CONSTITUTIONAL LAW

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I. INTRODUCTION

Major trends and themes during the *Survey* period for constitutional law involved: (1) the general lack of independent Michigan constitutional law when a federal constitutional counterpart exists; (2) limited development of independent Michigan constitutional law in which a federal constitutional counterpart exists, most notably involving the protection against cruel or unusual punishment and certain zoning cases; (3) the broadening of the right to confrontation in connection with inadmissibility of certain hearsay statements at criminal trials; (4) clarification of the right against self-incrimination; (5) limiting criminal defendants' post-conviction procedural rights; (6) refusal to expansively interpret the right to counsel; (7) clarification of the prohibition against double jeopardy in connection with charging and sentencing defendants; (8) strengthening the free exercise of religion; (9) development of issue preservation and the plain error standard of review; and (10) clarification of the applicability of the Headlee Amendment to revenue raising measures by municipalities.

II. MICHIGAN CONSTITUTIONAL LAW GENERALLY

Generally, there was no material development of independent Michigan constitutional law during the *Survey* period where parallel federal and Michigan constitutional provisions exist. Simply put, it is commonplace that Michigan jurisprudence applies federal constitutional analysis. Often there is no pretense of separately interpreting or evaluating Michigan constitutional provisions. Michigan's application of federal law without any meaningful separate Michigan constitutional analysis is deep and broad, applying to areas of constitutional law as diverse as the right to confrontation,[1] the right to remain silent,[2] the right to counsel,[3] the prohibition against double jeopardy,[4] the right to the free exercise of religion,[5] the prohibition against unreasonable search and

1. People v. Bryant, 483 Mich. 132, 135-36 (2009).

2. People v. Shafier, 483 Mich. 205, 208 (2009); People v. Borgne, 483 Mich. 178, 188 (2009).

3. People v. Jackson, 483 Mich. 271 (2009); Duncan v. State, 284 Mich. App. 246, 261-62 (2009), *vacated on other grounds*, 486 Mich. 906 (2010).

4. People v. Idziak, 484 Mich. 549, 552 (2009); People v. Wheeler, No. 289162, 2010 WL 1872947, at *2 (Mich. Ct. App. May 11, 2010).

5. Lamont Cmty. Church v. Lamont Christian Reformed Church, 285 Mich. App. 602, 615 (2009).

seizures,[6] the guarantee of due process,[7] the right to a speedy trial,[8] the right to effective counsel[9] and the equal protection of the laws.[10]

This lack of independent Michigan jurisprudence is telling in light of Michigan's rich history of constitutional analysis. In fact, when Chief Justice Thomas M. Cooley led the Michigan Supreme Court, it gained national recognition for the justices and its constitutional decisions.[11] More recently, the Court gained widespread attention, albeit not all positive, for its jurisprudence.[12]

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6. People v. Brown, No. 286716, 2009 WL 4827066, at *2 (Mich. Ct. App. Dec. 15, 2009); *Wheeler*, 2010 WL 1872947, at *5.

7. People v. Parks, No. 291011, 2010 WL 1576736, at *1 (Mich. Ct. App. Apr. 20, 2010) ("There is no significant difference between the due process clauses of U.S. Const. Amend. V and XIV, and Const. 1963, art. 1, § 17"); Armstrong v. Iosco Twp., No. 288027, 2010 WL 989219, at *4 (Mich. Ct. App. Mar. 18, 2010).

8. People v. Miller, No. 290488, 2010 WL 2016321, at *4 (Mich. Ct. App. May 20, 2010) (applying Michigan precedent that had previously adopted the constitutional test articulated by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972)).

9. Duncan v. State, 284 Mich. App. 246, *vacated on other grounds*, 486 Mich. 906 (stating, "To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668,104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984).").

10. *Armstrong*, 2010 WL 989219, at *4.

11. *See, e.g.*, Paul D. Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, 41 AM. J. LEGAL HIST. 368, 368 (1997) ("Thomas McIntrye Cooley won a national reputation as a legal scholar unequalled by any American in his time. . . . He has been cited hundreds of times by the Supreme Court of the United States and countless times by other American courts. . . . [I]n his lifetime Cooley was regarded as America's greatest legal writer."); HARRY A. LOCKWOOD, ISSAC CHRISTIANCY, PROCEEDINGS OF THE SIXTEENTH ANNUAL MEETING OF THE MICHIGAN STATE BAR ASSOCIATION 29 (1905) ("This state was most fortunate in having upon the bench of the Supreme Court during many years after its establishment an independent court, four men of pre-eminent ability, who in great measure, did for this state what John Marshall and his associates did for the National Government. These four men blazed the way, enunciated the great controlling principles and established the course and trend for the judiciary of this state. They gave our Supreme Court a reputation and high standing through-out all English speaking countries in the world. Their opinions are and will remain the guiding lights, the controlling authorities and the inspiration to clear thinking and right acting for the entire judiciary. Christiancy, Campbell, Cooley and Graves are the 'Big Four,' the mention of whose names awakens in every lawyer of Michigan a feeling of pride."); MICH. SUP. CT. HIST. SOC'Y, THE MICHIGAN SUPREME COURT: A BRIEF HISTORY, http://www.micourthistory.org/history_overview.php#BigFour ("Justices Christiancy, Campbell, Cooley, and Graves are known as the 'Big Four' in Michigan judicial history. As some of the first Justices to sit on the newly reorganized Court, the Big Four played a large role in shaping the Court as it is known today. They were widely respected Justices, as well as well-known legal scholars. Together, the Big Four attained for the Michigan Supreme Court the respect and authority it and its supporters felt it had long deserved, making it one of the most respected state Supreme Courts in the nation.").

12. *See, e.g.*, John Gizzi, *Here Comes the Judge (Campaign)*, HUMAN EVENTS (Oct. 29, 2007), http://findarticles.com/p/articles/mi_qa3827/is_20071029/ai_n21099408

That Michigan can develop its own constitutional jurisprudence is undisputed. In fact, the Michigan Supreme Court has relatively recently recognized that "[i]n interpreting our Constitution, we are not bound by the United State's Supreme Court's interpretation of the United States Constitution, even where the language is identical."[13] Indeed, considering Michigan's long standing adherence to more traditional modes of constitutional interpretation,[14] and that the current Michigan

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(noting that the then-majority has "been hailed by conservative court-watchers nationwide as 'the gold standard' of state judges"); Patrick J. Wright, *The Finest Court in the Nation: Hurray for Michigan Justice*, WALL ST. J. (Oct. 13, 2005), http://online.wsj.com/article/SB112917133552367462.html?ojcontent=otep ("For the past six years, the Michigan Supreme Court has been a leader in attempting to restore a proper balance between the judiciary, the legislature and the people."); Abigail Thernstrom, *Trial Lawyers Target Three Michigan Judges Up for Elections*, WALL ST. J. (May 8, 2000), http://www.manhattan-institute.org/html/_wsj-lawyers_target_three_.htm (calling the then-majority an "unusually thoughtful, sophisticated and articulate group"); *Judges Gone Wild*, WALL ST. J., Dec. 26, 2009, at A10 (discussing the competing views of the Michigan Supreme Court's new recusal process in light of Caperton v. Massy, 129 S. Ct. 2252 (2009)); Matthew Schneider, *Michigan's Big Four: An Analysis of the Modern Michigan Supreme Court*, FEDERALIST SOC'Y, Oct. 7, 2008 at 2, *available at* http://www.fed-soc.org/doclib/20081002_MichiganWhitePaper.pdf (citing Brian Dickerson, *Adultery, Life and Engler's High Court*, DETROIT FREE PRESS, Jan. 17, 2007 (noting the then-majority had been criticized "for abandoning long-standing judicial doctrines").

13. People v. Goldston, 470 Mich. 523, 534 (2004). *See also* People v. Hodgers, No. 287306, 2010 WL 480998, at *5 (Mich. Ct. App. Feb. 11, 2010) (Stephens, J., dissenting) (quoting *Goldston*, 470 Mich. at 534).

14. In *Comm. for Constitutional Reform v. Secretary of State*, 425 Mich. 336, 340-43 (1986), the Michigan Supreme Court explained the long standing traditional rules of constitutional construction applicable to the Michigan Constitution:

> For over a century, this Court has followed a number of consistent, "dovetailing rules of constitutional construction," Carmen v. Sec'y of State, 384 Mich. 443, 451 (1971); Advisory Opinion on the Constitutionality of 1978 PA 426, 403 Mich. 631, 639 (1978). "The cardinal rule of construction, concerning language, is to apply to it that meaning which it would naturally convey to the popular mind . . . ." People v. Dean, 14 Mich. 406, 417 (1866). A collateral rule "is that to clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered." Traverse City Sch. Dist. v. Attorney Gen., 384 Mich. 390, 405 (1971) (citing Kearney v. Bd. of State Auditors, 189 Mich. 666, 673 (1915)) . . . . In *Regents*, supra, this Court explained the appropriate use of the record of debates contained in the Official Record of the Constitutional Convention of 1961 and the "Address to the People":
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> > The debates must be placed in perspective. They are individual expressions of concepts as the speakers perceive them (or make an effort to explain them). Although they are sometimes illuminating, affording a sense of direction, they are not decisive as to the intent of the general convention (or of the people) in adopting the measures.
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> Therefore, we will turn to the committee debates only in the absence of guidance in the constitutional language as well as in the 'Address to the

Constitution was drafted in 1961 and ratified in 1963 (as opposed to 1787 and 1789 for the U.S. Constitution), one might expect the two documents would yield different constitutional analysis even with parallel language.[15] Apparently not.

People,' or when we find in the debates a recurring thread of explanation binding together the whole of a constitutional concept. The reliability of the 'Address to the People' (now appearing textually as 'Convention Comments') lies in the fact that it was approved by the general convention on August 1, 1962 as an explanation of the proposed constitution. The 'Address' also was widely disseminated prior to adoption of the constitution by vote of the people.' (Emphasis added.) 395 Mich. 52, 59-60, 231 N.W.2d 1.

