an order that required the remittance of the funds through the defendant's prisoner account.<sup>258</sup>

The U.S. Supreme Court has on several occasions considered various state procedures for the recoupment of the costs associated with providing counsel to indigent defendants.<sup>259</sup> As a result of these prior decisions, the Michigan Supreme Court in *Jackson* first recognized that any recoupment procedure must not require the indigent defendant who receives court-appointed counsel to be subjected to more onerous collection procedures than a civil debtor.<sup>260</sup> Second, there must be procedural and substantive safeguards in place to not only guarantee the indigent's right to counsel, but if reimbursement is ordered, that it can be accomplished without substantial hardship.<sup>261</sup> Finally, a defendant cannot be incarcerated if his failure to pay is due to his indigency.<sup>262</sup>

In *Jackson*, as noted, the trial court failed to assess the defendant's ability to pay *before* requiring repayment of attorney fees.<sup>263</sup> The defendant claimed this was a violation of his right to counsel,<sup>264</sup> the court disagreed.<sup>265</sup> The U.S. Supreme Court has never required a presentence ability-to-pay determination.<sup>266</sup> Rather, the assessment must be made before the defendant is punished for his failure to pay.<sup>267</sup> It is only when

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255. *Id.* at 275.

256. *Id.* at 276.

257. *Id.*

258. *Id.*

259. *See, e.g.,* James v. Strange, 407 U.S. 128, 141-42 (1972) (rejecting a Kansas statute because it failed to give defendants the same exemptions civil debtors possessed); Fuller v. Oregon, 417 U.S. 40, 45-46, 53 (1974) (an Oregon recoupment statute was deemed to be constitutional because a defendant was permitted to ask for remission when the payment would impose a "manifest hardship"); Bearden v. Georgia, 461 U.S. 660, 672 (1983) (holding that before punishing a defendant based upon his failure to pay, due process requires that "a sentencing court . . . inquire into the reasons for the failure to pay.").

260. *Jackson*, 483 Mich. at 282 (quoting *Dunbar*, 264 Mich. App. at 252-254).

261. *Id.* at 281-82 (quoting *Dunbar*, 264 Mich. App. at 252-254).

262. *Id.* at 282 (quoting *Dunbar*, 264 Mich. App. at 252-254).

263. *See id.* at 276.

264. *Id.* at 277.

265. *Id.* at 292-94.

266. *Jackson*, 483 Mich. at 287.

267. *Id.*

enforcement of the repayment order is sought that the court is required to determine whether the defendant has an ability to pay.<sup>268</sup>

As long as courts do not require indigent defendants to pay some portion of the fee for receiving court-appointed counsel without first considering ability to pay, it does not infringe upon the Sixth Amendment right to counsel.<sup>269</sup> “The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel.”<sup>270</sup> If reimbursement is sought, a defendant will be able to claim “manifest hardship.”<sup>271</sup>

*Jackson* makes sound practical sense. If a trial court was required to make an ability-to-pay assessment at sentencing, collection would likely be precluded notwithstanding a later ability to pay.<sup>272</sup> For example, *Jackson* noted that MCLA 769.1 allows for the garnishment of a prisoner’s account based upon a person’s “general ability to pay.”<sup>273</sup>

### C. Right to an Impartial Jury

In *Berghuis v. Smith*,<sup>274</sup> the U.S. Supreme Court concluded that the jury-selection process used in Kent County, Mich., was constitutional.<sup>275</sup> The process, characterized by the defendant as “siphoning off,” involved prospective African-American jurors first being called to serve in district courts before they could be considered for jury service in circuit courts.<sup>276</sup> The defendant in *Berghuis* also challenged the policy of excusing potential jurors who had child-care or transportation problems.<sup>277</sup> The defendant claimed the net result of these policies was a

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268. *Id.* at 292-93. As the court held: “trial courts should not entertain defendants’ ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun . . . once enforcement of the fee imposition has begun, and a defendant has made a timely objection based on his claimed inability to pay, the trial courts should evaluate the defendant’s ability to pay.” *Id.* at 292-93.

269. *See id.* at 292-93.

270. *Id.* at 297 n.25 (quoting *Fuller v. Oregon*, 417 U.S. 40, 53 (1974)).

271. *Id.* at 297 n.24.

272. *Jackson*, 483 Mich. at 290.

273. *Id.* at 295.

274. 130 S. Ct. 1382 (2010) (granting petitioner’s writ of habeas corpus), *aff’g* 543 F.3d 326 (6th Cir. 2008). The Michigan Supreme Court initially determined that the jury-selection process did not violate the fair-cross-section requirement of the Sixth Amendment. *People v. Smith*, 463 Mich. 199, 202-03 (2000).

275. *Berghuis*, 130 S. Ct. at 1395-96.

276. *Id.* at 1388-89.

277. *Id.* at 1389.

disproportionately low number of African Americans available for jury service.<sup>278</sup>

In *Berghuis*, the Court determined Smith's evidence regarding the underrepresentation of African-Americans was not due to "systematic exclusion."<sup>279</sup> The Court observed that neither *Duren v. Missouri*<sup>280</sup> nor any other decision of the Court required the application of a specific methodology when considering the issue of underrepresentation.<sup>281</sup> The Court held that the jury selection process at the time of the defendant's trial was not unconstitutional.<sup>282</sup> In addition, the Court looked to other factors, such as a failure by Smith to provide any evidence that African-Americans were excluded in significantly higher percentages than in Grand Rapids, Mich., which had the county's largest percentage of African-Americans.<sup>283</sup> After rejecting Smith's "siphoning off" argument, the Court also rejected Smith's other factors, including the county's practice of excusing jurors with a showing of hardship and failing to adequately enforce "court orders for the appearance of prospective jurors."<sup>284</sup> The U.S. Supreme Court held that the Michigan Supreme Court's decision was not "unreasonable" under the AEDPA.<sup>285</sup>

The Supreme Court's rejection of Smith's claims reinforces established case law and provides states with considerable latitude in formulating a jury selection process. Because of this broad power, a defendant seeking to challenge the cross-representation requirement of the Sixth Amendment has a very high bar to clear.

