# CRIMINAL PROCEDURE

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## I. INTRODUCTION

This Article focuses on developments in the area of criminal procedure during the period of June 1, 2014, through May 31, 2015. As we "surveyed" this area of law, we looked to published cases from the Michigan Supreme Court, the Michigan Court of Appeals, and the U.S. Supreme Court, with a heavy emphasis on cases interpreting the Fourth, Fifth, and Sixth amendments to the U.S. Constitution, as well as a sampling of cases interpreting procedural rights existing under the Michigan Constitution and/or state statutes. In reporting these developments, we have tried to be as neutral as possible, but we have also at times injected our analysis where we deemed it appropriate. If you, the reader disagree, we hope you share your thoughts by e-mail and we look forward to a healthy debate. Thank you for reading.

## II. PLEAS AND PLEA BARGAINING

### A. Cobbs *Pleas: Sentence Agreements with the Court*

One of the most common procedural vehicles to plea bargain a case is via the use of a "*Cobbs*[1] plea." In the original case, *People v. Cobbs*, the Michigan Supreme Court relaxed the prohibitions on judges involving themselves in plea negotiations.[2] Now, under *Cobbs*, "[a]t the request of a party, and not on the judge's own initiative, a judge may state on the record the length of sentence that, on the basis of the information *then* available to the judge, appears to be appropriate for the charged offense."[3] The *Cobbs* court further held that a defendant who pleads guilty under such an arrangement "has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation."[4] The Michigan Supreme Court has codified *Cobbs* principles in Rule 6.310[5] of the Michigan Court Rules,

1. People v. Cobbs, 443 Mich. 276, 505 N.W.2d 208 (1993).
2. *Id.* at 282, 505 N.W.2d at 211–12 (citing People v. Killebrew, 416 Mich. 189, 205, 330 N.W.2d 834, 840 (1982)).
3. *Id.* at 283, 505 N.W.2d at 212 (emphasis added).
4. *Id.*
5. MICH. CT. R. 6.310.

which provides that a defendant may withdraw a plea of guilty (or no contest) if:

> (b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.[6]

This "absolute right," however, is not truly "absolute," as the rule provides that defendants who commit "misconduct" pending sentencing forfeit their right to withdraw the plea.[7] Within the meaning of the rule, "misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing."[8]

In *People v. White*,[9] the Michigan Court of Appeals held that the defendant's failure to comply with a precondition of a *Cobbs* agreement triggered his forfeiture of a right to withdraw the plea when the trial court ultimately deviated from the *Cobbs* evaluation.[10] Rickey White pled guilty to one count of conducting a criminal enterprise and two counts of obtaining money by false pretenses, $1,000 or more but less than $20,000.[11] The defendant's offense involved a scheme of masquerading as a mortgage-loan-modification specialist, charging homeowners an upfront fee, and never completing the process of submitting a mortgage modification.[12] The trial court eventually determined that he owed his victims $283,245 in restitution.[13]

The defendant pled guilty to the charges pursuant to a *Cobbs* agreement with the Oakland County Circuit Court.[14] The court agreed to delay sentencing White for a two-month period, and promised to again delay sentencing for 90 days if, after the two-month period, he had paid $20,000 toward restitution.[15] If, after the 90-day period, the defendant

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6. MICH. CT. R. 6.310(B)(2).
7. MICH. CT. R. 6.310(B)(3).
8. *Id.*
9. People v. White, 307 Mich. App. 425, 862 N.W.2d 1 (2014).
10. *Id.* at 435, 862 N.W.2d at 6 (2014); *appeal denied*, 497 Mich. 1015, 862 N.W.2d 226 (2015), *reconsideration denied*, 498 Mich. 888, 869 N.W.2d 576 (2015).
11. *Id.* at 426–27, 862 N.W.2d at 2.
12. *Id.* at 427, 862 N.W.2d at 2.
13. *Id.*
14. *Id.* at 428, 862 N.W.2d at 2.
15. *Id.*

paid an additional $20,000, the court promised to delay sentencing for approximately six more months.[16] If the defendant complied with the terms of the agreement, the trial court promised to sentence him to a minimum sentence within the bottom third of the statutory sentencing guidelines.[17] When the defendant failed to make the first $20,000 payment, the court deviated from the *Cobbs* evaluation and sentenced him to a minimum sentence of twenty-three years and four months in prison on the most serious charge.[18]

On appeal, the defendant claimed the trial court erred in denying his request to withdraw the plea after it deviated upward from the *Cobbs* evaluation.[19] He pointed to the language in *Cobbs* that when a court deviates upward from an evaluation, the defendant "has an *absolute right to withdraw the plea.*"[20] Judge Mark T. Boonstra, writing on behalf of a unanimous panel that included Judges Jane E. Markey and Kirsten Frank Kelly,[21] rejected the defendant's argument.[22] The panel observed that, under *People v. Kean*, a defendant who violates a precondition of a plea agreement no longer retains a right to withdraw a plea.[23] The plea transcript, in the panel's determination, was clear that defendant's partial payments toward restitution were a "specific precondition" of the plea agreement:

> Okay. With regard to you as an individual, I have made a representation to you that pursuant to *People v. Cobbs* that if you were to plead guilty today that I would agree to the following: that we would wait sixty days, approximately sixty days for your sentence in this case, and if you pay $20,000.00 of restitution at the time of sentencing I would then further delay the sentence for an additional ninety days. If you paid an additional $20,000.00 at that time I would continue the delayed sentence up to the statutory maximum of approximately eleven months, at which time I would sentence you. *And if you meet those criteria up to the time of the delayed sentence and follow all the other conditions I impose on you in connection with the delay of*

16. *Id.*
17. *Id.*
18. *Id.* at 427, 862 N.W.2d at 2. The opinion does not specify the guideline range.
19. *Id.* at 432, 862 N.W.2d at 5.
20. *Id.* at 433, 862 N.W.2d at 5 (quoting People v. Cobbs, 443 Mich. 276, 283, 505 N.W.2d 208 (1993)) (emphasis added).
21. *Id.* at 435, 862 N.W.2d at 6.
22. *Id.* at 433, 862 N.W.2d at 5.
23. *Id.* (citing People v. Kean, 204 Mich. App. 533, 516 N.W.2d 128 (1994)).

> *sentence*, that any sentence that you would receive would not exceed the bottom one-third of the guideline range . . .[24]

The panel thus affirmed the conviction, citing *Kean*.[25] It is unclear whether the court rule was in effect at the time of the plea since *White* was initially a 2012 case and the court rule did not go into effect until 2014. The court rule defines "misconduct" to include "violating ... the terms of any sentencing or plea agreement[.]"[26] Thus, the defendant's failure to pay clearly would constitute "misconduct" within the meaning of Rule 6.310.

### *B.* Killebrew *Pleas: Sentence Agreements with the Court and the Prosecutor*

A *Killebrew* plea is slightly more complex than the procedure referenced in *Cobbs*. In a *Killebrew* plea, the defendant makes an agreement with the prosecution to plead guilty in exchange for a "specific sentence disposition."[27] The court, if it so chooses, may conditionally accept the plea pending sentencing.[28] If, however, at the time of sentencing the court determines the sentence is inappropriate, it must allow the defendant to withdraw his plea.[29] The Michigan Supreme Court has since codified the *Killebrew* procedure in the court rules.[30] As is the case with a *Cobbs* plea, a defendant, by committing misconduct, may forfeit his right to receive a sentence no more severe than the *Killebrew* agreement.[31]

### *C.* Siebert *Pleas: Charge and Sentence Agreements with the Court and Prosecutor*

In Michigan, separation-of-powers principles dictate that "the prosecutor is the chief law enforcement officer of the county and has the right to exercise broad discretion in determining under which of two applicable statutes a prosecution will be instituted."[32] A trial court may

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24. *Id.* at 435, 862 N.W.2d at 6 (emphasis in original).
25. *Id.*
26. MICH. CT. R. 6.310(B)(3).
27. People v. Killebrew, 416 Mich. 189, 206–07, 330 N.W.2d 834, 841 (1982)
28. *Id.* at 207, 330 N.W.2d at 841.
29. *Id.* at 207, 330 N.W.2d at 841–42.
30. MICH. CT. R. 6.310(B)(2)(a).
31. MICH. CT. R. 6.310(B)(3).
32. Genesee Prosecutor v. Genesee Circuit Judge, 386 Mich. 672, 683, 194 N.W.2d 693, 698–99 (1972) (citing People v. Lombardo, 301 Mich. 451, 453, 3 N.W.2d 839

not amend an information and accept a plea to a lesser charge over the prosecution's objection.[33] Moreover, under *People v. Siebert*,[34] if the prosecution agrees to reduce a charge as part of a sentencing agreement with the defendant and the court, the prosecution may withdraw from the agreement — and the court *must* vacate the plea to the lesser charge — if the court issues a sentence less severe than the one to which it previously agreed.[35]

### *D. Withdrawal of Pleas*

#### *1. Upon the Defendant's Request*

Pursuant to the Michigan Court Rules, a trial court cannot accept a defendant's plea of guilty or nolo contendere until it determines the plea is "understanding, voluntary, and accurate."[36] The rules go on to require specific questioning of the defendant to ensure that the plea passes muster.[37] The trial court may allow a defendant to withdraw a plea before sentence, or within six months after sentencing if there were defects in the plea procedure.[38]

However, in *People v. White*, a case we previously discussed in Part II.A,[39] the Michigan Court of Appeals had occasion to reaffirm that a defendant who, *after representing to the court that his plea was understanding, voluntary and accurate*, may not later seek to withdraw the plea by testimony that the plea was *not* understanding, voluntary, and accurate.[40] At White's plea hearing, the defendant "testified that he was satisfied with the advice given by his counsel. The court also specifically explained the charges and the possible sentences. Defendant stated that it was his own choice to plead guilty and that there were no promises, threats, or inducements compelling him to tender the plea."[41]

He then later sought to withdraw his plea, and presented affidavits from himself, his aunt, and his uncle, in which (in the words of the appellate panel) the three alleged "that defendant's counsel pressured

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(1942); People v. Thrine, 218 Mich. 687, 690–91, 188 N.W. 405, 406 (1922); and People v. Mire, 173 Mich. 357, 364, 138 N.W. 1066, 1068 (1912)).

33. MICH. CT. R. 6.301(D).

34. People v. Siebert, 450 Mich. 500, 537 N.W.2d 891 (1995).

35. *Id.* at 510–11, 537 N.W.2d at 896.

36. MICH. CT. RS. 6.302(A) (circuit court), 6.610(E)(1) (district court).

37. MICH. CT. RS. 6.302(B), (C) and (D) (circuit court), 6.610(E) (district court).

38. MICH. CT. R. 6.310(A)(1), 6.310(C).

39. *See supra* Part II.A.

40. People v. White, 307 Mich. App. 425, 428–31, 862 N.W.2d 1, 2–4 (2014).

41. *Id.* at 429, 862 N.W.2d at 3.

defendant into entering a plea, that counsel was unprepared, and that counsel did not advise defendant of the charges against him or any possible defenses."[42] The trial court, along with the appellate judges who affirmed it, approvingly quoted the case of *People v. Serr* for the proposition that a defendant may not attack his plea via testimony that contradicts his own testimony at the plea hearing:

> [W]here a defendant has been found guilty by reason of his own statements as to all of the elements required to be inquired into by [citation omitted] and his attorney has also confirmed the agreement and the defendant has been sentenced, neither he nor his attorney will be permitted thereafter to offer their own testimony to deny the truth of their statements made to induce the court to act. To do so would be to permit the use of its own process to create what amounts to a fraud upon the court. This is based on public policy designed to protect the judicial process.[43]

The trial court had gone slightly further, opining that taking testimony from the defendant and his attorney as to the plea's validity "would allow [White] to benefit from perjury (either at the plea or in his affidavit)."[44]

*2. Upon the Prosecutor's Request*

Outside of the trial court's departure from a sentencing agreement, a trial court may withdraw a defendant's plea on the prosecution's motion "if the defendant has failed to comply with the terms of a plea agreement."[45] The Muskegon County prosecutor charged Gilbert Alvarez Martinez with first-degree criminal sexual conduct (CSC), alleging the defendant engaged in at least one incident of "penile-vaginal and/or digital-vaginal" penetration of a girl under thirteen years of age.[46] After the preliminary examination, the prosecution moved to amend the information to add two additional counts of first-degree CSC.[47] The defendant, in response, agreed to plead guilty to a lesser charge of second-degree CSC.[48] In the trial court's words, "the prosecutor agreed

42. *Id.*

43. *Id.* at 430–31, 862 N.W.2d at 4 (quoting People v. Serr, 73 Mich. App. 19, 28; 250 N.W.2d 535, 539 (1976)).

44. *Id.* at 430, 862 N.W.2d at 3.

45. MICH. CT. R. 6.310(E).

46. People v. Martinez, 307 Mich. App. 641, 643–44, 861 N.W.2d 905 (2014).

47. *Id.* at 644, 861 N.W.2d at 907.