In *Pfeiffer v. Detroit Bd. of Educ.*, 118 Mich. 560, 564 (1898), this Court stated:

> In determining this question, we should endeavor to place ourselves in the position of the framers of the Constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change. McPherson v. Sec'y of State, 92 Mich. 377 (1892).

The intent of the framers, however, must be used as part of the primary rule of 'common understanding' described by Justice Cooley:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.' *In re* Proposal, 384 Mich. 390, 405 (1971) (emphasis added.) Cooley's CONST. LIM., (6th ed. 81).

15. Justice Cooley explained when examining the issue of double jeopardy under the Michigan Constitution of 1850, article VI, section 29:

> But it is urged that the clause is meaningless unless the effect is given to it for which the prosecution contends. In this we do not agree. It may have meaning and effect, though different than the prosecution contends for. And in seeking for its real meaning we must take into consideration the times and circumstances under which the state constitution was formed—the general spirit of the times and the prevailing sentiments among the people. Every constitution has a history of its own which is likely to be more or less peculiar; and unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it. This the court must keep in mind when called upon to interpret it; for their duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express.
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> The present constitution of this state was adopted in 1850, when all the tendencies of the day were in the direction of enlarging individual rights, giving new privileges, and imposing new restrictions upon the powers of government in all its departments. This is a fact of common notoriety in this State; and the

Moreover, even cases involving different federal and Michigan constitutional provisions often have yielded undifferentiated constitutional analysis. For example, the Michigan Constitution's protection of religious liberty[16] is significantly more precise and exacting than the federal counterpart set forth in the First Amendment.[17] Nevertheless, when addressing a religious liberty issue, the court of appeals only reviewed the First Amendment, albeit as interpreted by Michigan courts.[18]

A common approach of Michigan appellate courts is to note by brief citation that a parallel Michigan constitutional protection exists,[19] and

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> tendencies referred to found expression in many of the provisions of the Constitution. Many common-law rights were enlarged; and if any were taken away, or restricted in giving new privileges, it was only incidentally done in making the general system more liberal, and, as the people believed, more just. Such a thing as narrowing the privileges of accused parties, as they existed at the common law, was not thought of; but, on the contrary, pains were taken to see that they were all enumerated and made secure. Some were added; and among other provisions adopted for that purpose was the one now under consideration.

People v. Harding, 53 Mich. 481. 485-86, 19 N.W. 155 (1884).

See also Hodgers, 2010 WL 480998, at *5 (Stephens, J., dissenting) ("When determining if it is appropriate to interpret the Michigan Constitution differently than the United States Constitution, it is appropriate to consider, among other factors, the history of the state constitution and common law." (citing People v. Collins, 438 Mich. 8, 31 n.39 (1991)).

16. Article I, section 4 of the Michigan Constitution provides:

> Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.

17. The U.S. Constitution provides that, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

18. *Lamont Cmty. Church*, 285 Mich. App. 602.

19. *See, e.g.*, *Bryant*, 483 Mich. at 138 n.4 ("The Michigan Constitution also guarantees criminal defendants the right 'to be confronted with the witnesses against him or her.'"); *Shafier*, 483 Mich. at 212 ("recogniz[ing] that the Michigan Constitution's protection against the use of a defendant's post-arrest, post-Miranda silence is at least as extensive as that provided by the United States Constitution," but declining to conduct a separate Michigan constitutional law analysis "[b]ecause defendant's due process rights were so clearly violated under the United States Constitution in this case"); *Borgne*, 483 Mich. at 191 n.6; *Duncan*, 284 Mich. App. at 260, *vacated on other grounds*, 486 Mich. 906.

then to rely exclusively upon federal law as the controlling authority.[20] Another approach is to note by brief citation the parallel Michigan and federal counterparts, and then cite entirely Michigan cases which, however, are based upon federal jurisprudence,[21] or the independent nature of the Michigan cases is not readily discernible.[22]

On some occasions, for example in the realms of due process,[23] double jeopardy,[24] ineffective assistance of counsel,[25] and substantive due process,[26] the courts explicitly recognize that Michigan law simply follows federal law.

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20. *Bryant*, 483 Mich. at 135; People v. Hawes, No. 288598, 2010 WL 1223783, at *3 (Mich. Ct. App. Mar. 30, 2010).

21. *See, e.g.*, *Miller*, 2010 WL 2016321, at *4, *5.

22. For example, in *People v. Bennett*, No. 284887, 2009 WL 3837172 (Mich. Ct. App. Nov. 17, 2009), when addressing whether a defendant's right to due process and equal protection are denied when his appellate lawyer "fail[s] to give him access to the trial transcripts, thereby impeding his ability to prepare and file" an *in propria persona brief*, *id.* at *5, the court of appeals first cited federal law, but then relied solely upon Michigan jurisprudence and Michigan Supreme Court Administrative Order No. 2004-6. *Id.* at *5. The Court explained: "[a] defendant has either a constitutional right to counsel or to proceed in propria persona, but not both." *Id.* at *5 (citing People v. Adkins, 452 Mich. 702, 720 (1992), *overruled in part on other grounds by*, People v. Williams, 470 Mich. 634 (2004); People v. Dennany, 445 Mich. 412, 442, (1994)). Because the defendant already had appellate counsel who was provided the transcripts, there was no due process or equal protection requirement mandating that the defendant be provided access to the transcripts to prepare and file his own brief permitted under administrative rule. *Bennett*, 2009 WL 3837172, at *5. *See also In re* AMR, No. 292025, 2009 WL 5149947, at *5, *6 (Mich. App. Dec. 29, 2009) (beginning with the typical pattern of citing both the federal and Michigan constitutional provisions, the court thereafter cited solely Michigan jurisprudence when evaluating the respondent mother's claims and in the course of affirming the termination of the mother's parental rights).

23. *Parks*, 2010 WL 1576736, at *1 ("There is no significant difference between the due process clauses of U.S. Const. amend. V and XIV, and Const. 1963, art. 1, § 17. Notably, 'the Michigan Constitution does not provide greater protection than the federal due process guarantee'" (quoting English v. Blue Cross Blue Shield, 263 Mich. App. 449, 459-60 (2004)).

24. People v. Gorecki, Nos. 288902, 288965, 2010 WL 1872935, at *6 (Mich. Ct. App. May 11, 2010) ("Pursuant to *People v. Smith*, 478 Mich. 292, 315 (2007), the Michigan Constitution's protection against multiple punishments for the same offense in Const. 1963, art 1, § 15, is determined under the federal 'same elements' test in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), which is used to analyze a double jeopardy challenge under the Fifth Amendment of the United States Constitution.").

25. *Duncan*, 284 Mich. App. 246, *vacated on other grounds*, 486 Mich. 906 ("To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668,104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).").

26. Velting v. Cascade Charter Twp., No. 283638, 2009 WL 3013202, at *11 (Mich. Ct. App. Sept. 22, 2009) ("The substance of the analysis for a federal substantive due

A similar method is to simply conflate the Michigan and federal constitutional guarantees. For example, in *People v. Idziak*,[27] the court explained that "[t]he double jeopardy clauses of the United States and Michigan constitutions protect against governmental abuses for both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense."[28] Similar analysis has occurred in connection with the guarantee of due process of law,[29] equal protection of the laws,[30] the prohibition against ex post facto laws,[31] the right to present a defense,[32] the right to remain silent,[33] as well as the prohibition against unreasonable searches and seizures.[34]

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process claim . . . and substantive due process claim under the Michigan Constitution is the same" (citing People v. Sierb, 456 Mich. 519, 522-24 (1998)).

27. *Idziak*, 484 Mich. at 569 (quoting People v. Calloway, 469 Mich. 448, 450 (2003)).

28. *See also* People v. Parker, No. 287202, 2009 WL 4981184, at *4 (Mich. Ct. App. Dec. 22, 2009) ("The double jeopardy clauses of the United States and Michigan constitutions protect against governmental abuses for both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense" (quoting *Calloway*, 469 Mich. at 450); People v. DeWulf, No. 286047, 2009 WL 5195959, at *3 (Mich. Ct. App. Dec. 14, 2009); People v. Ross, No. 285642, 2009 WL 3931042, at *3 (Mich. Ct. App. Nov. 19, 2009). Thus, for example, citing Michigan law, the court in *Parker* found that "the scenario involving multiple punishments for felon in possession of firearm and felony-firearm is not a double jeopardy violation because the Legislature clearly intended to permit a defendant to be properly charged with an additional felony-firearm count." *Parker*, 2009 WL 4981184, at *4 (citations omitted). *See also Gorecki*, 2010 WL 1872935, at *6 ("Pursuant to *Smith*, 478 Mich. 292, 315 (2007), the Michigan Constitution's protection against multiple punishments for the same offense in Const. 1963, art 1, § 15, is determined under the federal 'same elements' test in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), which is used to analyze a double jeopardy challenge under the Fifth Amendment of the United States Constitution.").

29. *Armstrong*, 2010 WL 989219, at *4 ("The Fourteenth Amendment of the federal constitution, U.S. Const., Am. XIV, and Const. 1963, art. 1, § 2, guarantee equal protection of the laws. The Fourteenth Amendment and Const. 1963, art. 1, § 17 guarantee that no person shall be deprived of life, liberty or property without due process of law.").

30. *Id.*

31. *DeWulf*, 2009 WL 5195959, at *2 ("Both the Michigan and federal constitution prohibit ex post facto laws." (citing People v. Callon, 256 Mich. App. 312, 316-17 (2003)).

32. *Parks*, 483 Mich. at 1049 ("The Sixth Amendment of the United States Constitution and art. 1, § 20, of the Michigan Constitution contain identical provisions giving a criminal defendant the right to be 'confronted with the witnesses against him.' In interpreting the Confrontation Clause, the United States Supreme Court maintains that the right to present a defense is a fundamental right afforded to criminal defendants.").