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278. *Id.* at 1388-89.

279. *Id.* at 1394-96.

280. 439 U.S. 357 (1979). In *Duren*, the U.S. Supreme Court held that a defendant must establish the following in order to make a *prima facie* case that his Sixth Amendment right to a fair cross-section was violated:

(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the group's representation in the source 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 results from systematic exclusion of the group in the jury selection process.

*Id.* at 357.

281. *Berghuis*, 130 S. Ct. at 1393.

282. *Id.* at 1395.

283. *Id.* at 1394.

284. *Id.* at 1394-95.

285. *Id.* at 1395-96.

## V. SENTENCING

*A. Sex Offender Registration*

In *People v. Dipiazza*,<sup>286</sup> the Michigan Court of Appeals considered whether requiring a defendant who had been placed on probation under the Holmes Youthful Training Act (HYTA)<sup>287</sup> for attempted third-degree criminal sexual conduct to register as a convicted sex offender was a violation of the ban on cruel and unusual punishment under the Michigan Constitution.<sup>288</sup>

When the defendant successfully completed his term of probation he “petitioned the trial court asking that his name be removed from the sex-offender registry because the requirement, as it applie[d] to him,” violated the Michigan constitutional ban proscribing cruel and unusual punishment.<sup>289</sup> The defendant argued that because he successfully completed the program, he did not have a qualifying conviction as a sex offender and thus registration was not required.<sup>290</sup> Furthermore, the defendant argued that requiring registration constitutes cruel and unusual punishment, since it negatively impacted his ability to earn a living.<sup>291</sup> The trial court denied the petition based upon the previous Michigan Court of Appeals decision in *In re Ayres*.<sup>292</sup>

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286. 286 Mich. App. 137 (2009).

287. MICH. COMP. LAWS ANN. §§ 762.11 *et seq.* (West 2000). As the *Dipiazza* court noted:

HYTA is essentially a juvenile diversion program for criminal defendants under the age of 21. Under the act, if an individual pleads guilty to a criminal offense, committed on or after the individual’s seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee.

*Dipiazza*, 286 Mich. App. at 141 (citing MICH. COMP. LAWS ANN. § 762.11(1) (West 2000)). Adjudication under HYTA does not represent a conviction unless a court revokes the defendant’s status as a youthful trainee. MICH. COMP. LAWS ANN. § 762.12 (West 2000).

288. *Dipiazza*, 286 Mich. App. at 140-41.

289. *Id.*

290. *Id.* at 140.

291. *Id.* at 140-41.

292. *Id.* at 141. The court in *In re Ayres*, 239 Mich. App. 8, 20-21 (1999) held that requiring juveniles who had been convicted of sex offenses to register did not violate Michigan’s ban on cruel and unusual punishment. This was predicated on the law existing at that time which, unlike the situation regarding adult sex offenders, did not allow for public access to the information. *See In re Ayres*, 239 Mich. App. at 20-21.

Initially, the court observed that an individual under the age of twenty-one, who is adjudicated under HYTA and successfully completes what is essentially a diversion program, is not considered a "convicted" felon.<sup>293</sup> Further, when an individual completes the HYTA program, the sentencing court is required to dismiss the proceedings and order that the records pertaining to the case be sealed.<sup>294</sup> When first enacted in 1994, a person adjudicated under HYTA did not have to register as a sex offender.<sup>295</sup> However, the Sex Offender Registration Act (SORA) was amended in 1995, requiring the registration of youthful offenders.<sup>296</sup> It is also noteworthy that initially SORA was a confidential database, and then, in 1999, it was amended to allow for public access.<sup>297</sup> Finally, although SORA was amended in 2004 to no longer require the registration of a youthful trainee, the defendant was adjudicated as a youthful trainee prior to this amendment; therefore, he was required to register.<sup>298</sup>

The court then considered whether the registration requirements under SORA constitute punishment.<sup>299</sup> In *In re Ayres*,<sup>300</sup> the court concluded that it did not. First, the court noted that registration, as applied to adults under SORA, is not considered "punishment" under the Eighth Amendment, even considering the public's ability to access the information.<sup>301</sup> This was essentially due to a finding of legitimate governmental interest.<sup>302</sup> Also, the court in *Ayres* found that the fact that information regarding youthful trainees was not publicly available underscored its conclusion that registration for that group of individuals was not punishment.<sup>303</sup>

However, the defendant's situation in *Dipiazza* was very different from that of the defendant in *Ayres*, because he fell into the brief time period where registration under SORA was required and where that

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293. *Dipiazza*, 286 Mich. App. at 142.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 142-43.

298. *Id.* The amendment had an effective date of October 1, 2004. However, the defendant was adjudicated under HYTA on August 29, 2004 and, as noted, at that time youthful trainees had to register under SORA. *Id.* at 140-42.

299. *Dipiazza*, 286 Mich. App. at 144.