48. *Id.*

to dismiss the charge of criminal sexual conduct first degree and any other charges stemming out of this particular investigation in return for a plea of guilty by [Martinez] to criminal sexual conduct in the second degree."[49]

Prior to sentencing, however, the young victim disclosed other incidents of the defendant's sexual misconduct of which the prosecution had not been aware.[50] The prosecution then instituted two new charges of first-degree CSC.[51] The trial court denied the defendant's motion to dismiss the new charges, rejecting the argument that the plea agreement barred them, and permitted the prosecution to withdraw from the agreement.[52] After reviewing the police reports that were available to both parties at the time of the plea, the trial court, invoking principles of contract law, concluded there was a mutual mistake of fact because, in the words of the appellate judges reviewing the case, "the police reports on which the plea agreement was based did not contain allegations of fellatio" — fellatio being the conduct underlying the new charges.[53]

After the trial court denied his motion, the defendant proceeded to a bench trial, which resulted in his conviction and an appeal to the Michigan Court of Appeals. There, Judges David H. Sawyer, Jane E. Markey and Cynthia D. Stephens,[54] in a *per curiam* opinion, concluded that court rules did not allow the trial court to vacate the plea.[55] "The plain language of the court rule clearly limits the discretion of the trial court to vacate an accepted plea. The trial court may exercise its discretion to vacate an accepted plea only under the parameters of the court rule."[56] Because the defendant did not move to withdraw the plea, nor consent to withdraw it, and where there was no showing that defendant committed misconduct pending sentencing, the trial court erred in setting the plea aside.[57]

Having reached that conclusion, the appellate panel acknowledged that, *nevertheless*, there *are* circumstances outside the court rules' scope where a trial court may vacate the plea on the prosecution's motion. By way of example, the judges cited *Siebert*, a case briefly discussed in

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49. *Id.*

50. *Id.* at 645, 861 N.W.2d at 908. The parties did not dispute that the prosecution had been unaware of the allegations at the time of the plea. *Id.*

51. *Id.*

52. *Id.* at 645–46, 861 N.W.2d at 908.

53. *Id.* at 646, 861 N.W.2d at 908.

54. *Id.* at 655, 861 N.W.2d at 913.

55. *Id.* at 648–51, 861 N.W.2d at 909–11.

56. *Id.* at 649, 861 N.W.2d at 910 (quoting People v. Strong, 213 Mich. App. 107, 111–12, 539 N.W.2d 736, 737–38 (1995)).

57. *Id.* at 650, 861 N.W.2d at 910.

*supra* Part II.C, where the court held that a trial court must allow the prosecution to withdraw from a plea if the plea is part of a sentencing agreement and the sentence is more lenient than the agreement's terms specify.[58]

The court noted that judges normally must respect the plain meaning of the words in the agreement but also observed that "contractual theories will not be applied if to do so would subvert the ends of justice."[59] The appellate court determined that the trial court appeared to perform a strict interpretation of the plea agreement without considering that the terms of the agreement were unfair to the defendant.[60] The panel rejected the trial court's limited definition of the term "investigation" to be the scope of the information appearing in the police reports at the time of the plea.[61]

> First, the parties could have, but did not, state that the plea agreement was bounded by existing police reports. Further, *Black's Law Dictionary* (10th ed), defines 'investigation' as '[t]he activity of trying to find out the truth about something, such as a crime . . . .' While a police investigation may be summarized in a police report, it is not the same as an 'investigation.' The circuit court erred by rewriting the parties' plea agreement. *While the parties could have stated that the prosecutor agreed not to bring additional charges that were disclosed in known police reports or to which defendant confessed his culpability, they did not do so.* Instead, the phrase 'grows out of this same investigation' must be understood by its relation to the agreement as a whole. The prosecutor agreed to 'not bring any other charges regarding sexual contact or penetration with [the complainant] that grows out of this same investigation that occurred during the period of 1996 through 2000.' Thus, the 'investigation' of other charges that would not be prosecuted included (1) specific types of offenses—sexual contact or penetration; (2) against a named person, the

58. *Id.* at 650–51, 861 N.W.2d at 910–11 (citing People v. Siebert, 201 Mich. App. 402, 404–08, 507 N.W.2d 211, 214–15).

59. *Id.* at 651, 861 N.W.2d at 911 (quoting People v. Swirles, 218 Mich. App. 133, 135, 553 N.W.2d 357 (1996)).

60. *Id.*

61. *Id.*

complainant, and (3) during a specified timeframe—1996 through 2000.[62]

Thus, the panel concluded there was no mutual mistake – no "erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction."[63] Rather, it subtly suggested, the prosecution entered into an "unwise" bargain.[64] "No caselaw supports vacating the plea agreement under these circumstances."[65]

The panel vacated the conviction for first-degree CSC and ordered the trial court to reinstate the plea to the lower charge and to proceed to sentencing.[66] Mindful that the trial court had also given Martinez a *Cobbs* evaluation of a prison sentence of no more than four years,[67] the appellate judges informed the trial court that it must allow the defendant to withdraw the plea if the sentence was in excess of the *Cobbs* evaluation.[68]

## III. STATUTE OF LIMITATIONS

The Michigan Legislature has established a statute of limitations for criminal offenses.[69] Once the time period in the statute runs, an individual cannot be charged with a crime.[70] However the statute includes a tolling provision, which states: "Any period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed."[71]

The Michigan Court of Appeals in *People v. Blackmer*[72] addressed the tolling provision. On December 17, 1981, the defendant sexually assaulted the victim at gunpoint.[73] The victim did not know Joseph Harry

62. *Id.* at 652–53, 861 N.W.2d at 911–12 (emphasis added) (internal citations omitted).

63. *Id.* at 653, 861 N.W.2d at 912 (quoting Ford Motor Co. v. Woodhaven, 475 Mich. 425, 442, 716 N.W.2d 247 (2006)).

64. *Id.*

65. *Id.*

66. *Id.* at 654–55, 861 N.W.2d at 912–13.

67. *Id.* at 642–43, 861 N.W.2d at 906.

68. *Id.* at 655 n.7, 861 N.W.2d at 913 n.7 (citing MICH. CT. R. 6.310(B)(2)).

69. MICH. COMP. LAWS ANN. § 767.24 (West 2015).

70. *Id.*

71. *Id.* § 767.24(8).

72. People v. Blackmer, 309 Mich. App. 199, 870N.W.2d 579 (2015), *leave denied*, 498 Mich. 868, 866 N.W.2d 418 (2015).

73. *Id.* at 200, 870 N.W. 2d at 580.

Blackmer and, because the police had no suspects, the case was closed in March of 1982.[74] In June of 1982, Blackmer's job sent him to Indiana.[75] While there, he committed another sexual assault.[76] In May of 2011, police in Grand Rapids "learned that the Combined DNA Index System database" (CODIS) identified a match between DNA obtained from the sexual assault in the Michigan case and defendant while the defendant was still incarcerated in Indiana.[77] Blackmer was extradited to Michigan and, on May 17, 2013, he was charged with first-degree criminal sexual conduct.[78] Defendant filed a motion to dismiss claiming that the statute of limitations had run.[79] The trial court denied the motion and defendant appealed.[80]

When the crime was committed, the statute of limitations for criminal sexual conduct first degree (unless the victim was under eighteen years of age) was six years and the change in the statute of limitations with respect to adult victims did not occur until 2001.[81] The Legislature can extend the limitations period for a crime whose period has not run, but it cannot extend the period for a crime whose period has already run.[82]

In other words, if a person commits crime X — which carries a five-year statute of limitations — the Legislature must lengthen the period before five years has elapsed since crime X occurred. If the Legislature extends the period to ten years before the original five-year period runs, the state may still prosecute the suspect within ten years of crime X. On the other hand, if six years has elapsed, and the state only *then* decides to extend the limitations period to ten years, a prosecution is impossible after the original five-year period has elapsed. To put it simply, a legislative extension of a statutory limitations period will lengthen the life of a prosecution that is still alive, but it will not *revive* a dead prosecution.

Blackmer claimed that the tolling provision also did not apply because he intended to return to Michigan.[83] However, in a *per curiam* opinion, a unanimous panel of Court of Appeals Judges Peter D.

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74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 201, 870 N.W.2d at 581.
82. *Id.*; *see also* People v. Russo, 439 Mich. 584, 593–94, 487 N.W.2d 698, 701–02 (1992).
83. *Id.* at 201, 870 N.W.2d at 581.

O'Connell, David H. Sawyer and Jane E. Markey[84] concluded that the plain and unambiguous language of the statute dictated that the limitations period tolled for any period that defendant was not customarily and openly living in Michigan and the defendant's subjective intent was irrelevant. [85] The court determined that Blackmer did not customarily and openly live in Michigan between 1982 and 2013 and therefore the statute of limitations had tolled during that period.[86]

## IV. THE FOURTH AMENDMENT

### *A. Introduction*

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[87]

The federal constitutional protections against unreasonable searches and seizures have been extended to state proceedings through the Due Process Clause of the Fourteenth Amendment.[88] The Michigan Constitution also provides protection against unreasonable searches and seizures.[89] The Michigan Supreme court has observed that:

> While members of this Court take an oath to uphold the United States Constitution, we also take an oath to uphold the Michigan Constitution, which is the enduring expression of the will of 'we, the people' of this state. In light of these separate oaths of office, we need not, and cannot, defer to the United States Supreme Court in giving meaning to the latter charter. Instead, it is this Court's obligation to independently examine our state's

84. *Id.* at 202, 870 N.W.2d at 581.
85. *Id.*
86. *Id.*
87. U.S. CONST. amend. IV.
88. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
89. MICH. CONST. art 1 § 11.

> Constitution to ascertain the intentions of those in whose name our Constitution was 'ordain[ed] and establish[ed].'[90]

*B. Probable Cause to Arrest*

Thus, both the federal and Michigan constitutions protect against unreasonable seizures of a person.[91] For a felony arrest, however, a police officer must only possess reasonable or probable cause that an arrestee has committed a felony.[92] In addition, state law provides:

> (1) A peace officer, without a warrant, may arrest a person in any of the following situations:
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> . . . .
>
> (c) A felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it.[93]

Reasonable or probable cause to arrest exists "where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."[94]

In *People v. Nguyen*, the court of appeals grappled with whether there was probable cause for the police to make a warrantless felony arrest.[95] In *Nguyen,* a confidential informant (CI) working with U.S. Immigration and Customs Enforcement (ICE) had agreed to purchase a large quantity of cocaine from Thanh Manh Nguyen in the city of Troy.[96] ICE agents said that the CI had been used in three ICE investigations and the CI's information had resulted in seizure of controlled substances, seven arrests and five convictions.[97] ICE informed Troy police regarding the agreement and that the CI was reliable and credible.[98] The day of Nguyen's eventual arrest, ICE agents indicated that he had told the CI he

90. People v. Tanner. 496 Mich. 199, 221–22, 853 N.W.2d 653 (2014).

91. U.S. CONST. amend. IV; MICH. CONST. art 1, § 11.

92. Albright v. Oliver, 510 U.S. 266, 297 n.12 (1994); People v. Sizemore, 132 Mich. App. 782, 788, 348 N.W.2d 28 (1984).

93. MICH. COMP. LAWS ANN. § 764.15 (West 2015).

94. People v. Champion, 452 Mich. 92, 115, 549 N.W.2d 849, 860 (1996).

95. People v. Nguyen, 305 Mich. App. 740, 854 N.W.2d 223 (2014); *leave denied,* 497 Mich. 1035, 863 N.W.2d 327 (2015).

96. *Id.* at 744, 854 N.W.2d at 226.

97. *Id.* at 746, 854 N.W.2d at 227.

98. *Id.* at 746–47, 854 N.W.2d at 227–28.

was going to retrieve the cocaine after work and deliver it to the CI in Troy.[99] A surveillance team monitored Nguyen leaving his work and approaching a home in Detroit, considered to be a high-intensity, drug-trafficking area.[100] After the defendant left the Detroit location, he informed the CI that he was in possession of the cocaine.[101] He then drove toward the specific Troy location at which the defendant and the CI agreed to meet.[102]

With prior knowledge of the CI's agreement, Troy police stopped Nguyen's vehicle.[103] Furthermore, when the officer activated his emergency lights to initiate the traffic stop, the defendant failed to follow the officer's instructions to pull off onto the next side road.[104] Instead, he traveled for another five hundred feet and the officer observed the defendant moving around in the vehicle as though he were attempting to move or hide something.[105] The officer then performed a pat-down search for weapons and a consensual vehicle search.[106] An officer searched the driver's compartment, underneath the seats, the top of the seats, and behind the driver's seat.[107] No drugs were located during the pat down or during the search of the vehicle.[108]

While one of the officers was speaking to the defendant, he noticed that the defendant kept his hands in his pants pockets.[109] Then, when the defendant removed his hands from his pocket, the officer noticed a bulge in the defendant's right pants pocket, bigger than a golf ball.[110] The officer noted that the pocket had been smooth during the initial pat down.[111] The officer felt the bulge, asked what it was, and began to check out the pocket, whereupon the defendant told the officer to arrest him.[112] When the officer asked why, the defendant said, "for what you're going to find in my pocket."[113] The officer removed a felt bag from the

99. *Id.* at 744, 854 N.W.2d at 226.
100. *Id.* at 747, 854 N.W.2d at 228.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 754, 854 N.W.2d at 231–32.
105. *Id.*
106. *Id.* at 744, 854 N.W.2d at 226.
107. *Id.*
108. *Id.*
109. *Id.* at 744–45, 854 N.W.2d at 226–27.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 745, 854 N.W.2d at 227.

defendant's pocket and, before he could look inside, the defendant said that it contained cocaine.[114]

Approximately twenty minutes had elapsed from the time the police pulled the defendant over until the time of his arrest.[115] The defendant then waived his *Miranda*[116] rights and admitted to running an illegal marijuana-growing operation in his home and possessing firearms and other illicit substances.[117] The police relied on his statement, obtained a search warrant, and found various illegal drugs, firearms, and other contraband in his home.[118]

After an evidentiary hearing which was part of the defendant's preliminary examination, the district court suppressed evidence of the cocaine found in the defendant's pocket, holding that the police had no probable cause for his arrest.[119] The court also suppressed the defendant's statements and evidence found during the execution of the search warrant as fruit of a poisonous tree.[120] The court found that although the police initially had probable cause for arrest, officers no longer possessed probable cause to arrest the defendant after they found nothing in their search of the car and pat down of the defendant.[121] The prosecution appealed the case to the circuit court, which reversed.[122] The circuit court determined that the police had probable cause to believe the evidence was on the person of the defendant, eliminating other prospective locations for the drugs, and therefore had probable cause to arrest.[123]