33. People v. Horton, No. 287232, 2009 WL 3931009, at *2 (Mich. Ct. App. Nov. 19, 2009) ("The Fifth Amendment of the United States Constitution provides that '[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be

The Michigan Constitution is simply ignored in some cases.[35]

In other cases, the Michigan courts have expressly deferred to federal jurisprudence, even when not mandated by federal constitutional law. Thus, when examining whether a defendant's conviction should be overturned when a defendant failed to raise error at the trial court level, the Michigan Supreme Court found "the factors adopted by the federal courts of appeals are useful for plain-error review . . . ."[36] As such, the Court adopted a federally derived test even when it recognized that "Michigan courts are of course not bound by the federal courts' application of FED. R. CRIM. P. 52(b), and plain-error review is an inevitably case-specific and fact-intensive inquiry . . . ."[37]

The application of Michigan versus federal law is no trivial matter. For example, by relying on federal law, the Michigan Court of Appeals in *People v. Hodgers*[38] found that a police officer who had legally stopped a driver had the authority to ask questions unrelated to the reason for the traffic stop "so long as those inquiries do not measurably extend the duration of the stop."[39] The dissent, on the other hand, would have found that the federal precedent cited by the majority opinion does not apply in Michigan because prior Michigan jurisprudence "has historically protected citizens from questioning that is unrelated to the purpose of the traffic stop where that questioning is not prompted by a

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deprived of life, liberty, or property, without due process of law.' U.S. Const., Amend. V. Michigan's Constitution is in agreement that no defendant in a criminal case shall be coerced into providing inculpating evidence as it relates to his prosecution. Const. 1963, art. 1, § 17; People v. Geno, 261 Mich. App. 624, 628 (2004).").

34. *Brown*, 2009 WL 48270667, at *1 ("Under both the United States Constitution and the analogous portion of the Michigan Constitution, searches and seizures without a warrant are per se unreasonable, unless any of the specific and well-delineated exceptions apply.").

35. *See, e.g.*, *Jackson*, 483 Mich. at 278-80 (analyzing, per the title of the section of the Court's opinion, "THE UNITED STATES SUPREME COURT'S OPINIONS ON RECOUPMENT PROCEDURES FOR FEES FOR COURT-APPOINTED ATTORNEYS"); *Lamont Cmty. Church*, 285 Mich. App. at 605 (omitting any reference or discussion to the Michigan Constitution's protection of religious liberty and basing the decision solely on the First Amendment to the United States Constitution and Michigan jurisprudence interpreting the same); People v. Payne, 285 Mich. App. 181, 197-200 (2009) (omitting any reference or discussion to the Michigan Constitution in the course of determining that the admission of testimony by a DNA analyst and a DNA report violated the Confrontation Clause of the Sixth Amendment to the federal constitution because the analyst did not participate in creating the DNA report and the report was created in preparation for criminal proceedings).

36. *Borgne*, 483 Mich. at 198 n.10.

37. *Id.*

38. *Hodgers*, 2010 WL 480998.

39. *Id.* at *2 (quoting Arizona v. Johnson, 555 U.S. 323 (2009)).

reasonable suspicion of criminal activity. The *Johnson* decision relied upon by the majority is contrary to the jurisprudence of this state."[40]

Whether the lack of independent development of Michigan constitutional law can be fairly attributable to the failure of parties raising the issue, the dispositive role of federal law (i.e., that analysis of Michigan law was unnecessary, redundant, or rendered moot), lack of attention or interest by the courts, or the inapplicability of the Michigan Constitution is unknown from the face of the opinions — they are silent regarding the issue.

III. INDEPENDENT MICHIGAN CONSTITUTIONAL JURISPRUDENCE INVOLVING MICHIGAN CONSTITUTIONAL PROVISIONS PARALLEL TO FEDERAL PROVISIONS

Although the trend in Michigan is clearly to defer to federal constitutional interpretation, this trend is not universal, and narrow but important pockets of independent constitutional analysis exist.

A. Recognition of Potential for Independent Jurisprudence

Despite the strong federal current in its jurisprudence, the courts have not completely disemboweled the Michigan Constitution. The Michigan Supreme Court recognized the potential for independent constitutional development when it acknowledged (albeit in footnotes) that the Michigan constitutional provision's protection of the right to remain silent is "at least as extensive as that provided by the United States Constitution," but declined to conduct a separate Michigan constitutional law analysis "[b]ecause defendant's due process rights were so clearly violated under the United States Constitution in this case . . . ."[41]

Likewise, the court of appeals teased that it would seriously consider Michigan constitutional jurisprudence in the realm of a defendant's right

40. *Id.* at *5 (Stephens, J., dissenting).

41. *Shafier*, 483 Mich. at 212 n.6. *See also Borgne*, 483 Mich. at 191 n.6; People v. Commire, No. 285696, 2010 WL 199593, at *1 n.1 (Mich. Ct. App. Jan. 21, 2010) ("Pluralities of our Supreme Court have indicated that 'the Michigan Constitution imposes a stricter requirement for a valid waiver of rights to remain silent and to counsel than imposed by the federal constitution.' However, this Court has stated, 'Michigan's constitutional provision against self-incrimination, is construed in line with and no more liberally than the Fifth Amendment of the United States Constitution.' The distinction, if any, between the protections of the United States Constitution and the Michigan Constitution are not applicable here, because those distinctions appear to pertain to situations involving the appearance of an attorney.") (citations omitted).

to self-representation. Unlike the federal Constitution, the Michigan Constitution expressly provides that "[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney."[42] Likewise, in *People v. Holden*,[43] the court acknowledged that a right to represent oneself in a criminal proceeding is protected by Michigan statute.[44] The court also explained that "[t]o accept defendant's request to represent himself, the trial court must substantially comply with the requirements delineated in MCR 6.005, and in *People v. Anderson*, 398 Mich. 361, 67-68, 247 N.W.2d 857 (1976)."[45] Because *Anderson* was based on the Michigan Constitution, it appeared that the decision might turn on such law. However, presumably because MCR 6.005(D) is so exacting and encompasses any constitutional requirements, the court did not conduct any independent constitutional analysis. In fact, although the court of appeals quoted the language of MCR 6.005(D),[46] it did not quote, explore or rely upon the constitutional provision presumably implicated in the case.[47] Hence, in the course of finding that the trial court did not err by allowing the defendant to represent himself and then subsequently refusing to allow the defendant to withdraw that request, the court found no constitutional error, but relied exclusively on MCR 6.005(D) to make such a determination.[48]

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42. MICH. CONST. art. 1, § 13. Following the typical practice, the court first explained that "[t]he right of self-representation is guaranteed by federal and state law." *Holden*, 2009 WL 3929986, at *1 (citing Iowa v. Tovar, 541 U.S. 77, 87-88 (2004); MICH. CONST. art. 1, § 13; MICH. COMP. LAWS ANN. § 763.1 (West 2000).

43. People v. Holden, No. 284830, 2009 WL 3929986 (Mich. Ct. App. Nov. 19, 2009).

44. *Id.* at *1 (citing MICH. COMP. LAWS ANN. § 763.1).

45. *Holden*, 2009 WL 3929986 (citing People v. Willing, 267 Mich. App. 208, 219-20 (2005)).

46. *Id.* at *1 n.1.

47. *Id.* Similarly, although it cited to MCL section 763.1, the court did not quote, explore, or rely upon the statutory provision in its decision-making process. *Id.*

48. *Id.* at *1-*2. In particular, the court found that a defendant who is aware of the charges, possible penalty, and who swears under oath that he understands "the risks and dangers inherent in self-representation," when requesting to engage in self-representation, cannot complain that his demand to represent himself was constitutionally infirm. *Id.* at *1. Moreover, once the right to self-representation has been invoked, a trial court need not allow the defendant to rescind that revocation in the middle of trial based upon the defendant's professed lack of competence, when that incompetence relates to his desire to use evidence that has already been ruled to be inadmissible. *Id.* Judge Gleicher forcefully dissented, finding that the trial court had not met the requirements of MCR 6.005 both prior to and at trial. *Id.* at *7-10 (Gleicher, J., dissenting).

B. Independent Jurisprudence Following a Choice Among Federal Law Decisions

Michigan maintained an independent course of sorts in *People v. Corbin*,[49] where the court evaluated the defendant's challenge to his conviction based on his argument "that the trial court erroneously failed to sua sponte give a special jury instruction on unanimity with regard to the CSC [criminal sexual conduct] I counts because the acts of penetration charged, i.e., digital penetration and cunnilingus, were materially distinct but the jury was not instructed that its verdict had to be unanimous as to the specific act or acts committed."[50] In the course of affirming the defendant's conviction, the court conducted an analysis using a decision by the U.S. Court of Appeals for the Fifth Circuit, *United States v. Gipson*,[51] instead of the U.S. Supreme Court decision *Schad v. Arizona*,[52] because the Michigan Supreme Court had previously found "that the *Gipson* test provided an analytical framework that was instructive."[53] Thus, although Michigan jurisprudence chose between two federal tests — by choosing the Fifth Circuit test articulated in *Gipson* instead of the test articulated in *Schad*, Michigan showed some independence by not following the latter test articulated by the U.S. Supreme Court.

C. Cruel or Unusual Punishment

The most vigorous exercise of independent Michigan constitutional law came in the context of Michigan's constitutional guarantee against "cruel or unusual punishment."[54] However, this independence is rooted in the differing texts of the Michigan Constitution and the federal Constitution. As the court of appeals explained, "[t]he United States Constitution prohibits 'cruel *and* usual' punishment, whereas the Michigan Constitution prohibits 'cruel *or* unusual' punishment."[55] In light of the significant textual difference,[56] the Michigan constitutional

49. No. 284302, 2009 WL 2195891, at *1 (Mich. Ct. App. July 23, 2009).

50. *Id.* at *1.