300. *In re Ayres*, 239 Mich. App. at 10.

301. *Id.* at 14.

302. *Id.* at 14-19. The court considered two federal cases which held registration under SORA is not considered "punishment" under the 8th Amendment: *Doe v. Kelly*, 961 F. Supp. 1105 (W.D. Mich. 1997) and *Lanni v. Engler*, 994 F. Supp. 849 (E.D. Mich. 1998). *In re Ayres*, 239 Mich. App. at 14-18.

303. *In re Ayres*, 239 Mich. App. at 18-19.

information was publicly available, even as to youthful sex offenders.<sup>304</sup> The SORA registration requirement runs counter to the core aim of HYTA, which is to give youthful trainees who successfully complete the diversion program a second chance.<sup>305</sup> The 2004 amendments to SORA recognized this remedial purpose: "Consequently, by requiring defendant to register for 10 years, defendant is forced to retain the status of being 'convicted' of an offense, thus frustrating the basic purpose of HYTA."<sup>306</sup>

The court in *DiPiazza* further concluded that the effects of public registration have been devastating.<sup>307</sup> Potential employers note his appearance as a sex offender even though he correctly states he does not have a criminal record.<sup>308</sup> As a result, he has been unable to find employment.<sup>309</sup> The court determined that the effect of registration constitutes cruel and unusual punishment as applied to this defendant<sup>310</sup> because he received the sting of punishment by being labeled a convicted sex offender, even though he successfully completed HYTA which, as noted, does not constitute a conviction.<sup>311</sup> Further, HYTA requires that the records are to be sealed<sup>312</sup> and that the youthful trainee "shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee."<sup>313</sup> The stigma associated with being a convicted sex offender exceeds the circumstances of the offense.<sup>314</sup>

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304. See *Dipiazza*, 286 Mich. App. at 140-41.

305. *Id.* at 152.

306. *Id.*

307. See *id.* at 152-53.

308. See *id.*

309. *Id.*

310. *Dipiazza*, 286 Mich. App. at 156. The court also noted that the circumstances of the offense were not terribly egregious. The defendant was in a consensual sexual relationship with a 15-year-old. The parents of the 15-year-old were aware of the relationship. The defendant and the 15-year-old eventually married. The trial court, apparently feeling frustrated by its inability to grant petitioner relief from registration, commented, "if I had some discretion yours is one of those Romeo and Juliet cases where I would probably grant your relief." *Id.* at 140, 154.

311. MICH. COMP. LAWS ANN. §§ 762.11(1), 762.12 (West 2000).

312. *Id.* § 762.14(4).

313. *Id.* § 762.14(2).

314. The court also commented on the trend to limit prosecution and registration requirements for teenagers when there is consensual sex. See *Dipiazza*, 286 Mich. App. at 155.

*B. Probation Violation*

In *People v. Glass*,<sup>315</sup> a case involving a court's continuing jurisdiction to revoke a defendant's probation, the defendant argued that a circuit court lacked jurisdiction to revoke his probation and sentence him to a term of incarceration because his probationary term had expired.<sup>316</sup> Previously, the defendant pled guilty to larceny from a motor vehicle and in July 2004, was sentenced to a two-year term of probation.<sup>317</sup> In February, 2008, the circuit court found the defendant guilty of violating the terms of his probation, and sentenced him to a 25 month to five-year period of incarceration.<sup>318</sup>

The circuit court believed it had jurisdiction based upon the Supreme Court's decision in *People v. Marks*.<sup>319</sup> However, the Court of Appeals found that the lower court incorrectly relied on *Marks* since, unlike *Marks*, the court in *Glass* revoked the defendant's probation as opposed to altering or amending the defendant's probationary terms.<sup>320</sup> In addition, MCLA 771.4, MCLA 771.5(1), MCLA 771.6 require that a probation revocation must be initiated during the defendant's probationary period.<sup>321</sup> The "probationary period" is defined as the term of probation imposed by the lower court.<sup>322</sup> Thus, the court in *Glass* lacked jurisdiction to revoke the defendant's probation and sentence him to a term of incarceration after his two-year term of probation had been

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315. 288 Mich. App. 399 (2010).

316. *Glass*, 288 Mich. App. at 400.

317. *Id.*

318. *Id.*

319. *Id.* at 401. In *People v. Marks*, 340 Mich. 495 (1954), the defendant was placed on probation as a result of his having been found guilty of causing a car accident. *Id.* at 496. After the three-year probationary period was successfully completed, the victims in the accident obtained civil judgments against him and after more than four years had elapsed since he was removed from probation, the court, based upon a petition filed by a probation officer, extended Marks' probation an additional two years and ordered that he pay restitution. *Id.* at 497. He challenged the court's jurisdiction to extend his probation "after the original period of probation had expired." *Id.* at 497-98. The court held that the trial court had the discretion to "alter and amend" the original order of probation. *Id.* at 501. It found that former MCLA sections 771.2 and 771.3 authorized the trial court's decision inasmuch as section 771.2 authorized a probationary term up to five years and thus a court could amend its probation order at any time up to five years. *Id.* at 498-99.

320. *Glass*, 288 Mich. App. at 403.