Defendant then appealed and the court of appeals affirmed.[124] The unanimous panel comprising Judge Kurtis L. Wilder, who wrote on behalf of Judges Peter D. O'Connell and Patrick M. Meter,[125] first emphasized that when examining whether there is probable cause for arrest, the court must examine the information that the police collectively possess, known as the "police team" approach.[126] The panel also noted that "[p]robable cause requires only a probability or substantial chance of

114. *Id.*
115. *Id.*
116. Miranda v. Arizona, 384 U.S. 436 (1966).
117. *Nguyen*, 305 Mich. App. at 745, 845 N.W.2d at 227.
118. *Id.* at 744–45, 854 N.W.2d at 226–27.
119. *Id.* at 748–49, 854 N.W.2d at 228–29.
120. *Id.* at 749, 854 N.W.2d at 229.
121. *Id.* at 748–49, 854 N.W.2d at 228–29.
122. *Id.* at 749, 854 N.W.2d at 229.
123. *Id.* at 749–50, 854 N.W.2d at 229.
124. *Id.* at 750, 854 N.W.2d at 229.
125. *Id.* at 759, 854 N.W.2d at 234.
126. *Id.* at 751–52, 854 N.W.2d at 230–31.

criminal activity, not an actual showing of criminal activity."[127] "Circumstantial evidence, coupled with those inferences arising therefrom, is sufficient to establish probable cause . . . ."[128] The appellate judges also noted that it was permissible for officers to rely on information provided by an informant "so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge."[129]

The court determined that in this case the CI's information was sufficiently corroborated since the CI had provided narcotics-trafficking information and arranged controlled-substances transactions in the past, resulting in seven arrests and five convictions.[130] Furthermore, not only had the CI's information been credible and reliable in the past, but the police and ICE agents also corroborated the information by their observations of the defendant that day.[131] The court found that, given that ICE agents and Troy police officers reasonably corroborated the CI's tip, the police properly relied on this information in making an arrest without a warrant.[132]

The court rejected Nguyen's argument that probable cause to arrest had dissipated when the police did not find cocaine in the car or during the pat-down.[133] The court noted, "Once established, probable cause to arrest, which is concerned with historical facts, is likely to continue indefinitely, absent the discovery of contrary facts. By contrast, it cannot be assumed that evidence of a crime will remain indefinitely in a given place."[134] The court also noted that, while the district court had "viewed the failure to find the cocaine during the initial pat-down for weapons and vehicle search as facts supporting the dissipation of probable cause, the circuit court held that these facts demonstrated that it was more probable that the cocaine was on defendant."[135] The court of appeals held that the evidence supported the circuit court's conclusion that probable cause did not dissipate, noting in particular the extent of corroboration of

127. *Id.* at 751, 854 N.W.2d at 230 (citing People v. Lyon, 227 Mich. App. 599, 611, 577 N.W.2d 124, 129 (1998)).

128. *Id.* at 752, 854 N.W.2d at 230 (citing People v. Northey, 231 Mich. App. 568, 575, 591 N.W.2d 227, 230 (1998)).

129. *Id.* at 752, 854 N.W.2d at 230 (citing Illinois v. Gates, 462 U.S. 213, 242 (1983)).

130. *Id.* at 753, 854 N.W.2d at 231.

131. *Id.*

132. *Id.*

133. *Id.* at 755, 854 N.W.2d at 232.

134. *Id.* (citing People v. Russo, 439 Mich. 584, 605, 487 N.W.2d 698 (1992)).

135. *Id.*

the CI's tip and the officer's observation that the defendant appeared to be hiding something before he stopped his vehicle.[136]

The court noted that, considering the arrest was valid, the search incident to arrest, even though it was technically conducted before defendant was placed under arrest, was also valid.[137] "A search incident to an arrest is an exception to the warrant requirement, and may occur whenever there is probable cause to arrest."[138] The court emphasized that "[t]he search may occur immediately before the arrest, at the place of arrest, or at the place of detention, and may occur before the defendant is advised of his or her right to post bail."[139] The court also pointed out that, because the inquiry was an objective one, the subjective belief of the officer that he may not have had probable cause to arrest the defendant at the time of the search was irrelevant.[140]

The court found that the "circuit court did not err by reversing the district court's suppression of the evidence regarding the cocaine" since "the police had probable cause to arrest and the search incident to the lawful arrest was valid."[141]

### *C. Traffic Stops*

Investigative stops, also known as *Terry* stops, are exceptions to the search-warrant requirement.[142] Under this exception, if a police officer has a reasonable, articulable suspicion to believe a person has committed, is committing, or is about to commit a crime, given the totality of the circumstances, the officer may briefly stop that person for further investigation.[143] Moreover, under *Terry v. Ohio*, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even if probable cause does not exist to arrest the person.[144]

In *Heien v. North Carolina*,[145] the Court established that, along with a reasonable mistake of fact, a reasonable mistake of law by a police officer could justify an investigative stop of a vehicle.[146] In *Heien*, the

136. *Id.* at 755–56, 854 N.W.2d at 232.
137. *Id.* at 757, 854 N.W.2d at 233.
138. *Id.* at 756, 854 N.W.2d at 232.
139. *Id.* at 756–57, 854 N.W.2d at 233.
140. *Id.* at 758, 854 N.W.2d at 233–34.
141. *Id.* at 759, 854 N.W.2d at 234.
142. Terry v. Ohio, 392 U.S. 1 (1968).
143. People v. Shabaz, 424 Mich 42, 57, 378 NW2d 451, 457–58 (1985).
144. People v. Barbarich, 291 Mich. App. 468, 473, 807 N.W.2d 56, 59 (2011) (citing *Terry*, 392 U.S. at 22).
145. Heien v. North Carolina, 135 S. Ct. 530 (2014).
146. *Id.* at 534.

Court noted that the Fourth Amendment prohibits "unreasonable searches and seizures" and that a stop could be justified if based on a reasonable mistake of fact by an officer.[147] The Court gave an example of an officer who stopped a vehicle traveling alone in a high-occupancy zone only to discover, upon approaching the car, that two children were slumped over asleep.[148] The Court noted that the driver had not violated the law, but the officer also had not violated the Fourth Amendment.[149] In *Heien*, the police officer was mistaken regarding the law. The officer stopped Nicholas Brady Heien's car because, when the driver put on the brakes, only the left brake light came on.[150] The traffic stop ultimately led to the discovery of cocaine in the vehicle.[151] While the trial court had denied Heien's motion to suppress, the appellate court reversed, holding that two working brake lights were not actually required by the statute, which provided that a car must be equipped with a stop lamp on the rear of the vehicle.[152] The stop lamp shall display a red or amber light visible from a distance of not less than one hundred feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake.[153] The stop lamp may be incorporated into a unit with one or more other rear lamps.[154]

The North Carolina Supreme Court reversed, finding that the officer made a reasonable mistake of law which justified the stop.[155]

The U.S. Supreme Court reiterated that to stop a vehicle, an officer must have reasonable suspicion, "a particularized and objective basis for suspecting the particular person stopped [was] breaking the law",[156] and emphasized that the touchstone for the Fourth Amendment was reasonableness.[157] The Court observed, "reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion."[158] The Court found that, while Heien was not responsible for the traffic infraction, the officer's reasonable mistake of law justified the stop.[159] The Court ultimately concluded:

147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 535.
153. *Id.*
154. *Id.* (citing N.C. GEN. STAT. ANN. §20-129(g) (West 2007)).
155. *Id.*
156. *Id.* (citing Navarette v. California, 134 S. Ct. 1683, 1687 (2014)).
157. *Id.* at 536.
158. *Id.*
159. *Id.* at 540.

> Here we have little difficulty concluding that the officer's error of law was reasonable. Although the North Carolina statute at issue refers to 'a stop lamp,' suggesting the need for only a single working brake light, it also provides that '[t]he stop lamp may be incorporated into a unit with one or more other rear lamps.' The use of 'other' suggests to the everyday reader of English that a 'stop lamp' is a type of 'rear lamp.' And another subsection of the same provision requires that vehicles have all originally equipped rear lamps or the equivalent in good working order,' arguably indicating that if a vehicle has multiple 'stop lamp[s],' all must be functional.
>
> The North Carolina Court of Appeals concluded that the 'rear lamps' discussed in subsection (d) do not include brake lights, but, given the 'other,' it would at least have been reasonable to think they did. Both the majority and the dissent in the North Carolina Supreme Court so concluded, and we agree. This 'stop lamp' provision, moreover, had never been previously construed by North Carolina's appellate courts. It was thus objectively reasonable for an officer in Sergeant Darisse's position to think that Heien's faulty right brake light was a violation of North Carolina law. And because the mistake of law was reasonable, there was reasonable suspicion justifying the stop.[160]

The U.S. Supreme Court also decided a case concerning the scope of a traffic stop, particularly the role drug dogs play during a stop. In *Illinois v. Caballes,*[161] the Supreme Court had previously held that a dog sniff conducted during a lawful traffic stop did not violate the Fourth Amendment's prescription of unreasonable seizures.[162] In *Rodriguez v. United States*, however, the Court declined to extend this rule to dog sniffs occurring after the traffic stop has completed.[163] The court held:

> [A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful

160. *Id.* (internal citations omitted).
161. Illinois v. Caballes, 543 U.S. 405 (2005).
162. *Id.*
163. Rodriguez v. U.S., 135 S. Ct. 1609 (2015).

> if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation.'[164]

Justice Ruth Bader Ginsburg, writing for a six-member majority that included Chief Justice John G. Roberts Jr. and Justices Stephen G. Breyer, Elena Kagan, Sonia M. Sotomayor, and Antonin G. Scalia,[165] noted that as part of the "mission" of issuing a ticket, the officer could conduct ordinary inquiries incident to the stop which might involve checking the driver's license, determining whether there were outstanding warrants against the driver, and inspecting the registration and proof of insurance.[166] However, the Court found that if the officer wished to extend the length of the traffic stop, the officer had to possess reasonable suspicion of another offense.[167]

In *Rodriguez,* a police officer stopped the defendant for driving on the shoulder of the roadway. The officer asked Rodriguez a number of questions regarding the reason for his driving as well as his route of travel.[168] He also ran a records check on his driver's license.[169] The officer then wrote a warning ticket for Rodriguez and handed him the ticket. The officer testified "I got all the reason[s] for the stop out of the way[,] . . . took care of all the business."[170] Therefore at that point in time the "mission" was complete. However, the officer then asked Rodriguez for permission to run his canine around the vehicle.[171] Rodriguez declined and the officer waited for a second officer to arrive who then ran his drug dog around the vehicle.[172] The dog alerted on the vehicle and a subsequent search of the vehicle revealed a large bag of methamphetamine.[173] The Court remanded to the lower court to determine whether a reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation.[174]

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164. *Id.* at 1612 (citation omitted).
165. *Id.*
166. *Id.*
167. *Id.* at 1615.
168. *Id.* at 1613.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 1612–13.
174. *Id.* at 1616–17.

### *D. Electronic Monitoring and Searches of Computers and Cell Phones*

The courts have been increasingly active regarding the application of the Fourth Amendment to emerging technology. In *Grady v. North Carolina*, the court considered whether the Fourth Amendment is applicable to GPS monitoring devices which tracked convicted sex offenders' movements.[175] Torrey Dale Grady had been convicted of two sex crimes and, after serving his sentence for taking indecent liberties with a child, he "was ordered to appear in New Hanover County Superior Court for a hearing to determine whether he should be subjected to satellite-based monitoring (SBM) as a recidivist sex offender."[176] Although Grady argued that the fact that he was forced to wear a tracking device would violate his Fourth Amendment rights, the judge ordered him to wear the monitoring device for the rest of his life.[177] Grady's Fourth Amendment claim subsequently reached the U.S. Supreme Court.[178] The Court unanimously, in a *per curiam* opinion,[179] determined that because in *United States v. Jones*[180] it had concluded that affixing a GPS device does constitute a search, the trial court's decision to the contrary in Grady's case was erroneous.[181] The Court held that a search has occurred when the government obtains information by physically intruding on a constitutionally protected area.[182]

However, the Court also held that, solely because the monitoring equated to a search did not decide the question of the program's constitutionality because the Fourth Amendment prohibits only *unreasonable* searches and seizures.[183] The Supreme Court determined that "[t]he reasonableness of a search depends on the totality of circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations."[184] The Court remanded the case to consider this question.[185]

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175. Grady v. North Carolina, 135 S. Ct. 1368 (2015).
176. *Id.* at 1369.
177. *Id.*
178. *Id.*
179. *Id.*
180. U.S. v. Jones, 132 S. Ct. 945 (2012).
181. *Grady*, 135 S. Ct. at 1371.
182. *Id.* at 1370 (citing *Jones,* 132 S. Ct. at 949–50 n.3).
183. *Id.* at 1371.
184. *Id.*
185. *Id.*

In *People v. Hallak,* the Michigan Court of Appeals addressed the unresolved question in *Grady.*[186] Hallak, a medical doctor, had been convicted of second-degree CSC (victim under thirteen), third-degree CSC (sexual penetration by force or coercion), and six counts of fourth-degree CSC (sexual contact by force or coercion).[187] On appeal, he challenged the lifetime electronic monitoring imposed by the court as a result of his second-degree CSC sentence.[188]