51. 553 F.2d 453 (5th Cir. 1977).

52. 501 U.S. 624 (1991).

53. *Corbin*, 2009 WL 2195891, at *1 n.1 (citing People v. Cooks, 446 Mich. 503, 515-16 (1994)).

54. MICH. CONST. art 1, § 16.

55. People v. Correa, No. 290271, 2010 WL 1979297, at *9 (Mich. Ct. App. May 18, 2010) (quoting U.S. CONST., amend. VIII (emphasis added); MICH. CONST. art. 1, §16 (emphasis added)).

56. Words *do* matter. What a difference an "or" makes.

guarantee "is more broadly interpreted than the federal prohibition."[57] To determine whether a punishment is cruel or unusual "requires consideration of the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties for other crimes in this state, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation."[58]

Rejecting challenges to a minimum sentence of 25 years for first degree criminal sexual conduct involving minor children,[59] Michigan jurisprudence has found the punishment constitutional because such crimes are "grave"[60] and that the punishment was "in line with [sentencing] schemes from other states."[61]

In reviewing the application of the Sex Offender Registration Act (SORA)[62] to a defendant who, when he was 18, had a consensual sexual relationship with a nearly 15 year old, and who pled guilty to attempted third-degree criminal sexual conduct[63] under the Holmes Youthful Trainee Act (HYTA),[64] the court, in *People v. Dipiazza*,[65] found such registration was not only punishment,[66] but unconstitutional cruel or unusual punishment.[67] As an "essentially . . . juvenile diversionary program for criminal defendants under the age of 21," defendants given HYTA status do not have a criminal conviction, but, prior to amendments to the SORA enacted in 2004, defendants in the defendant's position who were placed under HYTA status were still required to register as sex offenders on a public registry for at least 10 years under the SORA.[68] In light of very specific circumstances of the defendant's plight, including the small age difference, the consensual nature of the crime, and that the defendant and the victim later wed and had a child, the court concluded that "the circumstances of the offense [were] not

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57. *Correa*, 2010 WL 1979297, at *9 (citing MICH. CONST. art. 1, § 16; U.S. CONST. amend. VIII; People v. Bullock, 440 Mich. 15, 30-35 (1992)).

58. *Id.* at *9 (quoting People v. Dipiazza, 286 Mich. App. 137, 153-54 (2009)). *See also* People v. Smith, No. 290866, 2010 WL 1986575, at *1 (Mich. Ct. App. May 18, 2010).

59. MICH. COMP. LAWS ANN. § 750.520b(2)(b) (West 2004).

60. *Smith*, 2010 WL 1986575, at *9; *Correa*, 2010 WL 1979297 at *9.

61. *Correa*, 2010 WL 1979297, at *10. *See also Smith*, 2010 WL 1986575, at *1 ("[M]any other states mandate a minimum sentence of 25 years or more for adults who commit serious sexual crimes against minors.") (footnote omitted).

62. MICH. COMP. LAWS ANN. §§ 28.721-.732 (West 2009).

63. MICH. COMP. LAWS ANN. §§ 750.92-.520d(1)(a) (West 2004).

64. MICH. COMP. LAWS ANN. §§ 762.11-.16 (West 2000).

65. 286 Mich. App. 137 (2009).

66. *Id.* at 144-53.

67. *Id.* at 154-57.

68. *Id.* at 141-42.

very grave . . . ."[69] On the other hand, the stigma of being placed on the SORA (despite not having a criminal conviction), the loss of two jobs because of being listed on the registry, and the defendant's consequent depression, all revealed that "the offense that defendant committed was not very grave, but the penalty has been very harsh."[70] In reviewing other states, the court relied heavily upon a *USA Today* article from 2007 that noted that "[m]ore states are bucking the national crackdown on sex offenders by paring back punishment for teens who have consensual sex with underage partners,"[71] cited an Indiana Supreme Court case finding that Indiana's statute was punitive in nature,[72] noted that "[o]ther states are recognizing the need to distinguish between people who truly represent a danger to the public and those who do not,"[73] and found that ["t]he penalties imposed for the same Romeo and Juliet offense in some other states are less severe."[74] Moreover, because the defendant did not need rehabilitation, and the registration undermined his ability to be rehabilitated, the court found "abundantly clear that there is no goal of rehabilitation in this case."[75] In light of the foregoing, the court held that "requiring defendant to register as a sex offender for 10 years is cruel or unusual punishment."[76] Despite a very lengthy analysis of the unusual circumstances in the case, the *Dipiazza* Court cited scant authority, and failed to note the material constitutional difference between Michigan and federal constitutional provisions or jurisprudence.

D. Zoning Involving Extraction of Natural Resources

Likewise, Michigan constitutional jurisprudence remains vibrant in a narrow range of zoning cases. The "very serious consequences test" is "unique to Michigan law and only applied in situations where a zoning ordinance affects a landowner's ability to extract natural resources . . . ."[77] Under this test, "such zoning regulations are invalid, and therefore

69. *Id.* at 154.

70. *Id.*

71. *Id.* at 155 (quoting Wendy Koch, *States Ease Laws that Punish Teens for Sex with Minors*, USA TODAY, July 24, 2007, *available at* http://www.usatoday.com/news/nation/2007-07-24-teen-sex-offenders_N.htm). How this article became part of the record, or why it should be considered as a valuable survey of the existing state of affairs regarding the matters it purports to examine, is entirely unaddressed.

72. *Dipiazza*, 286 Mich. App. at 155 (quoting Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009)).

73. *Id.* at 156.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Velting*, 2009 WL 3013202, at *7.

unconstitutional, unless very serious consequences would result from permitting the excavation of those natural resources."[78] Thus, "[i]n this context, federal and state rights are not coextensive. Rather, in Michigan the landowner is afforded more protection under the Michigan Constitution than under the federal constitution."[79] Consequently, in a case implicating the very serious consequences test, the Court first examined the propriety of the zoning regulation under the Michigan Constitution, and determined that because the zoning ordinance survived the more exacting Michigan test, no independent federal analysis was necessary.[80]

Following the *Survey* period, however, this line of precedent was reversed.[81]

E. Criminal Venue

Furthermore, the lack of parallel federal and Michigan provisions was found to be dispositive when a criminal defendant claimed that his constitutional right to be tried in the proper venue was violated. The court of appeals determined that the federal Constitution's mandate[82] that "the right to be tried in the proper venue" is applicable only to federal prosecutions.[83] Hence, the court concluded that the "defendant had no federal constitutional right to be tried in a certain venue or vicinage."[84] More pertinent, the Court examined the history of the Michigan Constitution, including the removal of a venue requirement in the original constitution, as precluding any Michigan constitutional right to venue.[85]

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78. *Id.* at *7 (citing Silva v. Ada Twp., 416 Mich. 153, 156 (1982)).

79. *Id.* at *11.

80. *Id.* ("If there is no constitutional violation under the heightened standard of the no very serious consequences test, then it necessarily follows that there can be no violation under the lesser standard of the rational basis test. In other words, if the township's decision in this matter passed constitutional muster under the no very serious consequences test, . . . then the township's action also necessarily met the less stringent standard of the rational basis test. That is the case in the instant matter.").

81. *Kyser v. Kasson Township*, 486 Mich. 514 (2010).

82. U.S. CONST. art. III, § 2, cl. 3 ("Trial of all Crimes shall be held in the State where the said Crimes shall have been committed."); U.S. CONST. amend. VI (trial shall occur "by an impartial jury of the State and district wherein the crime shall have been committed").

83. People v. Gayheart, 285 Mich. App. 202, 225-26 (2009).

84. *Id.* at 226.

85. *Id.* at 226 n.12 ("The Michigan Constitution of 1963 contains no similar venue or vicinage requirement. It is true that a vicinage requirement did appear in the Michigan Constitution of 1835, but that requirement was omitted from the Michigan constitutions of 1850 and 1908. A vicinage requirement was also omitted from the 1963 constitution.

IV. THE HEADLEE AMENDMENT

Of course, where the Michigan Constitution has text completely foreign to the federal Constitution, that Michigan constitutional analysis is independent of federal precedent is self-evident.[86] In one of the few constitutional cases involving a Michigan-specific constitutional provision with no federal parallel, the court of appeals clarified the applicability of the so-called Headlee Amendment to a charge assessed by the City of Detroit to its citizens.[87] Under the Headlee Amendment, a local governmental unit may only increase taxes with voters' approval.[88] In *Wolf v. City of Detroit*,[89] the court of appeals clarified the difference between a fee — which may be imposed by a municipality without a vote of the people, and a tax — which requires voter approval.[90]

On June 30, 2006, the Detroit City Council passed an ordinance that imposed an annual Solid Waste Inspection Fee for each residence in the city, which was used to replace a 3-mill tax levied on commerical businesses and certain apartment buildings.[91] The ordinance was subsequently amended in 2007 to provide for an annual inspection fee for cetain commercial properties.[92] The fee does not apply to commerical properties that use the city Department of Public Works for garbage disposal.[93]

The plaintiff filed suit alleging that the inspection fee was in reality a disguised tax, passed by the city council — not the voters — in violation of section 31 of the Headlee Amendment.[94] While a tax is intended to raise revenue, "the imposition of a fee constitutes an exercise of the municipality's police power to regulate public health, safety, and welfare."[95] A fee generally "is 'exchanged for a service rendered or a

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'The evident purpose' of omitting the vicinage requirement from these later constitutions was 'to permit the legislature some latitude in legislating as to venue of criminal cases.'" (citation omitted)).

86. *See, e.g.*, Wolf v. City of Detroit, 287 Mich. App. 184 (2010) (addressing the Headlee Amendment).

87. *Id.* at 187 (citing MICH. CONST. of 1978, art. IX, §§ 25-33).