321. *Id.*

322. *Id.* at 404. MCLA section 771.4 (West 2006) provides, "[i]f during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation."



terminated.<sup>323</sup> Revocation proceedings needed to have been initiated during his probationary period.<sup>324</sup>

### *C. Parole Revocation*

In *People v. Holder*,<sup>325</sup> the court considered whether the Michigan Department of Corrections (DOC) was authorized to cancel or revoke a defendant's parole after he had been discharged from parole.<sup>326</sup> The defendant was convicted in 1999 for drug-related offenses and paroled in April 2004.<sup>327</sup> Defendant was given an early parole discharge notwithstanding the fact that he had sold cocaine on two occasions in 2006 while on parole.<sup>328</sup> Eventually, the defendant was charged with these new drug offenses and pled guilty.<sup>329</sup> Then, in May 2007, the DOC informed the defendant that his parole had been "cancelled."<sup>330</sup> The DOC thereafter advised the parties and the sentencing court of the parole cancellation.<sup>331</sup> The import of this determination is found in the DOC's position that because the newest offenses had been committed while defendant was on parole, the sentences were to run consecutively to his parole.<sup>332</sup> The sentencing court subsequently issued an amended judgment to reflect this determination by the DOC.<sup>333</sup>

This decision had a substantial impact on the defendant's length of incarceration since his new sentence would not begin to run until he completed the service of the remaining portion of his parole-related sentence.<sup>334</sup>

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323. *Glass*, 288 Mich. App. 408.

324. *Id.* The court could also have amended the terms of his probation if the change took place during the probation period. The court could have kept the defendant on probation for an additional three years. *See* MICH. COMP. LAWS ANN. § 771.2 (West 2006); *Glass*, 288 Mich. App. at 403.

325. 483 Mich. 168 (2009).

326. *Holder*, 483 Mich. at 171-72.

327. *Id.* at 170.

328. *Id.* at 170-71.

329. *Id.* at 171.

330. *Id.*

331. *Id.*

332. *Holder*, 483 Mich. at 171-72.

333. *Id.*

334. *See id.* at 172 n.7. MICH. COMP. LAWS ANN. § 768.7a(2) (West 2000) provides that:

If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

At the outset, the court in *Holder* reiterated the principle that “a prisoner’s release on parole is discretionary with the parole board.”<sup>335</sup> Additionally, the parolee is not considered to have been released from custody, and when parole has been granted, it may be revoked.<sup>336</sup> If a paroled prisoner satisfies all the conditions and terms of parole, then the parole board is required to issue a “final order of discharge.”<sup>337</sup>

Given the plain meaning of MCLA section 791.242 (1), the parole board is not authorized to “cancel” or otherwise revoke a discharged prisoner’s parole regardless of subsequent criminal conduct.<sup>338</sup> Given the clear intent of the Legislature, the court rejected the Attorney General’s argument that the parole board retains the “implied authority” to rescind a certificate of discharge.<sup>339</sup> The parole board’s authority is limited to the term in which the prisoner is on parole.<sup>340</sup>

#### *D. Sentence Guidelines*

In a decision impacting the sentencing guidelines and their application to armed robbery prosecutions, the Michigan Court of Appeals, in *People v. Huston*,<sup>341</sup> held that assessing fifteen points for

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335. *Holder*, 483 Mich. 168 (quoting MICH. COMP. LAWS ANN. § 791.234(11) (West 1998)).

336. *Id.* at 173.

337. *Id.* MICH. COMP LAWS ANN. § 791.242(1) (West 1998) provides

If a paroled prisoner has faithfully performed all of the conditions and obligations of parole for the period of time fixed in the order of parole, and has obeyed all of the rules and regulations adopted by the parole board, the prisoner has served the full sentence required. The parole board shall enter a final order of discharge and issue the paroled prisoner a certificate of discharge.

338. *Holder*, 483 Mich. at 173. The court reaffirmed its decision in *In re Eddinger*, 236 Mich. 668 (1926), where it stated:

The purpose of a parole is to keep the prisoner in legal custody while permitting him to live beyond the prison enclosure so that he may have an opportunity to show that he can refrain from committing crime. It is a conditional release; the condition being that, if he makes good, he will receive an absolute discharge from the balance of his sentence; but, if he does not make good, he will be returned to serve his unexpired time. The absolute discharge is something more than a release from parole. It is a remission of the remaining portion of his sentence. Like a pardon, it is a gift from the executive, and, like any other gift, it does not become effective until it is delivered and accepted. After delivery, it cannot be recalled.

*Id.* at 173-74 (quoting *In re Eddinger*, 236 Mich. 668 (1926)).

339. *Holder*, 483 Mich. at 174-75.

340. *Id.* at 175.

341. 288 Mich. App. 387 (2010). The Michigan Court of Appeals originally denied the defendant’s delayed application for leave to appeal. However, the Michigan Supreme Court remanded the case limiting review to “the challenge to the scoring variable of

Offense Variable 10 (OV10)<sup>342</sup> was improper, unless there was “predatory conduct” directed at a specific victim.<sup>343</sup> In this case, the defendant robbed a female victim in a parking lot.<sup>344</sup> Although there was evidence that the defendant was “lying in wait,” there was insufficient evidence to prove that he singled her out, or that she was “vulnerable” as contemplated by the statute.<sup>345</sup> As the court of appeals noted, “it appears Ms. Flanigan was vulnerable only in the sense she was in a location under circumstances that put her at a high risk.”<sup>346</sup>

### *E. Sentence Enhancement*

In *People v. Wilcox*,<sup>347</sup> the Michigan Supreme Court considered “whether the legislative sentencing guidelines apply to [a] defendant’s ten-year minimum sentence imposed under MCL 750.520f, the repeat criminal sexual conduct (CSC) offender statute.”<sup>348</sup> The defendant was convicted of first-degree CSC.<sup>349</sup> The information informed him that he was subject to an enhanced sentence as a repeat CSC offender as well as

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Offense variable 10, MCL 777.40, in light of *People v. Cannon*, 481 Mich. 152; 749 NW2d 257 (2008).” *People v. Huston*, 485 Mich. 885 (2009).