The court of appeals held that, in light of *Grady,* placement of electronic-monitoring devices constitutes a search for purposes of the Fourth Amendment.[189] However, the court held that "lifetime electronic monitoring for a defendant 17 years or older convicted of second-degree CSC involving a minor under the age of 13" is not an *unreasonable* search.[190] The court stated that the Legislature's purpose in enacting the statute was to "protect society from a group well-known for" a high level of recidivism "and was protecting some of the most vulnerable in society from some of the worst crimes."[191] The court noted that the monitoring device simply recorded where he was traveling, but did not prohibit him from going where he wished.[192] "The court pointed out that, although the monitoring lasted a lifetime, the Legislature presumably provided shorter prison sentences for second-degree CSC convictions because of the availability of lifetime monitoring."[193] The court also highlighted that victims of "second-degree CSC are often harmed for life."[194] The court — Judge Christopher M. Murray writing for a unanimous panel that also comprised Judges Mark T. Boonstra, and Henry William Saad[195] — ultimately concluded, "[t]hough it may certainly be that such monitoring of a law abiding citizen would be unreasonable, on balance the strong public interest in the benefit of monitoring those convicted of CSC II against a child under the age of 13 outweighs any minimal impact of defendant's reduced privacy interest."[196]

*People v. Gingrich*[197] concerned a search of a computer in an interesting set of circumstances. In *Gingrich,* Best Buy employees who

186. People v. Hallak, 310 Mich. App. 555, 873 N.W.2d 811 (2015).
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 581, 873 N.W.2d at 826.
194. *Id.*
195. *Id.* at 555, 873 N.W.2d at 811.
196. *Id.*
197. People v. Gingrich, 307 Mich. App. 656, 862 N.W.2d 432 (2014).

were repairing defendant's computer noticed suspicious file names and turned the machine into the police.[198] Although it was the policy of Best Buy employees that they not open any files on the computer during repair, a Best Buy employee noticed files named "12-year old Lolita" and "12-year-old female virgin's pussy" during the backup, which led him to believe that the files could contain child pornography.[199] A Best Buy employee then contacted the sheriff's department and the employee showed the deputy the suspicious file names while the backup was still running.[200] The deputy requested that the employee open the files and, when the files were opened, there was pornography involving minors in the files themselves.[201] The deputy seized the computer.[202]

The Michigan Court of Appeals indicated that a warrant is required if law enforcement conducts a search of an object or area that is protected by the Fourth Amendment.[203] The court held that under the Fourth Amendment, "when the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly' occurred."[204] In addition, the court indicated that law enforcement "needs a warrant before searching something in which the person has demonstrated a reasonable expectation of privacy."[205] The court noted that in this case, "the deputy learned what he learned only by physically intruding on the defendant's property (his computer) to gather evidence."[206] The court observed that "it can hardly be doubted that a computer, which can contain vast amounts of personal information in the form of digital data, is an 'effect' and a 'possession.'"[207] The court held that a search warrant was needed before the police directed the Best Buy employees to provide the hard drive to the police for law enforcement to search.[208] The court — in a *per curiam* opinion for the panel comprising Judges Jane E. Markey, Kurtis T. Wilder, and Christopher M. Murray[209] — held that because the deputy physically intruded on defendant's

198. *Id.* at 658, 862 N.W.2d at 434.
199. *Id.* at 659, 862 N.W.2d at 434.
200. *Id.* at 658–59, 862 N.W.2d at 434.
201. *Id.* at 660, 862 N.W.2d at 435.
202. *Id.*
203. *Id.* at 661, 862 N.W.2d at 435.
204. *Id.* at 662, 862 N.W.2d at 435–36
205. *Id.* at 662–663, 862 N.W.2d at 435–36.
206. *Id.* at 663, 862 N.W.2d at 436.
207. *Id.*
208. *Id.* at 665–66, 862 N.W.2d at 437–38.
209. *Id.*

property to obtain information, a search warrant was necessary.[210] Therefore, the court found the evidence should be suppressed.[211]

In *Riley v. California,* the U. S. Supreme Court considered whether the police may, without a warrant, search a cell phone seized from a person who had been arrested.[212] One of the exceptions to the search warrant requirement which has been recognized for a century is a search incident to arrest.[213] However, the court noted that the scope of this exception had "been debated for nearly as long."[214] The court previously noted in *Arizona v. Gant,* "[t]he exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations."[215]

In *Riley,* the plaintiff Riley had been stopped by a police officer for driving with an expired registration tag.[216] During the stop, the officer learned that Riley's license was also suspended.[217] The officer arrested Riley, searched him as an incident to his arrest, and seized a smart phone from Riley's pants pocket.[218] The officer accessed information on the phone and noticed some words (presumably in text messages or a contact list) which were preceded by the letters "CK," a label that he believed stood for "Crip Killers," a slang term for members of the Bloods gang.[219] At the police station, a detective again went through Riley's phone and "found photographs of Riley standing in front of a car [investigators] suspected had been involved in a shooting a few weeks earlier."[220] Riley was subsequently charged with the shooting and "the state alleged that Riley committed crimes for the benefit of a criminal street gang" which required "an enhanced sentence."[221] Riley moved to suppress the evidence seized from the search of his phone.[222]

The *Riley* Court also decided a companion case, *United States v. Wurie.*[223] In *Wurie,* officers observed Bima Wurie making an apparent

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210. *Id.*
211. *Id.*
212. Riley v. California, 134 S. Ct. 2473, 2480 (2014). Chief Justice John G. Roberts Jr. wrote the majority opinion on behalf of himself and seven of his colleagues. *Id.* Justice Samuel A. Alito Jr. wrote a concurring opinion. *Id.* at 2495.
213. *Id.* at 2482.
214. *Id.* at 2482–83.
215. Arizona v. Gant, 556 U.S. 332, 339 (2009).
216. *Riley,* 134 S. Ct. at 2480.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 2480–81.
221. *Id.* at 2481.
222. *Id.*
223. *Id.*

drug sale from a vehicle.[224] The police arrested Wurie and seized two cell phones they found as a result of a search incident to his arrest.[225] One of the phones, a flip phone, kept ringing and receiving phone calls from a source identified as "my house."[226] The officers opened the phone and traced the phone number identified as "my house" to an apartment building.[227] The officers went to the apartment building and saw Wurie's name on the mailbox, secured the apartment, obtained a search warrant, and discovered cocaine, marijuana, drug paraphernalia, a firearm, ammunition, and currency.[228] Wurie was charged with drug and weapons offenses; he subsequently moved to suppress evidence seized as a result of the search of the cell phone.[229]

The U.S. Supreme Court noted that although it had previously held that an officer can permissibly search physical objects discovered during a search incident to arrest, it would not extend the exception to searches of cell phones.[230] "A search of the information on a cell phone bears little resemblance to the type of brief physical search" that it had authorized previously.[231] The Court noted the capacity of phones to store a great amount of personal data,[232] and concluded that officers generally must secure a warrant before conducting such a search.[233] The Court observed that "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape."[234] The Court observed that if a certain case revealed there was a danger, the officer could utilize the exigent circumstances exception.[235] The Court also determined that once law enforcement officers had secured the phone, there was no longer any risk that the arrestee himself would be able to delete incriminating information from the phone.[236] The Court was not sufficiently convinced that the danger of remote wiping or data encryption of the phone allowed a search of the phone incident to arrest in all circumstances.[237] The Court instead said that "if 'the police are truly confronted with a "now or never" situation'—for example,

224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 2482.
230. *Id.* at 2485.
231. *Id.*
232. *Id.*
233. *Id.* at 2484, 2489–91.
234. *Id.* at 2485.
235. *Id.* at 2487.
236. *Id.* at 2486.
237. *Id.*

circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately."[238]

### *E. Knock-and-Talk*

There is no dispute that an individual's home is protected by the Fourth Amendment.[239] The cases discussed in this *Survey* Article show that questions have recently arisen regarding the authority of the police to walk onto an individual's property to pursue an investigation. Sometimes the police use a procedure called "knock and talk."[240] Generally this procedure is used when the police do not have a search warrant or do not have sufficient information to petition for a search warrant for the premises but they approach a residence, identify themselves as police officers, and request consent to search.[241] However, there are certain limitations regarding police entry onto an individual's premises.[242]

In *Florida v. Jardines*, the U.S. Supreme Court held that an officer's taking a drug dog onto a defendant's porch with the purpose of obtaining information and conducting a dog sniff constituted a search.[243] The Court observed, "[t]he [Fourth] Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a 'search' within the original meaning of the Fourth Amendment has 'undoubtedly occurred.'"[244]

In *Carroll v. Carman*, the police were sued due to their entry onto the Carmans' property.[245] On July 3, 2009, two officers, Jeremy Carroll and Brian Roberts, went to the home of Andrew and Karen Carmen to investigate a report that a man named Michael Zita had stolen a car and loaded guns and may have fled to their home.[246] When they arrived at the home, the two officers "saw a sliding glass door that opened onto a ground-level deck."[247] "Carroll thought that that door 'looked like a

238. *Id.* at 2487 (citing Missouri v. McNeely, 133 S. Ct. 1552 (2013)).
239. U.S. CONST. amend. IV; MICH. CONST. art 1, § 11.
240. Lavigne v. Forshee, 307 Mich. App. 530, 538, 861 N.W.2d 635, 640 (2014).
241. *Id.*
242. *Id.*
243. Florida v. Jardines, 133 S. Ct. 1409 (2013).
244. *Id.* at 1414.
245. Carroll v. Carman, 135 S. Ct. 348 (2014).
246. *Id.* at 348–49.
247. *Id.* at 349.

customary entryway", so he and Roberts decided to knock on it." [248] As they stepped onto the deck, "a man aggressively approached them." [249] The two officers identified themselves and said that they were looking for Michael Zita.[250] They then asked the man for his name.[251] "The man refused to answer" and "appeared to reach for his waist."[252] Believing the man might be reaching for a weapon, Carroll grabbed the man's arm.[253] "The man then twisted away from the officer, lost his balance, and fell into the yard."[254] At that point, a woman emerged from the house, identified herself as Karen Carman, and told the officers that Michael Zita was not in their home.[255] However, she let the officers search the home.[256] The officers did not find Zita and left.[257]

The Carmans subsequently sued Carroll in federal court claiming that he had "unlawfully entered their property in violation of the Fourth Amendment when he went into their backyard and onto their deck without a warrant."[258] Carroll argued that his entry was consistent with the "'knock and talk'" exception to the warrant requirement" which "he contended, allows officers to knock on someone's door so long as they stay 'on the portions of the property that the general public would be allowed access.'"[259] The Carmans responded that a normal visitor would have gone to their front door instead of their backyard or deck.[260]

"A governmental official sued under the Civil Rights Act, 42 U.S.C. §1983, is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct."[261]

> A right is clearly established only if its contours are sufficiently clear that "a reasonable official would understand that what he is doing violates that right." In other words "existing precedent must have placed the statutory or constitutional question beyond debate." This doctrine "gives government officials breathing

248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* at 348, 350.

> room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[262]

The U.S. Supreme Court, in a unanimous *per curiam* opinion, held that Carroll was entitled to qualified immunity.[263] The Court pointed out that there were a number of cases decided by federal and state courts which had found that as long as it was reasonable for the officers to believe that the point of entry would have been used by the "general public . . ., the Fourth Amendment was not implicated when the police officers approached that door."[264] Therefore, although the Court did not decide whether those cases were correctly decided or whether a police officer could conduct a "knock and talk" at any entrance that is open to visitors, "whether or not the constitutional rule applied by the court below was correct, it was not beyond debate."[265]

### *F. Administrative Searches*

Administrative searches are another exception to the search warrant requirement. "Search regimes where no warrant is ever required may be reasonable where 'special needs . . . make the warrant and probable-cause requirement impracticable.' . . . and where the 'primary purpose' of the searches is [d]istinguishable from the general interest in crime control.'"[266] The U.S. Supreme Court has identified certain industries that possess "such a history of governmental oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of

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262. *Id.* at 350 (internal citations omitted). The Civil Rights Act states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983 (West 2015).

263. *Carroll*, 135 S. Ct. at 348–350.

264. *Id.* at 351–352.

265. *Id.* at 352.