88. MICH. CONST. art IX, § 31; *see also Wolf*, 287 Mich. App. 184.

89. 287 Mich. App. 184.

90. *Id.* at 198-99.

91. *Id.* at 188.

92. *Id.* at 189.

93. *Id.* at 193.

94. *Id.* at 195.

95. *Wolf*, 287 Mich. App. At 199 ("The levying of a tax or an increase in the tax rate higher than that authorized by law at the time of the Headlee Amendment's adoption triggers application of this section of the Headlee Amendment." *Id.* at 198 (footnote omitted)).

benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.'"[96] Three criteria are utilized to determine whether a charge is a fee: "(1) a fee serves a regulatory purpose, (2) a fee is proportionate to the necessary costs of that service, and (3) a fee is voluntary."[97] Furthermore, the criteria should be evaluated "in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee."[98]

Because the $300 inspection charge was used to fund an inspection of properties to ensure compliance with trash disposal regulations and services, it served a regulatory purpose.[99] Likewise, the amount of the fee (and its reduction based on a cost analysis), revealed that it was intended to serve a regulatory purpose as opposed to generate funds.[100] Although the inspection process was far from perfect (for example, thousands of properties were not inspected), at worst such failures stemmed from the fact the city "launched the inspection program before it had worked out the details of the process. Such an inference does not, however, support a conclusion that the City intended the new Solid Waste Inspection Fee solely to generate revenue."[101] That the fee generates revenue is of no moment. "As long as the primary purpose . . . is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose."[102]

Moreover, the rather haphazard way that the city implemented the fees, including shifting the amount assessed, did not undermine this conclusion. The actual fees charged to the plaintiff were based on the size of the property, but the city subsequently determined that in the future it would reduce the fee to a lower flat fee, revealing that "the fees actually charged were disproportionate."[103] Yet, because the evidence revealed that the fee changes were based on "good-faith attempts on the city's part, to determine a reasonable fee on the basis of the information then existing and available to them," there was no attempted subterfuge

96. *Id.* (quoting Bolt v. City of Lansing, 459 Mich. 152, 161 (1988)).

97. *Id.* (quoting *Bolt*, 459 Mich. at 161-62 (internal citations omitted)).

98. *Id.* (quoting Graham v. Kochville Twp., 236 Mich. App. 141, 151 (1999) (additional citation omitted)). A slew of additional considerations are to be considered when evaluating these three criteria. *Id.* at 199-200 (citing *Bolt*, 459 Mich. at 163, 165, 167-69).

99. *Id.* at 200-01.

100. *Id.* at 202.

101. *Wolf*, 287 Mich. App. at 206.

102. *Id.* (quoting Westlake Transp., Inc. v. Pub. Serv. Comm'n, 255 Mich. App. 589, 613 (2003)).

103. *Id.* at 209.

by the city to disguise a tax.[104] Instead, the evidence revealed "the city's lack of preparedness to implement the solid waste disposal inspection process and its resulting inept launching of the inspection process caused any such disproportionality."[105]

Furthermore, the fee is voluntary because property owners can avoid paying the fee by contracting with the city's Department of Public Works for solid waste removal.[106] Likewise, that the inspection fee was collected through an owner's property tax bill and can result in a lien on the property "does not transform an otherwise proper fee into a tax."[107]

In light of the foregoing analysis, "the new solid waste inspection fee constitutes a poorly launched, but nonetheless permissible, regulatory fee," that did not violate the Headlee Amendment.[108]

Wolf provides additional clarity regarding the ability of a municipality to impose a fee without voters' approval—even if implemented in a rather untidy manner.

V. THE RIGHT TO CONFRONTATION

Although entirely dependent on federal law, during the *Survey* period Michigan courts played a leading role in clarifying and expanding the right of confrontation in connection with the admissibility of hearsay statements under the excited utterance exception to the hearsay rule[109] and other circumstances.

The police found the victim in *People v. Bryant*[110] on the ground in a gas station parking lot, suffering from a gunshot wound, bleeding, and in significant pain.[111] In response to police questioning, the victim said the defendant had shot him 30 minutes earlier while the victim was standing at the defendant's back door.[112] The victim died within hours.[113]

At the preliminary examination, the people sought to admit the victim's statements as excited utterances under Michigan Rule of Evidence 803(2) and dying declarations under rule 804(b).[114] The

104. *Id.* at 210.
105. *Id.* at 209.
106. *Id.* at 210 (stating that the city places the charge "on the property owner's tax bill and may place a lien on the property owner's parcel in the amount of the fee does not transform an otherwise proper fee into a tax").
107. *Wolf*, 287 Mich. App. at 210.
108. *Id.*
109. MICH. R. EVID. 803(2).
110. 483 Mich. at 132 (2009).
111. *Id.* at 135-36.
112. *Id.* at 136.
113. *Id.*
114. *Id.* at 153-54.

defendant argued that the people had not laid a sufficient foundation to permit their admission, but did not argue that their admission would violate the Sixth Amendment's Confrontation Clause.[115] The district court agreed with the defendant that the people had failed to lay a sufficient foundation to support their admission as dying declarations, but admitted the statements as excited utterances.[116] A mistrial was declared in the defendant's first trial because the jury deadlocked.[117] At the second trial, the defendant was convicted of second degree murder, felon in possession of a firearm, and possession of a firearm during the commission of a felony.[118]

The Sixth Amendment's Confrontation Clause to the federal Constitution provides that a criminal defendant has the right "to be confronted with the witnesses against him . . . ."[119] Simply put (which is somewhat risky in this endeavor), the right to confrontation bars the prosecutor from introducing an out of court, "testimonial" statement by an unavailable witness unless the defendant had a prior opportunity to cross-examine the witness.[120]

Obviously, the defendant did not have the opportunity to cross-examine the victim while he was bleeding and dying, and the victim made the statements at a gas station, not in court.[121] The key issue, therefore, was whether the statements were "testimonial" under the Confrontation Clause — if so, it was error to admit them.[122]

The circumstances surrounding the victim's statements revealed that they were testimonial in nature.[123] Rejecting the people's argument that the statements were given to "enable police assistance to meet an ongoing emergency,"[124] the court found that the thirty-minute lapse of time between the shooting and the police questioning, that the victim made the statements away from the crime scene, and that the police's conduct during the victim's questioning indicated that the police did not perceive that an emergency existed at the gas station, all meant that the

115. *Id.* at 151-52.
116. *Id.* at 154.
117. Bryant, 483 Mich. at 137.
118. *Id.* at 137.
119. U.S. CONST. amend. VI. The Court also noted that, "The Michigan Constitution also guarantees criminal defendants the right 'to be confronted with the witnesses against him or her . . . .'" *Bryant*, 483 Mich. at 138 n.4.
120. *Bryant*, at 141-42.
121. *Id.* at 141.
122. *Id.* at 141-42.
123. *Id.* at 142-43.
124. *Id.* at 135.

primary purpose of questioning the victim was to investigate a completed crime—not to react to an ongoing emergency.[125]

Relying exclusively on federal jurisprudence,[126] the court ruled that admitting the statements violated the defendant's right to confrontation as guaranteed by the Sixth Amendment of the federal constitution, and "that the admission of these statements constituted plain error requiring reversal."[127]

Filing a one paragraph dissent, Justice Weaver agreed with the court of appeals — which had found that the statements were "made in the course of a police interrogation under circumstances objectively indicating that the interrogation's primary purpose was to enable police assistance in an ongoing emergency."[128]

Justice Corrigan, joined by Justice Young, filed a separate, more spirited and comprehensive dissent, reasoning, inter alia, that the statements should have been admitted as excited utterances because the "[t]he Court of Appeals reasonably concluded that the victim's statements — made within a half-hour of being shot while he lay bleeding in a parking lot — were non-testimonial for Confrontation Clause purposes because they were elicited by police officers addressing an ongoing emergency."[129]

Putting aside the mesmerizing factual scenario presented, this case addresses a vital area of evolving constitutional law. In the wake of the recent U.S. Supreme Court Confrontation Clause jurisprudence, many trial and appellate courts are grappling with the issue of what exactly is "testimonial," and *Bryant* definitely assists in sharpening the analysis and crystalizing the law. *Bryant* can only enhance the trend of trial and appellate courts engaging in a more exacting level of scrutiny regarding the admission of hearsay statements against criminal defendants. However, after the close of the *Survey* period, the U.S. Supreme Court,

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125. *Id.* at 142-51.

126. *See, e.g.*, Crawford v. Washington, 541 U.S. 36 (2004). *See also* Davis v. Washington, 547 U.S. 813 (2006). These cases were the equivalent of earthquakes in constitutional law, completely changing the landscape regarding the admissibility of out of court statements in criminal cases. "[B]efore the United States Supreme Court issued *Crawford*, hearsay statements admissible under a 'firmly rooted hearsay exception'—including 'excited utterances' or 'spontaneous declarations'—did not violate the Confrontation Clause." *Bryant*, 483 Mich. at 165 (Corrigan, J., dissenting). In *Bryant*, the court also stated, "[b]efore *Crawford*, as long as the hearsay statement was admissible under a 'firmly rooted' hearsay exception, its admission did not violate the Confrontation Clause, and the excited utterance exception is a 'firmly rooted' hearsay exception." (citations omitted). *Id.* at 152 n.17.

127. *Bryant*, 483 Mich. at 135.

128. *Id.* at 157 (Weaver, J., dissenting).