342. OV10 provides in relevant part:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Predatory conduct was involved (15 points)

(b) The offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status (10 points)

(c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious (5 points)

....

(3) As used in this section:

(a) “Predatory conduct” means preoffense conduct directed at a victim for the primary purpose of victimization.

(b) “Exploit” means to manipulate a victim for selfish or unethical purposes.

(c) “Vulnerability” means the readily apparent susceptibility of a victim to injury, restraint, persuasion, or temptation.

MICH. COMP. LAWS ANN. §§ 777.40(1), (3) (West 1996).

343. *Huston*, 288 Mich. App. at 393-94 (citing *People v. Cannon*, 481 Mich. 152, 749 N.W.2d 257 (2008)).

344. *Id.* at 394.

345. *Id.* at 395.

346. *Id.*

347. 486 Mich. 60 (2010).

348. *Wilcox*, 486 Mich. at 62.

349. *Id.* at 63.

a second offense habitual offender.<sup>350</sup> The trial court imposed a sentence of ten to forty years because the defendant was a repeat CSC offender.<sup>351</sup> The trial judge did not indicate that the minimum term was a departure from the sentencing guidelines and, as a result, did not provide a “substantial and compelling reason” justifying the departure.<sup>352</sup>

The Michigan Supreme Court agreed with the defendant that his ten-year minimum sentence was a departure from the recommended guidelines and because the trial court did not provide “substantial and compelling” reasons for the departure, the conviction was reversed and the case remanded.<sup>353</sup> The core question presented was whether the mandatory minimum sentence provided for by MCLA 750.520f<sup>354</sup> is a straight five-year term or whether it is simply the baseline, and that a sentence above five years is permissible as long as it is governed by legislative guidelines.<sup>355</sup> The court, based upon a review of several statutes, concluded that the only mandatory minimum sentence was five years.<sup>356</sup> Any sentence above five years is a departure from the norm and a judge must articulate “substantial and compelling reasons” for the sentence.<sup>357</sup>

In another significant sentencing enhancement issue decided this term, the Michigan Supreme Court, in *Michigan v. Lowe*,<sup>358</sup> held that MCLA section 333.7413(2),<sup>359</sup> which permits a sentencing court to

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 62-64.

354. MICH. COMP. LAWS ANN. § 750.520f(1) (West 2004) provides that, “[i]f a person is convicted of a second or subsequent offense under [MCLA 750.520b, 750.520c, or 750.520d], the sentence imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of at least 5 years.”

355. *Wilcox*, 486 Mich. at 64-67.

356. *Id.* at 69.

[W]e must conclude that the only minimum that is ‘mandatory’ in the statute is the 5 years. Five years is the only minimum sentence in MCL 750.520f(1) that is ‘set by law with no discretion for the judge to individualize punishment.’ By contrast, the words ‘at least’ are permissive. They authorize a higher minimum sentence, such as the 10-year minimum imposed here, but nothing in the statute mandates that the minimum sentence exceed 5 years.

*Id.* (footnote omitted).

357. *Id.* at 70.

358. 484 Mich. 718 (2009).

359. MCLA section 333.7413(2) (West 2001) provides “[e]xcept as otherwise provided in subsections (1) and (3), an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both.”

Section 333.7413(5) (West 2000) provides:

enhance the sentence of a repeat drug offender, includes the authority to double both the minimum and maximum sentences.<sup>360</sup>

In *Lowe*, the defendant pled guilty to possession of methamphetamine with a sentencing enhancement, since he had previously been convicted of a drug-related offense.<sup>361</sup> It was determined by the sentencing court that his minimum sentence under the sentencing guidelines was ten to twenty-three months.<sup>362</sup> Relying on section 7412(2) and *People v. Williams*,<sup>363</sup> the court doubled both the applicable minimum and maximum sentences and thereafter sentenced the defendant to forty-six months to twenty years of incarceration.<sup>364</sup> Defendant did not object and later unsuccessfully sought leave to appeal in the court of appeals.<sup>365</sup>

The defendant asserts that the clause in section 7413(2), “the term otherwise authorized,” only refers to the maximum sentence and does not allow for the doubling of the minimum sentence.<sup>366</sup> Thus, the sentencing court should have found that the minimum sentence was within the range of ten to twenty-three months.<sup>367</sup>

The Michigan Supreme Court, applying the plain meaning of the word “term” in conjunction with Michigan’s indeterminate sentencing scheme, concluded that the statute allows for an indefinite term at both the low end and the high end of the sentence.<sup>368</sup> Thus, a sentencing court is authorized, but not required, to double the “term” at both the minimum and maximum sentences.<sup>369</sup> Also, the court noted that a contrary decision would defeat the legislative intent that a repeat offender should serve more time.<sup>370</sup> For example, if the court had decided differently, the defendant could conceivably serve the same sentence as a non-enhanced

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For purposes of . . . [§7413(2)], an offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to a narcotic drug, marijuana, depressant, stimulant, or hallucinogenic drug.

360. *Lowe*, 484 Mich. at 719-20.

361. *Id.* at 720.