266. City of Los Angeles v. Patel, 135 S. Ct. 2443, 2452 (2015).

such an enterprise,"[267] including firearms dealing, mining, liquor sales, and running an automotive junkyard.[268]

In *Los Angeles v. Patel*, the Court dealt with a provision of the Los Angeles Municipal Code which "requires hotel operators to record certain information about their guests" and "to make the records available" to any officer of the Los Angeles Police Department for inspection.[269] A group of motel operators, along with a lodging association, sued the City of Los Angeles seeking declaratory or injunctive relief claiming that the ordinance violated the Fourth Amendment on its face.[270]

The Supreme Court held that the ordinance did not survive a Fourth Amendment challenge.[271] Justice Sonia M. Sotomayor, writing for a five-member majority that comprised Justices Stephen G. Breyer, Ruth Bader Ginsburg, Elena Kagan, and Anthony M. Kennedy,[272] rejected the argument that the hotel industry was similar to types of "closely regulated industries" where the proprietors possessed no expectation of privacy.[273] The Court said that unless the business fell within that limited exception, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain pre-compliance review before a neutral decision-maker.[274] Because the ordinance did not afford the hotel owner this type of review prior to the search, the ordinance violated the Fourth Amendment.[275]

### *G. Consent*

Consent is a well-recognized exception to the Fourth Amendment's search warrant requirement. "The consent exception to the warrant requirement allows a search and seizure when consent is unequivocal, specific, and freely and intelligently given."[276] In *Lavigne v. Forshee*, the plaintiffs sued the police officers claiming a Fourth Amendment

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267. *Id.* at 2454 (citing Marshall v. Barlow's Inc., 436 U.S. 307, 313, 98 S. Ct. 1816 (1978)).
268. *Id.*
269. *Id.* at 2447–48.
270. *Id.* at 2448.
271. *Id.* at 2454.
272. *Id.* at 2447.
273. *Id.* at 2454–56.
274. *Id.* at 2447.
275. *Id.* at 2452, 2456.
276. Lavigne v. Forshee, 307 Mich. App. 530, 537–38, 861 N.W.2d 635, 640–41 (2014) (citing People v. Frohriep, 247 Mich. App. 692, 702, 637 N.W.2d 562, 568 (2001)).

violation when they searched their home.[277] The police officers, on the other hand, said that plaintiffs had consented to the search.[278] The lower court had granted the police officers' motion for summary disposition and plaintiffs subsequently appealed.[279] During depositions, the police officers indicated that they were "investigating an anonymous tip Kimberly Lavigne was growing marihuana in her residence and unlawfully selling it to high school students."[280] "The day before the entry, the police stopped by" but Lavigne was not available.[281] "The next morning, the officers retrieved several trash bags from the end of the driveway."[282] Inside, they discovered suspected marihuana as well as roaches.[283] An assistant prosecutor advised the officers to attempt a "knock and talk" at the home.[284]

Police officers went to the Lavigne residence but Diane Lavigne indicated that Kimberly was not available, but she would call her.[285] One of the officers asked if she could accompany Diane Lavigne inside the home but she did not respond.[286] The officer then "stood in the threshold of the doorway, between the outer storm door and the inner main door while Diane [Lavigne] went to retrieve a phone."[287] Kimberly Lavigne, who was actually present in the home, then approached the officers.[288] Kimberly Lavigne said that she had a "medical exemption for growing marihuana and offered to show [the officer] the grow operation in her room."[289] The officer asked to follow Kimberly Lavigne upstairs and did, in fact, follow Kimberly Lavigne upstairs to her room and inspected the marihuana grow operation.[290]

Kimberly Lavigne, on the other hand, testified in her deposition that she had told the officers to leave because they did not have permission to enter the home and did not have a search warrant.[291] She claimed the officers refused to leave and one of the officers demanded to follow her

277. *Id.* at 531–32, 861 N.W.2d at 637–38.
278. *Id.* at 532, 861 N.W.2d at 638.
279. *Id.* at 531–32, 861 N.W.2d at 637–38.
280. *Id.* at 532, 861 N.W.2d at 638.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.* at 533, 861 N.W.2d at 638.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* at 534, 861 N.W.2d at 638–39.

upstairs to see her marihuana grow operation.[292] Kimberly Lavigne said that, because the officers did not leave, she showed one of the officers her grow room.[293] According to Diane Lavigne's deposition, officers followed her into the home when she went to get the phone.[294] Criminal charges were not filed against any of the Lavignes.[295]

The trial court found that the plaintiffs could not prevail because the record indisputably established that the officers had consent to enter the home.[296] The Michigan Court of Appeals noted that, "whether consent to search is freely and voluntarily given presents a question of fact that must be demonstrated based on the totality of the circumstances."[297] The court noted that, for a motion for summary disposition to be granted, the issue was whether plaintiffs had demonstrated that a genuine issue of material fact existed regarding whether the defendant officers' conduct deprived the plaintiffs of fourth amendment protection.[298] The court of appeals, in a unanimous *per curiam* opinion representing the views of Judges Douglas B. Shapiro, Jane E. Markey, and Cynthia Diane Stephens, disagreed with the lower court, finding that there were "material questions of fact as to whether plaintiffs freely and voluntarily consented to the search of their home."[299] The court indicated that there were also questions of fact regarding whether, even if consent was initially granted, it was subsequently revoked.[300] The court noted that, "while voluntary consent could be given in the form of 'words, gestures, or conduct', it could not be established 'by showing no more than acquiescence to a claim of lawful authority.'"[301] The court also observed that, even if Diane Lavigne had consented, her consent would not render the search consensual if Kimberly Lavigne had objected.[302] The court opined that Diane Lavigne could have solely given consent to limited entry while she got the phone.[303] Also, the court determined there were disputed questions of fact regarding whether consent was coerced due to

292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at 535, 861 N.W.2d at 639.
296. *Id.*
297. *Id.* at 538, 861 N.W.2d at 640–41.
298. *Id.* at 536–39, 861 N.W.2d at 639–41.
299. *Id.* at 539, 861 N.W.2d at 641. In other words, if there were material questions of fact regarding whether defendants' conduct deprived plaintiffs of their Fourth Amendment protection against unreasonable searches and seizures, summary disposition was inappropriate.
300. *Id.* at 540–41, 861 N.W.2d at 642–43.
301. *Id.* at 539–40, 861 N.W.2d at 641–42.
302. *Id.* at 541, 861 N.W.2d at 643.
303. *Id.*

the allegations that the officers claimed that they did not have to obtain a warrant.[304]

### *H. Drug Tests*

Because an order requiring an individual to submit to drug testing is an intrusion on bodily privacy, it is characterized as a search under the Fourth Amendment.[305] In *In re Dorsey,* Kelly Michelle Dorsey, a mother of a juvenile delinquent, was ordered to submit to random drug testing to ensure that she was an appropriate custodian for her son. She was subsequently held in contempt when she failed to comply with the court's order.[306] While the Michigan Court of Appeals noted that the family court possesses jurisdiction over adults pursuant to MCLA § 712A.6,[307] the court held that the order requiring drug tests violated the Fourth Amendment.[308] A unanimous panel of Judges Karen M. Fort Hood, Kirsten Frank Kelly, and Jane E. Markey, in a *per curiam* opinion,[309] indicated that "[w]hether a particular search and seizure is reasonable 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"[310]

The court determined that, "while there was no dispute that the state had an interest in protecting and rehabilitating children who had been adjudicated as delinquent", "appellant did not enjoy a diminished expectation of privacy merely by virtue that her son had been adjudicated delinquent."[311] However, the court determined that because Dorsey only contested the contempt proceedings and not the underlying order in the lower court, Dorsey's Fourth Amendment challenge was waived and the

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304. *Id.* at 540–41, 861 N.W.2d at 642–43.

305. *In re* Contempt of Dorsey, 306 Mich. App. 571, 584–85, 858 N.W.2d 84, 93 (2014), *held in abeyance*, 872 N.W.2d 489 (2015).

306. *Id.* at 575–78, 858 N.W.2d at 88–90.

307. MICH COMP. LAWS ANN. § 712A.6 (West 2015). The statute states:

> The court has jurisdiction over adults as provided in this chapter and as provided in chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082, and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, those orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles.

*Id.*

308. *Dorsey*, 306 Mich. App. at 584–85, 858 N.W.2d at 93.

309. *Id.* at 593, 858 N.W.2d at 97–98.

310. *Id.* at 584, 858 N.W.2d at 93 (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619, 109 S. Ct. 1402 (1989)).

311. *Id.* at 588–89, 858 N.W.2d at 95.

contempt conviction would stand.[312] *Dorsey's* application is being held in abeyance by the Michigan Supreme Court.[313]

## V. FIFTH AND FOURTEENTH AMENDMENTS

The Fifth Amendment to the U.S. Constitution, limiting federal power, provides that

> No person ... shall ... be subject for the same offence to be twice put in jeopardy of life or limb; nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.][314]

Similarly, the Fourteenth Amendment provides that no *state* may "deprive any person of life, liberty, or property, without due process of law[.]"[315]

### *A. Due Process*

In *Chambers v. Mississippi*, the U.S. Supreme Court observed that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[316] Quoting his predecessor, Hugo L. Black, Justice Lewis F. Powell Jr. noted that

> [A] person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.[317]

312. *Id.* at 591, 858 N.W.2d at 96.
313. *In re* Contempt of Dorsey, 498 Mich. 891, 869 N.W.2d 614 (2015).
314. U.S. CONST. amend. V.
315. U.S. CONST. amend. XIV, § 1.
316. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct 1038, 1045 (1973).
317. *Id.* (quoting *In re* Oliver, 333 U.S. 257, 273, 68 S. Ct. 499 (1948)).

*1. Right to be Present at Trial*

Although the right is not specifically guaranteed by the Michigan Constitution,[318] in Michigan a defendant has a statutory right to be present at trial.[319] The defendant also has a due process right guaranteed by the Fourteenth Amendment to be present at all critical stages of the proceedings.[320] As stated by the U.S. Supreme Court,

> [t]he constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment . . . but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not confronting witnesses or evidence against him.[321]

"A defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."[322]

*i. Interpreters and Simultaneous Translation*

The Michigan Court of Appeals in *People v. Gonzalez-Raymundo*[323] addressed the claim that the defendant's interpreter did not simultaneously translate the proceedings, which would implicate the defendant's right to due process of law as well as the defendant's right to be present at trial. It also would implicate the defendant's right to

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318. The state constitution provides:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

MICH. CONST. art. I, § 17.

319. The statute provides: "No person indicted for a felony shall be tried unless personally present during the trial; persons indicted or complained against for misdemeanors may, at their own request, through an attorney, duly authorized for that purpose, by leave of the court, be put on trial in their absence." MICH. COMP. LAWS ANN. § 768.3 (West 2015).

320. United States v. Gagnon, 470 U.S. 522, 526 (1985); Snyder v. Massachusetts, 291 U.S. 97, 105–06 (1934).

321. *Gagnon,* 470 U.S. at 526 (citation omitted).

322. Kansas v. Stincer, 482 U.S. 730, 745 (1987); *see also Gagnon,* 470 U.S. at 526 (indicating that this right is guaranteed at "a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge . . .'" (citation omitted)).

323. People v. Gonzalez-Raymundo, 308 Mich. App. 175, 862 N.W.2d 657 (2014).

confront witnesses against him and participate in his own defense.[324] Michigan has established a statutory right to an interpreter.[325] Elias Gonzalez-Raymundo was convicted of four counts of third-degree criminal sexual conduct.[326] Before trial, defense counsel told the judge that she did not want jurors to take offense to people speaking Spanish during the course of trial and waived the right to an interpreter and would explain things to the defendant on break.[327] However, the defendant did not personally waive simultaneous translation services.[328] An interpreter was provided for the defendant at trial who explained the proceedings to the defendant during breaks.[329]

The court of appeals noted that a defendant must personally waive his right to be present at trial (which includes the right to simultaneous translation) and courts must "indulge in every reasonable presumption against the loss of constitutional rights" in assessing the waiver of such rights.[330] In *Gonzalez-Raymundo*, the defendant did not personally waive the right.[331] Judge Mark T. Boonstra, writing on behalf of a unanimous panel that included Judges Jane E. Markey and Kirsten Frank Kelly,[332] also determined that the court violated MCLA § 775.19a when all parties were aware that the defendant was incapable of understanding English at a level necessary to effectively participate in his defense without simultaneous translation.[333] The court did not determine whether the error was structural because, even if it were not, the error was not

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324. *Id.* at 188, 862 N.W.2d at 664–65.

325. MICH. COMP. LAWS ANN. §775.19a (West 2015). The statute provides:

> If an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language, the inability to adequately communicate by reason of being mute, or because the person suffers from a speech defect or other physical defect which impairs the person in maintaining his or her rights in the case, the judge shall appoint a qualified person to act as an interpreter. Except as provided in the deaf persons' interpreter act, the interpreter shall be compensated for his or her services in the same amount and manner as is provided for interpreters in section 19 of this chapter.

*Id.*

326. *Gonzalez-Raymundo*, 308 Mich. App. at 177, 862 N.W.2d at 659, *appeal denied*, 497 Mich. 998, 861 N.W.2d 617 (2015); *see* MICH. COMP. LAWS ANN. § 750.520d(1)(a) (West 2015) (child at least thirteen years of age but less than sixteen years of age).

327. *Gonzalez-Raymundo*, 308 Mich. App. at 181–82, 862 N.W.2d at 661.

328. *Id.* at 185, 862 N.W.2d at 663.

329. *Id.* at 184, 862 N.W.2d at 662.

330. *Id.* at 187, 862 N.W.2d at 664 (quoting Illinois v. Allen, 397 U.S. 337, 343 (1970)).

331. *Id.* at 188–89, 862 N.W.2d at 664.

332. *Id.* at 194, 862 N.W.2d at 668.

333. *Id.* at 189–190, 862 N.W.2d at 665–66.

harmless beyond a reasonable doubt.[334] Thus, the court concluded a new trial was necessary.[335]

*ii. Waiver or Forfeiture of Right to be Present*

In *People v. Kammeraad*, the Court of Appeals concluded that a defendant, by being persistently "disorderly and disruptive[,]" may forfeit his right to be present during trial.[336] In *Kammeraad*, the defendant refused to participate in the proceedings, interrupted the judge and his standby counsel, and appeared on more than one occasion naked from the waist up in a wheelchair (it was apparent he had no need for a wheelchair).[337] The court in this case followed the lead of the U.S. Supreme Court, which observed that though

> "courts must indulge every reasonable presumption against the loss of constitutional rights," the Court nevertheless held "that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom."[338]

Because waiver is an "intentional relinquishment or abandonment of a known right" the defendant did not *waive* the right because "the record does not reflect that defendant was ever *specifically informed* of his constitutional right to be present at trial[.]" The court, however, subsequently found that he forfeited this right.[339]

Dylan James Kammeraad faced several felony and misdemeanor assaultive charges in Allegan County and one count of refusing or resisting the collection of biometric data, which eventually resulted in his conviction by jury.[340] As the case began its initial stages, the district court judge inquired if he wanted an attorney, prompting the defendant to respond:

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334. *Id.* at 191–192, 862 N.W.2d at 666.

335. *Id.* at 193, 862 N.W.2d at 667.

336. People v. Kammeraad, 307 Mich. App. 98, 117–18, 858 N.W.2d 490 (2014).

337. *Id.* at 105–06, 112–15, 858 N.W.2d 496, 499–501.

338. *Id.* at 118, 858 N.W.2d at 503 (quoting Illinois v. Allen, 397 U.S. 337, 338 (1970)).