129. *Id.* at 157-58 (Corrigan, J., dissenting).

using such an exacting analysis but reaching an opposite conclusion, reversed and vacated the Michigan Supreme Court's decision.[130]

In a less spectacular—but much more common-factual scenario, the court of appeals in *People v. Lloyd*[131] found the prosecution violated the Confrontation Clause when the trial court admitted a 911 telephone call made by a neighbor who did not appear at trial.[132] In particular, the Court found the statement testimonial because "the caller's primary purpose was to relate who committed the crime" — and "the 911 operator's primary purpose was to identify the perpetrator so that he could be located and apprehended" two hours after the crime.[133]

Because the admission of such a statement is an affront to the Sixth Amendment's Confrontation Clause, the *Lloyd* court found that it may only be considered harmless (and therefore not warranting a reversal of a conviction), if the error "was harmless beyond a reasonable doubt."[134]Although the eyewitnesses' testimony in the case was more than sufficient to convict, "the defense in this case hinged on undermining the accuracy of their identifications. A review of the record reveals that, absent the admission of the additional identification made in the 911 call, a jury might reasonably have found the witnesses' identifications suspect."[135] Thus, the court could not "conclude that the error was harmless beyond a reasonable doubt," and reversed the defendant's convictions for first-degree murder and felony-firearm.[136]

Likewise, in *People v. Payne*,[137] the court of appeals contributed to the development of Confrontation Clause jurisprudence when it ruled that the improper admission of hearsay testimony regarding a DNA analysis and report in a criminal sexual conduct case was reversible plain error when such evidence was "decisive" to the jury's verdict.[138] This was so because during trial "the DNA laboratory reports far and away constituted the single most condemning piece of evidence introduced against the defendant . . . ."[139] In a parallel fashion, because "[t]here

130. 131 S. Ct. 1143 (2011).

131. No. 277172, 2009 WL 4827440 (Mich. Ct. App. Dec. 15, 2009), *appeal denied*, 486 Mich. 940 (2010).

132. *Id.* at *5.

133. *Id.*

134. *Id.* at *6 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

135. *Id.*

136. *Id.* at *7. *See also* People v. Hill, No. 290031, 2010 WL 1873105, at *2 (Mich. Ct. App. May 11, 2010) (reversing a defendant's conviction based on the admission of statements introduced at trial in violation of the Confrontation Clause because the error was not harmless beyond a reasonable doubt).

137. 285 Mich. App. 181 (2009).

138. *Id.* at 199.

139. *Id.*

simply was no other independent and properly admitted evidence of defendant's guilt sufficient to erase or overcome the overwhelming taint of the improperly admitted hearsay reports," the admission of the reports "affected the fairness and integrity of defendant's trial."[140]

Following the lead of the United States Supreme Court, the trend in Michigan jurisprudence is to aggressively protect a criminal defendant's constitutional right to confront his or her accusers.

VI. RIGHT AGAINST SELF-INCRIMINATION

Although relying upon federal jurisprudence, the Michigan Supreme Court provided illuminating analysis of the right against self-incrimination (i.e., the right to remain silent) in the specific context of improper prosecutorial comments about a criminal defendant's post-arrest silence. Simply put, a prosecutor seriously jeopardizes reversal of a conviction if he or she comments during a trial about the defendant's failure to cooperate or make any statements regarding the accusations at issue—especially if the case is generally a credibility contest.

Arrested for alleged criminal sexual misconduct against his adopted teenage daughter, the police in *People v. Shafier*[141] informed the defendant that he had the right to remain silent,[142] and the defendant indeed made no statements to the police.[143] "The trial was essentially a credibility contest between the defendant and AS [the victim] and her sisters . . . ."[144] During the trial, the prosecutor referred to the defendant's post-*Miranda* silence "frequent[ly] throughout the trial, from the prosecutor's opening and closing statements, to this case-in-chief, to his cross-examination of the defendant."[145] "[T]he jury acquitted defendant of three counts of first-degree criminal sexual conduct and convicted him of two counts of second-degree criminal sexual conduct."[146]

Agreeing with the court of appeals, the supreme court found that the prosecutor's "repeated references to defendant's post-arrest, post-Miranda silence violated defendant's due process rights under the United States Constitution."[147]

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140. *Id.* at 200 (citation omitted).
141. 483 Mich. at 205, 208 (2009).
142. Miranda v. Arizona, 384 U.S. 436 (1966).
143. *Shafier*, 483 Mich. at 208.
144. *Id.* at 223.
145. *Id.* at 222.
146. *Id.* at 210.
147. *Id.* at 212.

However, unlike the court of appeals, the supreme court, utilizing the plain-error standard,[148] found that this violation required the conviction to be reversed because the defendant had met his burden that the error had not been waived, was plain, affected the defendant's substantial rights, and was prejudicial to the defendant at trial.[149] Indeed, the supreme court concluded that "there is no question that this is the sort of error that compromises the fairness, integrity, and truth-seeking function of a jury trial. The violation of defendant's due process rights rendered the trial fundamentally unfair and cast a shadow on the integrity of our state's judicial processes."[150]

Similarly, in *People v. Borgne*,[151] "[t]he prosecutor referred to defendant's silence both during his cross-examination of defendant and in his closing argument."[152] The court rejected the prosecutor's argument that such references were constitutionally permissible as proper impeachment of the defendant's testimony.[153] Like the defendant in *Shafier*, the defendant in *Borgne* met his burden to show that the error had not been waived and was plain, but the defendant failed to show "the error affected his substantial rights by causing him prejudice."[154] The court considered "(1) the extent of the prosecutor's comments, (2) the extent to which the prosecution attempted to tie defendant's silence to his guilt, and (3) the relative strength of the other evidence against defendant."[155] After an exacting analysis of these factors, the court found that defendant had not met his burden to show prejudice.[156]

Nevertheless, the court chastised the prosecutor for "commit[ting] an offense against the constitution and its principles by misdeeds . . . in this case."[157] The court explained that "[h]ad it not been for the wealth of incriminating evidence against defendant . . . the prosecutor's trial victory would not be affirmed. To be clear, the prosecutor has not won this appeal; rather, the defendant has lost it . . . ."[158]

In light of *Shafier* and *Borgne*, prosecutors should clearly understand that any express or implicit criticism or commentary on a criminal

148. *Id.* at 224.
149. *Shafier*, 483 Mich. at 224. For a comprehensive review of the plain error standard see *infra*, Part VI.
150. *Shafier*, 483 Mich. at 224.
151. 483 Mich. 178 (2009).
152. *Id.* at 188.
153. *Id.* at 196.
154. *Id.* at 197.
155. *Id.* at 197-98.
156. *Id.* at 203.
157. *Borgne*, 483 Mich. at 203.
158. *Id.* at 203.

defendant's lack of cooperation, or statements regarding the accusations could constitute reversible constitutional error, even if such statements are not objected to at the time of trial.

VII. CRIMINAL DEFENDANTS' POST-CONVICTION PROCEDURAL RIGHTS

Criminal defendants' post-conviction procedural rights were clarified by a pair of decisions involving completely different matters: (1) the imposition of reimbursement of attorney fees as part of a criminal defendant's judgment of sentence, and (2) the right to obtain transcripts for an in propria brief. In carefully framed terms, the appellate courts rejected the expansion of the procedural rights asserted by the defendants.

Reversing *People v. Dunbar*,[159] the Michigan Supreme Court in *People v. Jackson*[160] affirmed a trial court's order that a criminal defendant repay the taxpayers the cost of his court appointed attorney without first determining whether the defendant had the ability to pay the fee at the time of imposition.[161] The court explained that "[i]f this case presented a banal question of statutory application, the trial court's actions would be summarily affirmed because they are authorized by the applicable statutes."[162] Because of the defendant's arguments, the court explained "this case presents a more nuanced constitutional question regarding a criminal defendant's right to counsel."[163]

Under the federal Constitution's guarantee of the right to counsel for a criminal defendant,[164] the court found that an ability to pay analysis "is only required once the imposition of the fee is enforced.[165] At such time, "the defendant must be advised of [the] enforcement action and be given an opportunity to contest the enforcement on the basis of his indigency."[166] On the other hand, the "trial courts should not entertain defendants' ability-to-pay based challenges to the imposition of fees until enforcement of that imposition has begun."[167]

The court also held that the statutory procedure[168] providing for the garnishment of 50 percent of a prisoner's account in excess of $50

159. 264 Mich. App. 240 (2004).
160. 483 Mich. 271 (2009).
161. *Id.* at 271.
162. *Id.* at 285.
163. *Id.*
164. U.S. CONST. amend. VI.
165. *Jackson*, 483 Mich. at 275.
166. *Id.* at 292.
167. *Id.* (footnote omitted).
168. MICH. COMP. LAWS ANN. § 769.11 (West 2006).

"inherently calculates a prisoner's general ability to pay and, in effect, creates a statutory presumption of nonindigency," that is constitutionally permissible.[169] Although a prisoner "may petition the court to reduce or eliminate the amount that the remittance order" issued under the statute, such a "defendant bears a heavy burden of establishing his extraordinary financial circumstances" warranting such relief.[170]

In a parallel fashion, in *People v. Bennett*,[171] the court rejected the defendant's argument that the refusal of his appellate counsel to provide him access to the trial transcripts violated equal protection and due process of law.[172] The defendant's appellate counsel possessed the transcripts and was using them to prepare for and pursue the appeal.[173] The defendant desired to file a Standard 4 brief permitted under Administrative Order No. 2004-6; the order provides the following:

> When a defendant insists that a particular claim or claims be raised on appeal against the advice of counsel, counsel shall inform the defendant of the right to present the claim *in propria persona.* Defendant's filing shall consist of one brief filed with or without an appropriate accompanying motion. Counsel shall also provide such procedural advice and clerical assistance as may be required to conform the defendant's filing for acceptability to the court.[174]

However, because a defendant only has a constitutional right to appellate counsel or *in propria persona* representation—"but not both"—the court explained that the rule "is an administrative creation . . . ."[175] Although "[t]o preserve equal justice, an indigent defendant is entitled to obtain a copy of trial transcripts without cost in order to pursue appeal of a conviction,"[176] because the defendant in this appeal already had appellate counsel who was provided the transcripts, there was no constitutional requirement pursuant to equal protection or due process of law to require provision of the transcripts to enable the defendant to "prepare and file a Standard 4 brief."[177] Thus, Michigan jurisprudence refused to expand the procedural rights of defendants in administratively provided appeals briefs or the reimbursement of court-ordered attorney fees.