362. *Id.*

363. 268 Mich. App. 416 (2005). “[T]he clear and unambiguous language of MCL 333.7413(2) does not differentiate or suggest a distinction . . . between maximum and minimum sentences.” *Id.* at 427.

364. *Lowe*, 484 Mich. at 720. Section 7403(2)(b)(i) generally carries a maximum sentence of 10 years. MICH. COMP. LAWS ANN. § 333.7403(2)(b)(i) (West 2001).

365. *Lowe*, 484 Mich. at 720.

366. *Id.* at 721.

367. *Id.*

368. *Id.* at 722-24.

369. *See id.* at 724.

370. *See id.* at 724-26.

defendant despite the recidivist nature of his conduct and the applicability of section 7413(2).<sup>371</sup> Such a result would frustrate the legislative intent.<sup>372</sup>

#### *F. Sentence Credit*

In *People v. Idziak*,<sup>373</sup> the Michigan Supreme Court considered whether, under the state's jail credit statute, a parolee is eligible for credit for a new offense while incarcerated and awaiting sentencing for the new offense.<sup>374</sup> The court concluded the parolee was not entitled to credit for the new offense because his incarceration is a resumption of his earlier sentence as long as there is still time left to serve on that sentence.<sup>375</sup> As a result, Michigan's jail credit statute<sup>376</sup> was inapplicable because the parolee was not being held "because of being denied or unable to furnish bond."<sup>377</sup>

Further, the court found that given the clear meaning of the statute, a sentencing court lacks common law authority to grant credit on the parolee's new sentence,<sup>378</sup> and that "the denial of credit . . . does not violate the double jeopardy or equal protection clauses of either the United States or the Michigan Constitutions."<sup>379</sup>

In 2006, while Idziak was on parole, he committed an armed robbery.<sup>380</sup> He pled guilty to that offense and possession of a firearm during the commission of a felony.<sup>381</sup> He was sentenced to a term of twelve to fifty years of imprisonment and the mandatory two-year term for the felony-firearm conviction.<sup>382</sup> In a post-judgment motion, the defendant claimed that the jail credit statute was mandatory and

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371. *Lowe*, 484 Mich. at 729-32.

372. *See id.* at 729-32.

373. 484 Mich. 549 (2009).

374. *Idziak*, 484 Mich. at 552.

375. *Id.*

376. Michigan's jail-credit statute provides as follows:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

MICH. COMP. LAWS ANN. § 769.11b (West 2006).

377. *Idziak*, 484 Mich. at 552 (quoting MICH. COMP. LAWS ANN. § 769.11b (West 2006)).

378. *Id.* at 552.

379. *Id.*

380. *See id.* at 553.

381. *Id.*

382. *Id.* at 553.

alternatively, the sentencing court had the discretion to award credit.<sup>383</sup> The sentencing court disagreed and refused to award him credit for the ninety-eight days he was in jail between his arrest and sentencing.<sup>384</sup>

Specifically, the court considered whether the defendant was entitled to credit against the “*new minimum sentence*” for the time he remained incarcerated for the new offense.<sup>385</sup> The determination of that issue had an impact on the defendant’s new parole eligibility date.<sup>386</sup> The court held that the jail credit statute does not apply in a situation such as this.<sup>387</sup> That is, it is inapplicable when “a parolee is convicted and sentenced to a new term of imprisonment for a felony committed while on parole.”<sup>388</sup> Specifically the court stated:

[W]e hold that the jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board. For that reason, he remains incarcerated regardless of whether he would otherwise be eligible for bond before conviction on the new offense. He is incarcerated not “because of being denied or unable to furnish bond” for the new offense, but for an independent reason. Therefore, the jail credit statute, MCL 769.11b, does not apply.<sup>389</sup>

Accordingly, with respect to the computation of a new parole eligibility date following a new conviction, the statute makes clear that the new sentence begins to run when the portion of the sentence for the previous offense has been served.<sup>390</sup> Thus, the sentencing court lacks discretion to avoid the clear meaning of MCLA section 769.11b.<sup>391</sup>

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383. *Idziak*, 484 Mich. at 553-54.

384. *Id.* Previously in *Wayne County Prosecutor v. Department of Corrections*, 451 Mich. 569 (1996), the court, in rejecting the prosecutor’s argument, held that MCLA 768.7a(2) required a parolee, who commits a new offense, to serve the new maximum sentence in addition to the new minimum sentence before again becoming eligible for parole. The statute applies equally to parolees as well as any other prisoner who commits a crime while incarcerated and escapes. *Wayne Cnty. Prosecutor*, 451 Mich. at 577-84.

385. *Idziak*, 484 Mich. at 554.

386. *Id.*

387. *See id.* at 562.

388. *Id.*

389. *Id.* at 562. (quoting MICH. COMP. LAWS ANN. § 769.11b (West 2006)).