339. *Id.* at 117, 858 N.W.2d at 502 (quoting People v. Buie, 298 Mich. App. 50, 57, 825 N.W.2d 361 (2012)).

340. *Id.* at 100, 858 N.W.2d at 493.

> I take exception. I refuse any and all court appointed attorneys and their services. I refuse any and all trials. I refuse any and all juries. I refuse any and all court services. I take exception to this process. And I take exception to these unlawful proceedings. Have the prosecution swear in and certify the false charges, the fake charges they are holding. . . .
>
> * * *
>
> I do not trust that man [standby counsel]. . . . [T]hat man does not speak for me. I refuse any and all court appointed attorneys, and their services.[341]

During the preliminary exam, the defendant repeatedly interrupted the court and interrupted the testimony of one of the prosecution witnesses, repeating his above statement or a variation of the same.[342] There was an unsuccessful attempt to gag him during the proceedings and, eventually, the district court directed the bailiff to remove the defendant from the courtroom.[343]

During his circuit court arraignment, the defendant refused to answer the trial court's questions about whether he wanted a court-appointed attorney, instead choosing to filibuster the proceedings:

> Court: Have you given this right to counsel significant serious thought Mr. Kammeraad?
>
> Defendant: I take exception, I take exception.
>
> Court: Mr. Kammeraad is not responding to the Court's inquiries.
>
> Defendant: And without an LEP interpreter I do not understand nor do I speak the English of this Court.
>
> Court: Mr. Kammeraad is choosing not to respond to the Court's questions. I'm finding therefore that he has waived his right to the assistance of counsel either retained by him and paid by him or appointed by the Court. Similarly he's has [sic] waived his right to assistance by a legal advisor who would not represent

341. *Id.* at 101–02, 858 N.W.2d at 494.
342. *Id.* at 102–03, 858 N.W.2d at 494.
343. *Id.* at 103, 858 N.W.2d at 494–95.

> him or advocate for him but serve as a provider of legal advice and guidance at his request. . . .
>
> Defendant: . . . [I] refuse to become a party to and join in the acts of entrapment, extortion, exploitation of vulnerable victims, [coercion] and human trafficking and human bondage.[344]

The defendant's behavior never let up. As the trial neared, at a pretrial hearing, the court asked him if he understood that, if he represented himself, he would have to follow the rules of evidence and procedure.[345] Kammeraad responded: "I take exception, I'm without a LEP interpreter, I do not understand what is going on here. I am not an attorney, I've never agreed to be in pro per and I have never agreed to represent myself in your venue."[346] In response,

> the circuit court noted that defendant was "in a wheelchair and... half naked from the elbows up." A deputy chimed in that defendant refused to get dressed and that there was no physical reason for him to use a wheelchair. The circuit court then expressed its belief that defendant was determined to disrupt the proceedings and had demonstrated an unwillingness to cooperate in any material way, including responding to the court's inquiries. The circuit court made an attempt to have defendant clearly and unequivocally waive his right to counsel, but defendant was entirely uncooperative. After defendant went on a diatribe that was consistent with his earlier remarks, the circuit court stated that it was convinced that defendant was determined to disrupt the proceedings, and it decided that it was necessary to appoint counsel for defendant. When asked by the court whether he would fill out a form regarding his financial situation for purposes of determining indigency status, defendant responded that he took exception.[347]

After the appointment of counsel, counsel sought to withdraw from representation because the defendant refused to communicate with him and refused the attorney's services.[348] The court noted that Kammeraad was again in a wheelchair, refused to dress for court, and had refused to

344. *Id.* at 103–04, 858 N.W.2d at 494–95.
345. *Id.* at 105, 858 N.W.2d at 495.
346. *Id.*
347. *Id.* at 105–06, 858 N.W.2d at 496.
348. *Id.* at 106, 858 N.W.2d at 496.

participate in the court proceedings (requiring jail deputies to wheel him in).[349]

The trial court concluded that Kammeraad intended to disrupt the proceedings.[350] The court made an inquiry of the defendant, whether, pursuant to the Michigan Court Rules, he intended to waive his right to counsel.[351] After the court made the requisite inquiry and complied with the court rules, the defendant gave his usual non-responsive answer.[352] Following similar maneuverings as the trial neared, the following occurred on the first day of trial:

> Court: . . . This is the date and time to conduct a jury trial in this matter. I inquire of the counsel whether they're going to make a motion to sequester witnesses. . . .
>
> Prosecutor: We don't—all of our witnesses are not in the courtroom.
>
> Court: Okay. [defense counsel]?
>
> Counsel: I am not aware of any witnesses on behalf of the defendant.
>
> Court: Okay.
>
> Defendant: I take exception. This man is not my attorney.
>
> Court: Mr. Kammeraad is present with us by my recollection for the third time in the courtroom during the pendency of this case. He's in a wheelchair, he's handcuffed, he's naked from the waist up and it was his voice that was heard just a moment ago.
>
> Mr. Kammeraad[,] the Court had made a determination at an earlier date after your first two live appearances in the court, attired and seated as you are now, that it would be impermissible and improper for you to appear before the jury in your present condition. Do you want to give the Court any assurance of your willingness to dress appropriately and behave in a non-disruptive fashion during this trial?

349. *Id.* at 106–07, 858 N.W.2d at 496–97.
350. *Id.* at 107, 858 N.W.2d at 496–97.
351. *Id.* (citing MICH. CT. R. 6.005).
352. *Id.* at 108–09, 858 N.W.2d at 497–98.

Defendant: I take exception. I am under extreme duress of an unlawful and false imprisonment. I am without an LEP interpreter. I do not understand the legal language that is being used against me by you.

[Trial Judge] Kevin Cronin you are fully aware that I am not an attorney, I am not a defendant, I am not a juvenile, I am not Mr. Kammeraad, I am not a member of your society. I am a natural person. I have never agreed to join you or your accomplices, the prosecutor and your court appointed attorney in any criminal proceedings in your courtroom forum and venue.

I am not the consideration on a contract being constructed here. I am not — I am not a patron of your goods or services. I am [neither] a patron of nor subscriber to the legal arts. I have never agreed to be in pro per. I refuse the assignment and appointment for fraud and inducement to entrapment. I am unauthorized and without license to practice law. I am not qualified to represent myself. Kevin Cronin you are intentionally trying to deceive me into believing I can engage in the law business without license. I take exception to this process. This process is undue to me. I take exception to these proceedings as they are unlawful. In good conscience I refuse to associate with the B[ar] and its members. I will not join you in your criminal enterprise. I will not willingly, intentionally or knowingly become a party to your criminal actions. I am not a member of your society. I will not take part in this scam. I'd rather not be here. I am not here voluntarily. Kevin Cronin you are threatening me with further legal abuse and continued detainment in an effort to unduly influence me to invoke the unknown jurisdiction of your court and to help you in an illegal and one sided contract.

Kevin Cronin you have used predatory conduct and abused your authority status to exploit my vulnerabilities. This whole scam that you are knowingly attempt[ing] to coerce me into joining you in is entrapment.

Kevin Cronin you have let the procedure of your office over to the prosecution to affect the desired outcome.

Kevin Cronin you have solicited a professional legal service on behalf of [defense counsel]. [Defense counsel] does not have my license or my authority to employ my title and his fraudulent

misrepresentations. I do not want [defense counsel's] services. I do not want a court appointed attorney. I do not want court appointed services. I refuse any and all of your court services. I'm not a patron of nor a subscriber to the legal arts. I have never agreed to any of this.

Kevin Cronin you have intentionally—you have prosecuted me, the natural person from the bench without any regard to my safety. You have caused me irreparable physical damage and emotional distress [in] a cooperative effort with the prosecutor . . . and your court appointed attorney . . . to break my will and . . . my political and religious beliefs. You have stifled my First Amendment guarantee in your courtroom forum and venue. You have destroyed the integrity and credibility of your office by the continued legal abuse and predatory prosecution actions you have willingly set up conducted against me, the natural person, for your extortion its rewards. Everything that you have done, I mean everything that you continue to do to me under color of authority has been well documented and will continue to be recorded throughout these sham prosecutions. I will never join you in your criminal activities. I demand immediate unconditional discharge right now. Do you understand me?

Court: Oh, I understand you and I reject your arguments and statements and you're not going to be granted any immediate or unconditional release, or any release on any other terms. The trial is going to begin.

Defendant: I take exception. I'd like to be removed.

Court: Okay. Well—

Defendant: I take exception. I refuse your jury services, I refuse your jury trial, I will not take part.

Court: Do you want to represent yourself in this trial?

Defendant: I take exception.

Court: If you are not Dylan Kammeraad who are you?

Defendant: I take exception.

> Court: Okay. Deputies the defendant can be removed where he can watch the proceedings on video.[353]

At numerous points throughout the ensuing trial, defense counsel left the courtroom to confer with his client, who did not assist him in any way and did not communicate with him.[354] Counsel did not cross-examine the witnesses nor did he object to any jury instructions.[355] After the jury convicted the defendant, the court sentenced him to nineteen to sixty months in prison on the most serious charge.[356]

On appeal, the defendant argued the trial court deprived him of due process in removing him from the courtroom.[357] However, Chief Judge William B. Murphy, writing for a unanimous panel that included Judges Douglas B. Shapiro and Michael J. Riordan, concluded that Kammeraad forfeited his right to be present.[358] The panel observed that, despite the multiple chances that the circuit court gave the defendant to participate, he "defiantly refused to participate in the process or to accept any and all services, regularly interrupted the courts with his denunciation of the justice system, made far-fetched claims that had no basis in fact or law, and refused to answer questions posed to him by the courts."[359] Furthermore, the defendant required the use of a wheelchair even though he was ambulatory, refused to dress appropriately for court, and demanded an interpreter despite the overwhelming evidence that he understood English.[360] Importantly, for the panel,

> [w]hen the circuit court expressly asked defendant whether he wished to give any assurances of a willingness to dress and behave appropriately and to act in a nondisruptive manner, defendant proceeded to conclusively establish that he was not willing to do so, as shown by defendant's launching into a tirade against the system and the circuit court judge himself.[361]

Accordingly, the court of appeals found that defendant forfeited his right to be present during trial and saw no error in the trial court's

353. *Id.* at 112–15, 858 N.W.2d at 499–501.
354. *Id.* at 115, 858 N.W.2d at 501.
355. *Id.*
356. *Id.* at 116, 858 N.W.2d at 501–02.
357. *Id.*
358. *Id.* at 150, 858 N.W.2d at 520.
359. *Id.* at 120, 858 N.W.2d at 504.
360. *Id.*
361. *Id.* at 121, 858 N.W.2d at 504.

excluding him.[362] It affirmed most of the defendant's convictions and sentence, but reversed his conviction on one of the assaultive charges on an unrelated ground.[363]

*2. Competence to Stand Trial*

The Due Process Clause requires that a defendant facing trial or sentence be legally competent to stand trial.[364] To that end, as part of the Mental Health Code, the Michigan Legislature has adopted statutory procedures for competency evaluation of persons facing criminal charges.[365] The "procedures for determining a criminal defendant's competence to stand trial are ultimately rooted in principles of due process."[366] In other words, "[t]he statutes therefore must 'be interpreted in a manner that protects incompetent defendants from indefinite denials of liberty.'"[367]

Either party or the court may raise the issue of competency.[368] Once a party raises a genuine concern about a defendant's competency, a trial court must refer her for an evaluation by the State of Michigan or a facility that the state has accredited for that purpose.[369] State law requires that the facility perform the evaluation and complete a report within sixty days.[370] Upon receiving the report, the trial court must hold a hearing within five days, unless it finds good cause to adjourn the hearing.[371] If the parties agree to the conclusions in the report, they may stipulate to it

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362. *Id.* at 120–21, 858 N.W.2d at 504.

363. *Id.* at 149–50, 858 N.W.2d at 519–20.

364. Pate v. Robinson, 383 U.S. 375, 378 (1966) (citing Bishop v. United States, 350 U.S. 961 (1956)). Michigan law similarly prohibits criminal actions proceeding while a defendant is incompetent to stand trial. MICH. COMP. LAWS ANN. § 330.2022(1) (West 2015).

365. MICH. COMP. LAWS ANN. §§ 330.2020 – 330.2044 (West 2015). To be incompetent, a defendant must be:

> incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.

*Id.* § 330.2020(1) (West 2015).

366. People v. Davis, 310 Mich. App. 276, 300, 871 N.W.2d 392, 406 (2015) (quoting People v. Bowman, 141 Mich. App. 390, 393–96, 367 N.W.2d 867 (1985)).

367. *Id.* at 300, 871 N.W.2d at 406 (quoting *Bowman*, 141 Mich. App. at 399, 367 N.W.2d at 871).

368. MICH. COMP. LAWS ANN. § 330.2024 (West 2015).

369. *Id.* § 330.2026(1).

370. *Id.* § 330.2028(1).