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169. *Jackson*, 483 Mich. at 295.
170. *Id.* at 296.
171. No. 284887, 2009 WL 3837172 (Mich. Ct. App. Nov. 17, 2009).
172. *Id.* at *4.
173. *Id.*
174. *Id.* at *5.
175. *Id.*
176. *Id.* at *4 (citation omitted).
177. *Bennett*, 2009 WL 3837172, at *5.

VIII. DOUBLE JEOPARDY

The Michigan courts examined and clarified the constitutional right against double jeopardy[178] involving specific statutory sentencing and charging schemes. Simply put, the prohibition against double jeopardy does not bar additional punishment for criminal defendants when the Legislature intended that such punishment occur.

In *People v. Idziak*,[179] the Michigan Supreme Court determined that a parolee, who commits an additional felony while on parole and is held in custody pending resolution of the new charge, was not placed in double jeopardy, even though the parolee was not entitled to credit for the new offense for the time he was held in custody pending sentencing on the new offense.[180] Often colloquially dubbed "dead time," under the applicable statutory provisions,[181] a defendant who commits a new felony while on parole is not entitled "to credit for time served in jail after his arrest on the new offense and before sentencing for that offense."[182] This is so because any such time in custody is solely credited to the defendant's time on parole.[183] Moreover, because the statutory scheme compels this result, a "sentencing court lacks common law discretion to grant credit" in such circumstances.[184] Contrary to the defendant's assertion that failing to provide jail credit for the new offense constitutes unconstitutional double jeopardy punishment, the supreme court determined that defendant is not subject to double jeopardy because he simply "continued to serve out his earlier [parole] sentence after he was arrested."[185] Likewise, the statutory scheme conforms with due process and the equal protection of the laws.[186]

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178. U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). MICH. CONST. art. 1, §15 ("No person shall be subject for the same offense to be twice put in jeopardy.").

179. 484 Mich. 549 (2009).

180. *Id.* at 552.

181. MICH. COMP. LAWS ANN. § 769.11(b) (West 2006); MICH. COMP. LAWS ANN. § 791.238(2) (West 1998).

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

183. *Id.*

184. *Id.* at 552.

185. *Id.* at 570.

186. "[I]t is entirely rational for the Legislature to treat parolees and nonparolees differently" in this context. *Id.* at 572. Any disparity relating to parole eligibility dates caused by the speed of disposition of the offenses committed on parole "does not arise from any classification created by the Legislature," and the statutory scheme does not violate equal protection of the laws. *Id.* at 573-74. In Michigan, a prison sentence is generally indeterminate. For example, a defendant is sentenced to a minimum and maximum term (e.g., 15 to 25 years), and a defendant is not eligible for parole until completing the minimum sentence. *Id.* at 555, 558-59. Because parolees held in jail

In a parallel fashion, the court of appeals determined in *People v. Parker*[187] that "the scenario involving multiple punishments for felon in possession of firearm and felony-firearm is not a double jeopardy violation because the Legislature clearly intended to permit a defendant charged with felon in possession of a firearm to be properly charged with an additional felony-firearm count."[188]

Hence, Michigan jurisprudence clarified that if the Legislature intends that a defendant be punished for crimes in a particular fashion, such punishment does not run afoul of the constitutional prohibition against double jeopardy.

IX. FREE EXERCISE OF RELIGION

In *Lamont Community Church v. Lamont Christian Reformed Church*,[189] contrary to prior precedent, the court of appeals clarified that civil courts possess subject matter jurisdiction to enter judgments in cases involving hierarchical church property disputes — but only to enter judgments in accord with the church hierarchy's decision.[190] The court also materially strengthened the free exercise of religion by prohibiting the courts from subjecting a church to undue scrutiny when determining whether the church is hierarchical in nature.[191]

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pending sentencing for a new offense are not given credit toward any new prison sentence, their eligibility for parole on the new offense is delayed by the amount of time they await sentencing in jail. *Id.* at 554-55. This time could vary widely depending on factors such was whether the defendant pleads guilty (generally shorter), is awaiting disposition "due to docket congestion or a judge's illness" (longer), or goes to trial (longer). *Id.* at 572-74. The Court found that such discrepancies "do not amount to a violation of equal protection." *Id.* at 573. Chief Justice Kelly, joined by Justice Cavanagh, concurred in part and dissented in part, "agree[ing] with the majority that a parolee incarcerated on new criminal charges is not entitled to jail credit. . . . But I reach that conclusion for different reasons than the majority finds appropriate." *Id.* at 589 (Kelly, C.J., concurring in part and dissenting in part). In his dissenting opinion, Justice Markman wrote that, "[The majority's decision] mischaracterizes the nature of the arbitrariness problem." *Id.* at 625 (Markman, J., dissenting). Justice Markman also stated that the practice condoned by the majority "treats identically situated defendants in a potentially widely disparate fashion" by no fault of the parolee. *Id.* at 627.

187. No. 287202, 2009 WL 4981184 (Mich. Ct. App. Dec. 22, 2009).

188. *Id.* at *4 (citations omitted). *See also Ross*, 2009 WL 3931042, at *3 (citing *Calloway*, 469 Mich. at 451-52). Felony firearm prohibits the possession of a firearm during the commission of a felony, and carries a 2 year mandatory sentence, to be served consecutive to the underlying felony. MICH. COMP. LAWS ANN. § 750.227(b) (West 2004).

189. 285 Mich. App. 602 (2009).

190. *Id.* at 616.

191. *Id.* at 617 (quoting Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 723 (1976)).

The case arose from a property dispute between the long standing Lamont Christian Reformed Church (LCRC), and a newer breakaway church, the Lamont Community Church (LCC).[192] "LCRC is affiliated with and a part of the Christian Reformed Church in North America (CRCNA or the Denomination)."[193] The property in dispute was purportedly owned by the Lamont Christian Reformed Church Property Corp. (the Property Corporation), and had originally been established by the LCRC "to hold the church property separate from LCRC so that if LCRC decided to leave the Denomination it could do so and retain the church property."[194] The church split occurred after the LCRC's pastor had been suspended and deposed by the Zeeland Classis.[195] The Zeeland Classis is a higher church body that has the authority to make binding decisions on its regional member churches.[196]

Although "civil courts have the general authority to resolve church property disputes,"[197] the First Amendment's protection of the free exercise of religion stands as an insurmountable barrier against civil courts resolving such disputes "on the basis of religious doctrine and practice and requiring that courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization."[198]

Whether a church "is hierarchical is a factual question."[199] Rejecting as "a misnomer" prior court of appeals' decisions that found that if a hierarchical church was involved a civil court had no subject matter jurisdiction,[200] the court found that "when a denomination is determined to be hierarchical, trial courts have jurisdiction to enter a judgment, but

192. *Id.* at 605.

193. *Id.* at 604.

194. *Id.* at 605.

195. *Lamont Cmty. Church*, 285 Mich. App. at 605.

196. *Id.*

197. *Id.* at 615.

198. *Id.* at 605 (quoting Bennison v. Sharp, 121 Mich. App. 705, 712-13 (1982)). There is an exception to this deference to hierarchical church authorities when "it appears from the church constitution, canons or rules, or from some other source, that an express trust exists in favor of one or the other of the contending parties." *Id.* at 624-25 (quoting *Bennison*, 121 Mich. App. at 724). When such a trust exists, then a "neutral principles of law method may be appropriate . . . ." *Id.* at 624. Although argued by LCC, no such trust was created because the hierarchical authorities determined that Property Corporation (which may otherwise have been considered a trust) had been created and held the church property in violation of church governing procedures. *Id.* Thus, the Property Corporation and the purported transfer of the property to it were void *ab initio*. *Id.* The decision definitively resolved the issue. *Id.*

199. *Id.* at 615 (citations omitted).

200. The Court cited *Leach v. Johnson*, No. 283626, 2009 WL 1710698 (Mich. Ct. App. June 18, 2009) as such an opinion.

the judgment must resolve the matter consistent with any determinations already made by the denomination."[201]

When determining whether a particular church is hierarchical, a court must exercise great caution, circumspection, and deference.[202] This is so because "it is a violation of the First and Fourteenth amendments for courts to substitute their own interpretation of a denomination's constitution 'for that of the highest ecclesiastical tribunals in which the church law vests authority to make that interpretation.'"[203] When a church's governing documents "are 'not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity,' courts must accept the interpretation provided by the denomination . . . ."[204]

In the case at hand, because the trial court's hearing took exhaustive testimony that delved into an array of matters not directly relevant to "whether CRCNA was hierarchical with respect to property," the "hearing devolved into an impermissible 'searching' inquiry into the polity of CRCNA . . . ."[205] To avoid "repeat[ing] the error" itself, the court of appeals simply focused on the governing documents.[206] Because those documents revealed "a central governing body which has regularly acted within its powers," the court found the denomination at issue to be hierarchical regarding both ecclesiastical as well as property matters.[207] Thus, the civil courts were required to accept the church hierarchy's decision about the disposition of the property as binding,[208] including the church's decision that the attempt to transfer the property to the Property Corporation was void.[209] In a parallel fashion, the court accepted the denomination's ecclesiastical determination that a "disaffiliation" had occurred, and that such disaffiliation had no effect on the church hierarchy's decision to make a binding decision about the property.[210]

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201. *Lamont Cmty. Church*, 285 Mich. App. at 616.

202. *Id.* at 617 (quoting *Serbian E. Orthodox Diocese*, 426 U.S. at 721).

203. *Id.* (quoting *Serbian E. Orthodox Diocese*, 426 U.S. at 721).