390. *Id.* at 557. MICH. COMP. LAWS ANN. § 768.7a(2) (West 2000) provides:

The defendant also claimed that the failure to award him jail credit subjected him to "multiple punishments" in violation of the double jeopardy clauses of the United States and Michigan constitutions.<sup>392</sup> The court rejected this issue reiterating that the defendant's new incarceration was predicated upon his earlier conviction; he was simply serving the remainder of his sentence.<sup>393</sup>

Similarly, the court rejected defendant's argument that denying him credit towards his new minimum sentence was in violation of the due process and equal protection guarantees found in the U.S. and Michigan constitutions.<sup>394</sup> However, as the court points out, his argument was centered on the equal protection clauses.<sup>395</sup> Defendant's argument is premised on the different treatment given to parole violators as compared to other prisoners who are eligible for jail credit.<sup>396</sup> The court notes that parolees by virtue of their status are legitimately treated differently from non-parolee defendants.<sup>397</sup> As a result, they do not enjoy the same rights as other criminal defendants.<sup>398</sup>

While there may be a difference in treatment as it concerns both types of criminal defendants, it is "rational for the Legislature to treat parolees and non-parolees differently in this regard because parolees are continuing to serve out existing prison sentences after being granted mere conditional releases."<sup>399</sup>

This disparity is not constitutionally objectionable.<sup>400</sup> The defendant's reliance on the possible sentencing effects of a decision to plead guilty or go to trial,<sup>401</sup> as well as docket congestion, do not amount

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If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

391. *Idziak*, 484 Mich. at 568-69.

392. *Id.* at 569.

393. *Id.* at 569-70.

394. *Id.* at 570.

395. *Id.* at 570 n.21.

396. *Id.* at 570-71.

397. *Idziak*, 484 Mich. at 571.

398. *Id.*; see also *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) ("The revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.").

399. *Idziak*, 484 Mich. at 572.

400. *Id.*

401. *Id.* at 572. The court rejected this argument inasmuch as that none of the relevant statutes, including the jail credit statute, makes a distinction between a defendant who pleads guilty and one who elects to go to trial. See also *People v. Prieskorn*, 424 Mich. 327 (1985).



to an equal-protection violation particularly when, as here, the legislation is facially neutral.<sup>402</sup>

### *G. Electronic Monitoring*

In a sentencing decision concerning a convicted sex offender and the statute governing lifetime electronic monitoring, the Michigan Court of Appeals, in *People v. Kern*,<sup>403</sup> held that lifetime electronic monitoring is only reserved for those convicted sex offenders who are either parolees or defendants released from prison.<sup>404</sup> It does not apply to probationers, even if sentenced to a period of incarceration in a jail.<sup>405</sup>

In this case the defendant pled guilty to second-degree Criminal Sexual Conduct (CSC) and was sentenced to a five-year probationary term with 365 days to be served in jail.<sup>406</sup> Upon motion of the prosecutor, the trial court amended the information to state that the conviction required an additional penalty of lifetime electronic monitoring.<sup>407</sup> The court of appeals, in examining the relevant statutes, concluded that while second-degree CSC allows for lifetime electronic monitoring, it must be imposed on an individual who has been released “on parole or from prison, or both.”<sup>408</sup>

The court also noted that the electronic monitoring program fell under the supervision of the Michigan Department of Corrections and includes only “individuals released from parole, prison, or both parole and prison who are sentenced by the court to lifetime electronic monitoring.”<sup>409</sup> It does not include defendants placed on probation.<sup>410</sup> Additionally, a prison and a jail are not “synonymous.”<sup>411</sup> Thus, the sentencing court lacked the authority to amend the information and place Kern on lifetime electronic monitoring.<sup>412</sup>

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402. *See Idziak*, 484 Mich. at 575.

403. 288 Mich. App. 513 (2010).

404. *Id.* at 519.

405. *Id.*

406. *Id.* at 515.

407. *Id.*

408. *Id.* at 525.

409. MICH. COMP. LAWS ANN. § 791.285(1) (West 2009).

410. *Kern*, 288 Mich. App. at 524.

411. *See Kent Cnty. Prosecutor v. Kent Cnty. Sheriff*, 425 Mich. at 718 n.10 (Mich. 1986); *see also* MICH. COMP. LAWS ANN. § 791.262(1)(c) (West 1998); *People v. Harper*, 83 Mich. App. 390 (1978).

412. *Kern*, 288 Mich. App. at 525.

## VI. JOINDER OF OFFENSES

In *People v. Williams*,<sup>413</sup> the Michigan Supreme Court reconsidered its decision in *People v. Tobey*.<sup>414</sup> In *Tobey*, the court had previously held that it was impermissible to join in a single information two drug sales by the defendant to an undercover police officer occurring within 12 days because, "[t]he two informations charged distinct and separate offenses, and . . . [the defendant] was entitled to a separate trial on each offense."<sup>415</sup> Since *Tobey* was decided, the Michigan Supreme Court in 1989 adopted rules of joinder and severance concerning multiple charges against a single defendant.<sup>416</sup> The issue for the *Williams* court was whether MCR 6.120 superseded *Tobey*.<sup>417</sup>

The relevant facts are as follows. On November 4, 2004, narcotics officers executed a search warrant at a motel and seized several bags of suspected crack cocaine as well as guns, cash, and materials used to package crack cocaine.<sup>418</sup> Thereafter, on February 2, 2005, police officers executed another search warrant where the defendant was found and seized suspected drugs, guns, and materials used for the packaging of crack cocaine.<sup>419</sup>

The prosecutor sought to join the two offenses under MCR 6.120(A) and (B).<sup>420</sup> In the alternative, the prosecutor wanted to use the evidence and circumstances from each offense in the trial of the other pursuant to MRE 404(b).<sup>421</sup> Despite the defendant's objection, the trial court allowed

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413. 483 Mich. 266 (2009).

414. 401 Mich. 141 (1977).

415. *Id.* at 144-45.

416. *See* MICH. CT. R. 6.120. Rule 6.120 was amended by the Michigan Supreme Court in 2006; however, at the time of defendant's trial, MCR 6.120(A) and (B) provided the following:

(A) Permissive Joinder. An information or indictment may charge a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.