371. *Id.* § 330.2030(1).

and the court can issue its competency findings solely in light of the report.[372] If there is a dispute about the defendant's competency, the parties can offer any evidence that sheds light on the issue before the court makes its determination.[373]

In the event the court determines the defendant is incompetent to stand trial, the court must "also determine whether there is a substantial probability that the defendant, if provided a course of treatment, will attain competence to stand trial within"[374] a certain time frame — either fifteen months or one third of the maximum potential sentence the defendant could receive upon conviction, whichever is less.[375] The organization supervising an incompetent person's treatment must provide updated reports every ninety days, or earlier if the agency believes the defendant has attained competency or if there is no longer a likelihood that the defendant will attain competency.[376] The court may order the defendant to receive such treatment if it determines treatment could render the defendant competent within this time frame.[377] If, however, the defendant does not become competent within fifteen months, the court must dismiss the charges.[378] A dismissal does not preclude civil commitment proceedings.[379]

### *i. Dismissal of Charges Against Incompetent Defendants*

In *People v. Davis*, the Michigan Court of Appeals held that a trial court may not dismiss charges over the prosecutor's objection simply because of a months-long delay in obtaining a competency evaluation due to insufficient bed space and the trial judge's assumption that, due to the delay, there was insufficient likelihood that the defendant would attain competency within the statutory period.[380]

Demond E. Davis and six other individuals "jumped" a sixteen-year-old boy and stole the electronic gaming system the boy was carrying.[381] The district court found probable cause to bind over the defendant on felony charges of unarmed robbery and assault with intent to commit

372. *Id.* § 330.2030(2), (3).
373. *Id.* § 330.2030(3).
374. *Id.* § 330.2030(2).
375. *Id.* § 330.2034(1).
376. *Id.* § 330.2038(1)
377. *Id.* § 330.2032(1), (2).
378. *Id.* § 330.2044(1).
379. *Id.* § 330.1401 *et. seq.*
380. People v. Davis, 310 Mich. App. 276, 293, 871 N.W.2d 392, 402 (2015).
381. *Id.* at 278–79, 871 N.W.2d at 394.

great bodily harm less than murder.[382] In June 2013, the circuit (trial) court issued an order referring Davis for a competency examination, during which point he was not in custody, although his mother reported he had been in custody for about two months on the charge.[383] In July, a psychologist at the Center for Forensic Psychiatry (CFP) reported that Davis had "cognitive difficulties," "limited abstract reasoning and limited understanding of the world around him."[384] The psychologist found her observations consistent with mild mental retardation.[385] In light of these difficulties, the examiner opined that defendant was incompetent to stand trial — "he would have problems assisting defense counsel in a rational manner"[386] However, the psychologist further reported that:

> [t]he next question becomes whether there is a substantial probability that [the defendant] could be expected to regain his competency within [the] time period provided by statute and if he were provided with a structured, inpatient, hospital setting with the provision of appropriate therapeutic intervention. It is my opinion [the defendant] has some skills which he can draw upon to learn more about the legal process. So with education and treatment, he may acquire a greater knowledge of the process. Additionally given his cognitive skills as being measured in the moderately impaired range, I anticipate that his will take some time. But, it is my opinion that he would be able to gain the knowledge required. With that knowledge, it is my opinion he would likely be able, in a basic way, to work with his attorney to resolve the current charges.[387]

On August 22, 2013, the trial court followed CFP's recommendation and ordered treatment at the Kalamazoo Psychiatric Hospital to (hopefully) attain competence, requiring Davis to enter custody so that Wayne County officials could transport him there.[388] However, the court, commenting on CFP's evaluation, observed: "I'm not completely sold on their conclusion about his ability to . . . attain . . . [c]omptency. And my opinion is based on the fact that they have not received his school records and they have not received the Wayne County Jail information

382. *Id.* at 278, 871 N.W.2d at 394.
383. *Id.* at 279–80, 871 N.W.2d at 394–95.
384. *Id.*
385. *Id.*
386. *Id.* at 282, 871 N.W.2d at 396.
387. *Id.*
388. *Id.* at 282–83, 871 N.W.2d at 397.

that they have requested."[389] The court announced it would schedule a review hearing to (apparently) monitor Davis' progress.[390]

That hearing took place on October 29, 2013, whereupon the trial court learned that the defendant had not yet begun treatment in Kalamazoo due to a lack of bed space and that he had been in custody since the prior hearing, and for a separate two-month period before the trial court's (in)competency finding — about five months in total.[391]

> I think that when a person who has been determined to not be competent is kept in jail and not treated, it kind of gets to cruel and unusual punishment.
>
> I mean, we have a place for people that are not competent. And it is in a state facility to help them restore them to competence. I don't want to be a part of a system that jails incompetent people, that incarcerates people who don't have the capacity to stay in the criminal justice system.
>
> To me, that's not the way that you deal with, you know, mental health challenges, to jail them and not treat them. And that's exactly where [defendant] is. He has been found not to be competent. And we have incarcerated a person that is not competent, would not have known that he was on a wait list. . . .
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> * * *
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> . . . But somebody believes that it's all right to incarcerate incompetent people. And I don't.[392]

The trial court noted its prior finding that there was a likelihood that defendant would attain competence within the statutory time limit, but reversed its prior decision in light of the fact that treatment had yet to begin and because "[t]hey're projecting out that he still won't be treated for another two months."[393] Essentially, the court decided it "disagree[d] with the report [and found] that he [was] incompetent to stand trial and that there [was] not a substantial probability that competency will be attained within the time established by law."[394] Accordingly, the trial

389. *Id.* at 282, 871 N.W.2d at 397.
390. *Id.* at 283, 871 N.W.2d at 397.
391. *Id.*
392. *Id.* at 284, 871 N.W.2d at 397.
393. *Id.* at 284–85, 871 N.W.2d at 397–98.
394. *Id.*

court, over the prosecution's objection, dismissed the charges.[395] (Prior to the trial court's ruling, defense counsel had only moved to release the defendant on bond, not to dismiss the charges.[396]) The prosecution appealed.[397]

A unanimous panel of the Michigan Court of Appeals (Judge Elizabeth L. Gleicher, writing for Judges Mark J. Cavanagh and Karen M. Fort Hood)[398] agreed with the prosecution that the trial court erred in dismissing the charges and in reversing its competency decision without holding a hearing.[399] In reaching this decision, the panel observed that the only competency hearing in the matter had occurred on August 22, 2013, and that, despite some reservations, the court had accepted the recommendations of the CFP examiner.[400] The trial court, however, made a redetermination of competency without holding a *new* hearing, and the statute requires that, in these hearings, the court "'hear and determine whether the defendant has made progress toward attaining competence.'"[401] The procedures for such review/redetermination hearings, by statute, are identical to those for the first competency hearing.[402] In other words, in a hearing regarding *redetermination* of competency, "'[t]he defense, prosecution, and the court on its own motion may present additional evidence relevant to the issues to be determined at the hearing.'"[403] Again, like the first competency hearing, "[t]he judgment of a defendant's competence and 'whether there is a substantial probability that the defendant' could attain competence must be based on '*the evidence admitted at the hearing.*'"[404]

Here, there was no subsequent report and the trial court prevented the prosecution from presenting any additional evidence pertaining to Davis' competency, thus, the appellate panel observed, the trial court erred in its ruling redetermining the defendant's competence.[405]

> The lack of treatment in the interim prompted the court to change its mind at the October 29 hearing. The only evidence at

395. *Id.* at 285, 871 N.W.2d at 398.
396. *Id.* at 283, 871 N.W.2d at 397.
397. *Id.* at 285–86, 871 N.W.2d at 398–99.
398. *Id.* at 304, 871 N.W.2d at 408.
399. *Id.* at 293–301, 871 N.W.2d at 402–07.
400. *Id.* at 293, 871 N.W.2d at 402.
401. *Id.* at 294, 871 N.W.2d at 403 (quoting MICH. COMP. LAWS ANN. § 330.2040(1) (West 2015)).
402. *Id.*
403. *Id.* (quoting MICH. COMP. LAWS ANN. § 330.2030(3) (West 2015)).
404. *Id.* at 293, 871 N.W.2d at 402 (quoting MICH. COMP. LAWS ANN. § 330.2030(2) (West 2015)) (emphasis added).
405. *Id.* at 293–94, 871 N.W.2d at 402–03.

> the hearing was that the Kalamazoo Psychiatric Hospital would not have an open bed for another six to eight weeks. From this fact alone, the circuit court jumped to the conclusion that defendant would not be able to attain the requisite level of competency to stand trial within the statutory fifteen-month period. More is required by the Mental Health Code, however.[406]

The appellate court further held that the trial court, "with or without a hearing," erred in dismissing Davis's charges.[407] Here, the circuit court dismissed the charges despite the prosecutor's intent to continue prosecuting the matter and the fact that it was only *two* months into the fifteen-month statutory period.[408] Under the statute, one of those circumstances had to be present for the trial court to have legal authority to dismiss the charges.[409] Absent that authority, the appellate panel concluded (perhaps, "strongly implied" is the most appropriate characterization) that the trial court violated the separation of powers by dismissing the matter.[410]

The panel further held that the defendant's confinement for a period of several months did not rise to the level of a constitutional violation:

> The circuit court exaggerated the delay that arguably could be attributed to the prosecution in this case. Defendant was released on bond two months after his arrest, and remained free until the August 22 hearing. He was held in the Wayne County Jail from August 22 through October 29, a period of two months and one week. The waiting list for the Kalamazoo Psychiatric Hospital would have extended defendant's jail confinement for approximately four months total after the issue of competency had been raised, but defendant had in fact been detained for only two months at the relevant time. This delay bears no similarity to the indefinite confinements in *Jackson* [*v. Indiana*] and *McNeil* [*v. Director, Patuxent Institution*]. Moreover, neither statutory nor constitutional grounds supported dismissal of the charges based on the delay.[411]

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406. *Id.* at 293, 871 N.W.2d at 402

407. *Id.* at 294, 871 N.W.2d at 403.

408. *Id.* at 295, 871 N.W.2d at 403.

409. *Id.* (citing MICH. COMP. LAWS ANN. § 330.2044(1) (West 2015)).

410. *Id.* at 297, 871 N.W.2d at 399 (citing People v. Morrow, 214 Mich. App. 158, 160–61, 542 N.W.2d 324 (1995)).

411. *Id.* at 301, 871 N.W.2d at 406–07 (internal citations omitted).

The panel was clearly sympathetic to the defendant's plight, but emphasized that the free-lancing trial court chose an incorrect remedy:

> We do not suggest that the circuit court's concern for incarcerating a cognitively-impaired 17-year-old boy was misplaced, only that the court chose an impermissible remedy. Ordering defendant's segregation in the jail or releasing defendant to his family's care on house arrest would have served the same purpose without violating the statutory provisions.[412]

In essence, the trial court ignored its statutory duty to determine "'whether, *if provided a course of treatment*, a substantial probability exists that a defendant found to be incompetent will attain competence within the time limit established.'"[413] The trial court's dismissal was incorrect because "it is mere speculation that defendant would remain incompetent for the entire fifteen months provided by statute."[414] The panel commented that the state should avoid similar delays in the future, but reversed the trial court's dismissal and remanded the matter "for proceedings consistent with this opinion."[415]

*ii. Courts' Obligation to Raise the Issue of Defendant's Competence*

In Michigan, "a trial court has the duty of raising the issue of incompetence where facts are brought to its attention which raise a 'bona fide doubt' as to the defendant's competence."[416] Appellate courts review such decisions by an abuse-of-discretion standard.[417] "Evidence of a defendant's irrational behavior, a defendant's demeanor, and a defendant's prior medical record relative to competence are all relevant in determining whether further inquiry in regard to competency is required."[418]

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412. *Id.*

413. *Id.* at 304, 871 N.W.2d at 408 (emphasis added by the appellate court) (quoting People v. Miller, 440 Mich. 631, 668, 489 N.W.2d 60 (1992)).

414. *Id.* at 304, 871 N.W.2d at 408 (citing MICH. COMP. LAWS Ann. § 330.2034(1) (West 2015)).

415. *Id.*

416. People v. Kammeraad, 307 Mich. App. 98, 138, 858 N.W.2d 490, 514 (2014) (quoting People v. Harris, 185 Mich. App. 100, 102, 460 N.W.2d 239 (1990)).

417. *Id.*

418. *Id.* at 139, 858 N.W.2d at 514 (citing Drope v. Missouri, 420 U.S. 162, 180 (1975)).

In *People v. Kammeraad*, a case we first discussed in Part V.A.1.b, the defendant on appeal alleged the trial court erred by not *sua sponte* referring him for a competency evaluation.[419] The panel considered the trial court's reasoning for not referring the defendant for such an evaluation:

> So far I think what he's doing is purposeful, it is not to me, just on the face of it evidence of mental illness or inability from a mental illness standpoint to represent himself. He seems articulate, he seems capable of writing, he seems familiar with concepts even though he refuses to do more than state them or invoke them. . . . I think this is purposeful behavior of someone who believes he has been treated unfairly but is . . . unwilling because he has so little respect for the legal system, unwilling to engage in any conversation about what his reactions are. I don't think he's really catatonic for example even though he gives that appearance, and I don't think he's nodding off now even though his chin is down to his chest. You know, I think this is part of the performance art that accompanies an intelligent philosophical display of disrespect and contempt for everybody in the room and everybody involved in the process. . . .
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> * * *
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> I am not going to order a psychiatric or forensic evaluation of the defendant because my conclusion having engaged with him is that he is in a posture of purposeful and decisive civil disobedience for lack of a better phrase. That even though his strategic course of action [may be] putting him at increasing risk I think he's made that choice knowingly, gIn voluntarily and intelligently and purposefully because he has no respect for the entire legal system and genuinely believes that no one has any jurisdiction to reign him in on any criminal offense no matter what his behavior is. He thinks . . . this is the correct strategic course to take to make that argument. It is an argument detached from legal reality but he's aware of the reality of this courtroom and his incarceration and he's been offered an attorney. I think this is more or less a strategic game, it is not an expression of

419. *Id.* at 137, 858 N.W.2d at 513.