204. *Id.* (citation omitted) (quoting *Serbian E. Orthodox Diocese*, 426 U.S. at 723).

205. *Id.* at 617-18.

206. *Id.* at 618.

207. *Lamont Cmty. Church*, 285 Mich. App. at 618 (quoting Calvary Presbyterian Church v. Presbytery of Lake Huron of the United Presbyterian Church, 148 Mich. App. 105, 108 n.1 (1986)). In *Borgman v. Bultema*, 213 Mich. 684 (1921), the Michigan Supreme Court had previously determined that the denomination was hierarchical in nature, and the court of appeals noted that the "characteristics used by the Supreme Court in *Borgman* to determine whether [the denomination] was hierarchical are still contained within the" governing documents. *Lamont*, 285 Mich. App. at 620.

208. *Id.* at 616.

209. *Id.* at 624.

210. *Id.* at 626-28.

This decision buttresses the free exercise of religion by ensuring that a decision of a church hierarchy can be enforced through a civil judgment, and by protecting and insulating a church from undue interference, exacting scrutiny and impermissible second guessing by a court when determining whether a church is indeed hierarchical.

X. ISSUE PRESERVATION AND PLAIN ERROR REVIEW

Issue preservation and the plain-error standard of review played a key, but not always decisive, role in Michigan jurisprudence during the *Survey* period. Plain-error review occurs when a criminal defendant raises on appeal "an unpreserved claim of constitutional error"[211]—i.e., the defendant failed to object to the claimed error at trial. Finding that "the factors adopted by the federal courts of appeals are useful for plain-error review,"[212] Michigan uses a four-step analysis derived from federal jurisprudence[213] when "determining whether an unpreserved claim of error warrants reversal under plain-error review":[214] 1) error, i.e., a "[d]eviation from a legal rule," which has not been waived;[215] 2) "the error must be plain, meaning clear or obvious";[216] 3) "the error must have affected substantial rights," which "'generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings'";[217] and, 4) the "error 'resulted in the conviction of an

211. *Borgne*, 483 Mich. at 196.

212. *Id.* at 198 n.10.

213. In particular, the court framed the question as, "[Whether] this type of error warrants reversal under the plain-error standard of review articulated in *People v. Grant*, 445 Mich. 535, 547-553, 520 N.W.2d 123 (1994) and *People v. Carines*, 460 Mich. 750, 765-766, 597 N.W.2d 130 (1990)." *Shafier*, 483 Mich. at 219. In a relatively unusual footnote, the author of the majority opinion, Justice Michael F. Cavanagh, specifically wrote in the first person and explained that "I continue to think that this Court erred by adopting the federal plain-error doctrine. . . . Nonetheless, as I have in other cases, I recognize that *Carines* is the law in Michigan." *Id.* at 219 n.14. *See also Borgne*, 483 Mich. at 196 n.8. Chief Justice Marilyn J. Kelly concurred to express similar sentiments, *Shafier*, 483 Mich. at 224-25; *Borgne*, 483 Mich. at 203, while Justice Robert Young concurred separately for the sole purpose of disclaiming agreement with footnote 14. *Shafier*, 483 Mich. at 225; *Borgne*, 483 Mich. at 204.

214. *Borgne*, 483 Mich. at 196. *See also Shafier*, 483 Mich. at 219.

215. *Shafier*, 483 Mich. at 314. *See also Borgne*, 483 Mich. at 196 (citation omitted).

216. *Shafier*, 483 Mich. at 314 (citation omitted). *See also Borgne*, 483 Mich. at 196 (citation omitted).

217. *Shafier*, 483 Mich. at 219-20 (quoting *Carines*, 460 Mich. at 763). *See also Borgne*, 483 Mich. at 196 (citation omitted).

actually innocent defendant' or ' seriously affected the fairness, integrity or public reputation of judicial proceedings.'"[218]

A conviction will only be reversed if all four elements are determined in favor of the defendant;[219] and the defendant bears the burden to show the third element—prejudice.[220]

In *People v. Bryant*,[221] the defendant argued on appeal that certain hearsay statements admitted at his trial violated the Confrontation Clause.[222] He failed to object at the trial because the dispositive federal decisions[223]–which fundamentally changed the underlying Confrontation Clause analysis–were not issued until after his conviction.[224] Nevertheless, the court found that "there was error and the error was plain."[225] In addition, because the error "clearly prejudiced [the] defendant"[226] and "affect[ed] the fairness, integrity or public reputation of the judicial proceedings," the admission of the statements warranted reversal of the conviction.[227] A parallel analysis and holding occurred in *People v. Shafier*,[228] where the court found that prosecutor's comments during trial violated the defendant's right against self-incrimination.[229]

Bryant reveals that the supreme court has no hesitation in finding plain-error in favor of protecting constitutional rights even when a trial court relies upon binding jurisprudence which is subsequently reversed.

However, the court granted no quarter to the prosecutor's failure to fully preserve its position in *Bryant*. Finding that at the district court "the prosecutor clearly abandoned any effort to establish even a minimally sufficient foundation for the dying declaration exception," and failed to appeal the district court's ruling that the people had failed to establish such a foundation, the court rejected the prosecutor's efforts before the supreme court to resurrect the dying declaration rationale for admitting

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218. *Shafier*, 483 Mich. at 219-20 (quoting *Carines*, 460 Mich. at 763). *See also Borgne*, 483 Mich. at 196 (citation omitted).

219. *See, e.g., Borgne*, 483 Mich. at 202 ("Without proof of prejudice, analysis of the plain-error element is irrelevant; therefore, defendant is not entitled to appellate relief").

220. *See, e.g., Shafier*, 483 Mich. at 220 (citation omitted); *Borgne*, 483 Mich. at 196-97 (citation omitted).

221. 483 Mich. at 132 (2009). For a more thorough analysis of *Bryant*, see *supra*, Part III.

222. *Id.* at 135-36. *See* U.S. CONST. amend. VI.; MICH. CONST. art. 1, § 20.

223. *See* Crawford v. Washington, 541 U.S. 36 (2004). *See also* Davis v. Washington, 547 U.S. 813 (2006).

224. *Bryant*, 483 Mich. at 151-52.

225. *Id.* at 152.

226. *Id.*

227. *Id.* at 153 (alteration in original) (citation omitted).

228. 483 Mich. 205 (2009).

229. *Id.* at 220-24.

the statements.[230] Justice Corrigan's dissent, joined by Justice Young, disagreed with the majority's refusal to consider the dying declaration exception, reasoning that the prosecutor's "abandonment of its original argument . . . was a reasonable strategy at the time [the] trial took place" in light of the binding jurisprudence extant at the time of the trial.[231]

In contrast to *Bryant*, the supreme court found in *People v. Borgne*[232] that the defendant failed to show that the prosecutor's unconstitutional "use [of] defendant's post-arrest, post-*Miranda* silence against him"[233] resulted in prejudice necessitating reversal of the defendant's conviction.[234] The court considered "(1) the extent of the prosecutor's comments, (2) the extent to which the prosecution attempted to tie defendant's silence to his guilt, and (3) the relative strength of the other evidence against the defendant."[235] After an exacting analysis of these factors—including a thorough review of the weight and credibility of the prosecutor's case—the court found that defendant had not shown prejudice.[236] Nevertheless, as a clear message to prosecutors in the future, the court emphasized that "[h]ad it not been for the wealth of incriminating evidence against defendant . . . the prosecutor's trial victory would not be affirmed. To be clear, the prosecutor has not won this appeal; rather, the defendant has lost it . . . ."[237]

An intriguing thread of analysis appeared in connection with evaluating the third element of plain-error review—i.e., prejudice—when the supreme court highlighted the juries' struggles to convict the defendants at issue. In *People v. Shafier*, in which the jury acquitted the defendant of the most serious charges but convicted him of less serious charges, the court found that "[t]he jury's acquittal of defendant on the charges of first-degree criminal sexual conduct suggests that at least some of the jurors questioned AS's [the victim's] credibility as compared to the defendant's, even with the prosecutor's impermissible references to defendant's silence."[238] Even more intriguing, in *Bryant*, the court found that "the fact that defendant's first trial resulted in a hung jury" was "[f]urther evidence that the error was prejudicial . . . ."[239] Why the jury's difficulty in the prior trial should be considered on appeal of the

230. *Bryant*, 483 Mich. at 153-56.
231. *Id.* at 164-65.
232. 483 Mich. 178 (2009).
233. *Id.* at 197.
234. *Id.* at 201, 203.
235. *Id.* at 197-98 (footnote omitted).
236. *Id.* at 198-02.
237. *Id.* at 203.
238. *Shafier*, 483 Mich. at 223.
239. *Bryant*, 483 Mich. at 153.

subsequent trial was not explained. However, the trend is clear: if a jury—even a prior one—has difficulty in convicting a defendant of all the charges, Michigan jurisprudence will consider such difficulty in determining whether prejudice occurred under the plain-error standard of review.

Furthermore, there is no longer any doubt that the erroneous introduction of important evidence in violation of the Confrontation Clause often rises to "the sort of error that compromises the fairness, integrity, and truth-seeking function of a jury trial."[240] As such, the introduction of such evidence—especially when the prosecutor's evidence is otherwise slight—"render[s] the trial fundamentally unfair and cast[s] a shadow on the integrity of our state's judicial processes."[241]

Michigan's plain-error review was significantly clarified during the *Survey* period by explaining the application of the standard in particular circumstances, especially those involving juries struggling to convict on the original charges and the impermissible introduction of hearsay evidence in violation of the Confrontation Clause.

240. *Shafier*, 483 Mich. at 224.

241. *Id. See also* People v. Payne, 285 Mich. App. 181, 199 (2009) (finding that because "the DNA laboratory reports far and away constituted the single most condemning piece of evidence introduced against the defendant . . . ." that admission of the reports "affected the fairness and integrity of the defendant's trial").