(B) Right of Severance: Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

*Williams*, 483 Mich. at 233.

417. *Williams*, 483 Mich. at 231.

418. *Id.* at 228-29.

419. *Id.* at 229.

420. *Id.* at 229-30.

421. *Id.* Rule 404(b) of the Michigan Rules of Evidence provides in relevant part:

the joinder of both offenses because, “[b]oth of the acts that are involved here do appear to the Court to be parts of a single scheme or plan; namely, drug trafficking and therefore they would appear to be related offenses.”<sup>422</sup> The defendant was eventually convicted of the offenses arising from both dates.<sup>423</sup> In an unpublished opinion, the decision to join the offenses was affirmed by the Michigan Court of Appeals.<sup>424</sup> The appeals court concluded that the offenses were “related” under MCR 6.120(B),<sup>425</sup> because they were part of a single scheme by the defendant to sell illegal drugs.<sup>426</sup>

The Michigan Supreme Court agreed with the trial court and found that the two transactions were “related” as being part of a “single scheme or plan” of drug trafficking as provided by MCR 6.120(B).<sup>427</sup> Although the drug seizures occurred on two separate days, the defendant was “engaged in ongoing acts constituting parts of his overall scheme” to distribute crack cocaine.<sup>428</sup> Thus, given the unambiguous nature of MCR 6.120, joinder was proper and the defendant was not entitled to a severance.<sup>429</sup>

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(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

422. *Williams*, 483 Mich. at 230.

423. *Id.* at 230. The trial court believed there was more prejudice in having separate trials and allowing the use of 404(b) evidence than in joining the offenses for a single trial. *Id.*

424. *Id.*; see also *People v. Williams*, No. 266807, 2007 WL 3119399, at \*2 (Mich. Ct. App. Oct. 25, 2007) (per curiam).

425. *Williams*, 483 Mich. at 230; see also *Williams*, 2007 WL 3119399, at \*2.

426. *Williams*, 483 Mich. at 230; see also *Williams*, 2007 WL 3119399, at \*2.

427. *Williams*, 483 Mich. at 234.

428. *Id.* at 234-35.

429. *Id.* The Court found support for its decision by engaging in a comparative analysis with the federal rules regarding joinder and severance. *Id.* Federal Rule of Criminal Procedure 8(a) provides that two or more offenses may be joined in a single indictment, “if the offenses charged . . . are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.” FED. R. CRIM. P. 8(a). Federal Rule of Criminal Procedure 14(a) provides that severance is appropriate “[i]f the joinder of offenses or defendants in an indictment, information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires.” FED. R. CRIM. P. 14(a).

The court then turned its attention to deciding whether *Tobey* was consistent with MCR 6.120.<sup>430</sup> It concluded that *Tobey* “cannot be reconciled” with the unambiguous language of the rule, and thus MCR 6.120 superseded *Tobey*.<sup>431</sup> Given the plain language of the rule, “temporal proximity between [the] offenses” is not required, as long as they constitute “a series of connected acts or acts constituting part of a single scheme or plan.”<sup>432</sup>

Finally, the court concluded that even if joinder was improper, the error was “harmless,”<sup>433</sup> because each charged offense could have been introduced in the other trial under MRE 404(b).<sup>434</sup> Thus, the current rule in Michigan allows for joinder of offenses even in the absence of temporal proximity as long as there is evidence of some commonality of a plan or scheme connecting the several offenses.<sup>435</sup> It is a relatively broad rule that is generally consistent with the federal rules as well as with other states.<sup>436</sup> The decision also has a practical benefit inasmuch as the effect is to promote judicial economy.

## VII. CONCLUSION

Both the U.S. Supreme Court and the Michigan courts addressed a number of issues during this *Survey* period that will have a substantial impact on practitioners. This is undoubtedly true as it concerns the exclusionary rule, and the expanded ability of the police to interrogate suspects following the advice of rights. Also, prosecutors must tread very carefully before seeking to impeach a defendant with his post-arrest, post-*Miranda* silence as well as attempting to introduce investigative reports absent a showing that the witness is unavailable and the

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430. *Williams*, 483 Mich. at 238.

431. *Id.* The court said that the previous court of appeals determination that *Tobey* codified, MCR 6.120, was erroneous. *See id.*

432. *Id.* at 241. The court rejected the *Tobey* court’s consideration of the issue as to whether double jeopardy precluded the joinder of the offenses, given the clear language of MCR 6.120. *Id.* at 241-42.

433. *Id.* at 243.

434. *Id.* at 243. The U.S. Supreme Court has held that misjoinder will not ordinarily constitute constitutional error in the absence of “prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.” *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986).

435. *Id.* at 234-35; MICH. CT. R. 6.120.

436. *See e.g.*, *United States v. Saadey*, 393 F.3d 669 (6th Cir. 2005); *United States v. Graham*, 275 F.3d 490 (6th Cir. 2001); *United States v. Jacobs*, 244 F.3d 503 (6th Cir. 2001); *State v. Oetken*, 613 N.W.2d 679 (Iowa 2000); *Rushing v. State*, 911 So.2d 526 (Miss. 2005); *Lessard v. State*, 158 P.3d 698 (Wyo. 2007); *State v. Willis*, 915 A.2d 208 (Vt. 2006).

defendant had a prior opportunity to cross-examine the witness. Future survey periods may witness a monumental change in the procedure by which indigent defendants are appointed counsel as well as the process trial courts engage in when faced with a jury that claims it is deadlocked.