> mental illness or denial of reality. So, I'm not going to order a forensic examination[.][420]

The panel found no abuse of discretion — no indication that the trial court's decision was "outside the range of reasonable and principled outcomes."[421] After evaluating the record, the court concluded that a "reasonable" jurist "could logically have rejected the proposition that defendant was 'incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner.'"[422] The record showed that while the defendant was intelligent, articulate and had the capacity to assist in his defense, he simply chose not to do so.[423]

*3. Notice in Charging Documents*

The prosecution must file the information on or before the day the trial court sets for arraignment.[424] In addition to specifying the "name, statutory citation, and penalty of the offense allegedly committed" court rules require the prosecutor to specify the time and place of the offense "to the extent possible."[425] The Michigan Code of Criminal Procedure provides that "[n]o variance as to time shall be fatal unless time is of the essence of the offense."[426] Due process requires that, when charging an offence, the prosecution must "'give a defendant fair notice of the charge against the defendant, to permit the defendant to adequately prepare a defense.'"[427] Furthermore, a defendant has the burden of establishing on appeal that inadequate notice prejudiced him.[428]

In *People v. Gaines*, the Michigan Court of Appeals held that ambiguity about the date and time of criminal sexual conduct (CSC) offenses would not be grounds for the court vacating the convictions in this case.[429] The Michigan Court of Appeals' consideration of *People v. Gaines* encapsulated three prosecutions (which the trial court

420. *Id.* at 139–40, 858 N.W.2d at 514–15.

421. *Id.* at 140, 858 N.W.2d at 515 (quoting Saffian v. Simmons, 477 Mich. 8, 12, 727 N.W.2d 132 (2007)).

422. *Id.* (quoting MICH. COMP. LAWS. ANN. § 330.2020(1) (West 2015)).

423. *Id.* at 141–42, 858 N.W.2d at 515–16.

424. MICH. CT. R. 6.112(C).

425. MICH. CT. R. 6.112(D); *see also* MICH. COMP. LAWS ANN. § 767.51 (West 2015).

426. MICH. COMP. LAWS ANN. § 767.45(1)(b) (West 2015).

427. People v. Gaines, 306 Mich. App. 289, 297, 856 N.W.2d 222 (2014) (quoting People v. Chapo, 283 Mich. App. 360, 364, 770 N.W.2d 68 (2009)).

428. *Id.* at 298, 856 N.W.2d at 232 (quoting *Chapo*, 283 Mich. App. at 364, 770 N.W.2d 68, 72).

429. *Id.* at 298–301, 856 N.W.2d at 231–33.

consolidated into one jury trial in the Saginaw County Circuit Court against Logan Scott Gaines) for crimes against three minors, "AW," "CP," and "MM" during his senior year of high school, 2008–09, and the following year, 2009–10, when he was eighteen or nineteen years old.[430]

In May 2009, the defendant encountered AW, then fifteen years old, at a bonfire.[431] AW testified that they drove to Gaines' parents' house, where they had non-forced sex in the bedroom basement.[432] This conduct resulted in a conviction for third-degree criminal sexual conduct (CSC).[433]

After graduating, the defendant met MM, then thirteen or fourteen, and obtained her cellular telephone number.[434] After some messaging that was apparently innocuous, the defendant first asked for photographs of MM, then asked for naked photographs, to which she responded with photos of her stomach and buttocks.[435] Finally, Gaines asked for photographs of her breasts and vagina, a request with which she complied.[436] These events occurred in October through December of 2009.[437] Additionally,

> MM testified that, in May 2010, defendant 'fingered' MM in his basement by putting his finger in her vagina for three to five minutes. About a week later, MM asked defendant to hang out. He picked up MM and her friend, Sarah Cramer. MM testified that defendant digitally penetrated her when Cramer went to the bedroom to talk on the phone. Although Cramer came out of the bedroom while defendant was digitally penetrating her, MM testified that she did not think Cramer knew what was happening because defendant's back was to Cramer and the lights and television were off. MM testified that she told Cramer what defendant did to her after they got home. Although Cramer told the police that MM had said 'nothing happened,' Cramer testified at trial that she was afraid of getting in trouble and that MM had actually said that defendant 'fingered' her. MM testified that, around June 10, 2010, she visited defendant's

430. *Id.* at 292–93, 856 N.W.2d at 229 (2014), *appeal denied*, 497 Mich. 892, 861 N.W.2d 33 (2015).

431. *Id.* at 293, 856 N.W.2d at 230.

432. *Id.*

433. *Id.* at 292–93, 856 N.W.2d at 229 (citing MICH. COMP. LAWS ANN. § 750.520d(1)(a) (West 2015)).

434. *Id.* at 293–94, 856 N.W.2d at 229.

435. *Id.*

436. *Id.*

437. *Id.*

> parents' house again and he digitally penetrated her on his bed. Defendant offered contrary testimony from his friend, who testified that he was present during this visit and never left MM and defendant alone.[438]

In addition, Gaines told MM not to disclose these events to anyone because he knew it was "illegal" due to their age difference.[439]

Gaines had graduated by the spring of 2010, but was at the high school training to try out for a college track team and was (ostensibly) assisting some of the members of the high school track-team.[440] CP, then fourteen years old, was one of those members.[441] CP testified that she sent naked photographs of herself to the defendant and that he would threaten not to help her with track or speak with her if she did not send the photographs.[442] The defendant also told her not to tell anyone about the incident.[443] This conduct resulted in convictions for two counts of soliciting a child for immoral purposes and four counts of third-degree CSC.[444]

On appeal, Gaines contended the trial violated his right to due process because the prosecution failed to prove that the offenses against MM occurred on or about May 1, 2010, as the prosecution alleged in the information.[445] Judge Kurtis T. Wilder, writing on behalf of a unanimous panel that included Judge Jane E. Markey and now-retired Judge E. Thomas Fitzgerald,[446] however, observed that an "'imprecise time allegation would be acceptable for sexual offenses involving children, given their difficulty in recalling precise dates.'"[447] In *Gaines*, "the prosecutor made a good-faith effort to establish the dates with MM's text messages, which reflected when she visited defendant at his parents' house, where the offenses occurred."[448] The panel held that Gaines had adequate notice to defend against the charges because MM testified at the preliminary examination, and because defense witnesses gave

438. *Id.* at 294, 856 N.W.2d at 229.
439. *Id.*
440. *Id.* at 295, 856 N.W.2d at 230.
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.* at 292–93, 856 N.W.2d at 229 (citing MICH. COMP. LAWS ANN. §§ 750.145a (accosting) and 750.520d(1)(a) (third-degree CSC) (West 2015)).
445. *Id.* at 297, 856 N.W.2d at 231.
446. *Id.* at 324, 856 N.W.2d at 245.
447. *Id.* at 298–99, 856 N.W.2d at 231–32 (quoting People v. Howell, 396 Mich. 16, 27 n.13, 238 N.W.2d 148, 153 (1976) and People v. Naugle, 152 Mich. App. 227, 234 n.1, 393 N.W.2d 592, 596 (1986)).
448. *Id.* at 297, 856 N.W.2d at 231.

specific testimony about the defendant's activities during the time frame in question.[449] Case law dating to 1876 established that specificity as to date and time were not paramount

> so long as the facts and incidents precluded all doubts respecting the identity of the transaction to be prosecuted, and so long as it was manifest that the act was recent enough to be subject to prosecution, and that a preliminary examination in regard to it had been had. Time is not an ingredient of the offense in any such sense as to make it necessary to charge it according to the truth.[450]

Accordingly, the panel affirmed the defendant's convictions and sentences but vacated the restitution order (for unrelated reasons).[451]

*4. Prosecutorial Error*

Depending on his or her remarks, a prosecutor may deprive an accused of a specific constitutional right, such as the Fifth Amendment privilege against self-incrimination, by commenting on an accused's decision to remain silent after receiving *Miranda*[452] warnings.[453] However, when the prosecution's remarks do not implicate a *specific* constitutional provision, reviewing courts examine whether the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[454] The remarks can implicate due process, for

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449. *Id.* at 299, 856 N.W.2d at 232–33.

450. *Id.* at 298–99, 856 N.W.2d at 232 (quoting Turner v. People, 33 Mich. 363, 378 (1876)).

451. *Id.* at 324, 856 N.W.2d at 245.

452. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

453. People v. Clary, 494 Mich. 260, 271–72, 833 N.W.2d 308, 315–16 (2013) (citing Doyle v. Ohio, 426 U.S. 610, 618–19 (1976)).

454. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). In Michigan, courts are beginning to refer to such circumstances as "prosecutorial error," rather than "misconduct."

> Although we recognize that the phrase "prosecutorial misconduct" has become a term of art in criminal appeals, we agree that the term "misconduct" is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct. In the vast majority of cases, the conduct about which a defendant complains is premised on the contention that the prosecutor made a technical or inadvertent error at trial—which is not the kind of conduct that would warrant discipline under our code of professional conduct. Therefore, we agree that these claims of error might be better and more fairly presented as

example, when the prosecutor "interjects issues broader than the defendant's guilt or innocence."[455] The courts "must examine the entire record and evaluate a prosecutor's remarks in context."[456] Relatedly, "[a] prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial."[457] While a prosecutor may not vouch for the credibility of a witness,[458] a recent case in the Michigan Court of Appeals held that the prosecutor did not err when he characterized defendant's out-of-court statements as lies and argued that his lies showed consciousness of guilt.

In *People v. Lane*, a Wayne County jury convicted D'Andre Louis Lane of first-degree felony murder and first-degree child abuse, triggering a life sentence for the murder conviction.[459] The case concerned Lane's daughter, Bianca Jones, who was two years old when she disappeared in 2011.[460] On appeal, Lane contended that the prosecutor's remarks that the defendant *lied* following the disappearance and during the police investigation violated his due-process rights.[461]

Prior to her disappearance, the young girl lived with her mother, uncle, grandmother, and another woman in Detroit, although she would also spend time with her father, two half-sisters, and two women, Lisa Dungey and Anjali Lyons, at a different house in the same city.[462] The defendant picked up his daughter from his mother's home on November 26, 2011, while driving Dungey's silver Grand Marquis, and the plan was for Bianca to live with him until around Christmas.[463]

While Lyons could not recall that Lane used a wooden paddle to discipline Bianca, she said he would use it to discipline the other children.[464] Bianca's seven-year-old half-sister, however, testified that

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> claims of 'prosecutorial error,' with only the most extreme cases rising to the level of "prosecutorial misconduct."

People v. Cooper, 309 Mich. App. 74, 87–88, 867 N.W.2d 452, 460–61 (2015) (citation omitted).

455. People v. Dobek, 274 Mich. App. 58, 63–64, 732 N.W.2d 546, 554 (2007) (citing People v. Rice, 235 Mich. App. 429, 438, 597 N.W.2d 843, 849 (1999)).

456. *Id.* at 64, 732 N.W.2d at 555 (citing People v. Thomas, 260 Mich. App. 450, 454, 678 N.W.2d 631 (2004)).

457. *Id.* (citing People v. Brown, 267 Mich. App. 141, 152, 703 N.W.2d 230 (2005)). When a defendant fails to object to alleged prosecutorial improprieties, the appellate panel will review the matter by the highly deferential "plain error" standard. People v. Unger, 278 Mich. App. 210, 235, 749 N.W.2d 272, 292 (2008).

458. People v. Leshaj, 249 Mich. App. 417, 421–22, 641 N.W.2d 872, 875 (2002).

459. People v. Lane, 308 Mich. App. 38, 42, 862 N.W.2d 446, 451 (2014).

460. *Id.*

461. *Id.* at 63, 862 N.W.2d at 462.

462. *Id.*

463. *Id.* at 42, 862 N.W.2d at 451.

464. *Id.* at 43, 862 N.W.2d at 452.

Lane did paddle the two-year-old "to give Bianca 'a whooping.'"[465] The testimony at trial continued to suggest Lane was far from an ideal parent. For example, Bianca's mother, Banika Jones, testified that if Bianca or Lane's children had accidents, "Lane would ask them questions, spank them, and give them a time-out."[466] Jones testified that the defendant would react to accidents with anger and frustration.[467] Clinton Nevers, who worked out in Lane's basement every morning, testified that on the morning of November 29, 2011,

> he was sitting in Lane's living room after working out. He heard "three hard paddles" and a baby begin to cry. Nevers went to investigate and Lane met him in the doorway of a bedroom where Bianca was crying. Lane told him that Bianca had urinated and defecated on his floor and "he don't play that s***."[468]

Lyons, who lived with the defendant at his home, testified that two days later, she awoke to the sound of Bianca crying, then the sound of

> "a couple taps" from the downstairs bathroom and a toilet flushing. Lyons heard Lane ask Bianca about wetting the bed, heard the closet door open, and heard Lane hitting Bianca with the paddle. Lyons did not get up to investigate. Lyons agreed at trial that in response to the investigative subpoena, she had stated that she heard four or five smacking sounds and that Bianca was crying "like she was really intensely in pain."[469]

The defendant, who gave an interview to the police, attributed the sounds to Bianca hitting her head on the floor while trying to get out of bed and go to the bathroom.[470] Lane said he took her to the bathroom and kept her awake to make sure she did not have a concussion.[471] Lane's nephew, however, testified that

> Bianca soiled herself in her sleep and Lane brought her out to the living room. Lane tried to keep Bianca awake by 'standin' her up' and 'tapp[ing] her with a paddle' on the buttocks. The

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465. *Id.*
466. *Id.*
467. *Id.*
468. *Id.*
469. *Id.* at 44, 862 N.W.2d at 452.
470. *Id.*
471. *Id.*

> nephew testified that Bianca was not crying and that Lane eventually put Bianca back to bed.[472]

The seven-year-old testified that Lane brought Bianca out to the living room the next morning, December 2, and placed her on the couch.[473] She did not stand, walk, or move on her own and appeared to be "just looking."[474] The nephew said that the defendant put a blanket over Bianca's head when he went to his car that morning, but removed the blanket when they entered the car.[475] When he could see Bianca's face, her eyes were open ("just looking") and she was not making any noises.[476]

A friend of the defendant's, Rico Blackwell, saw Lane the same morning on December 2 as Blackwell walked to Wayne County Community College, and observed that the defendant appeared distraught.[477] There were bags in the backseat of the defendant's vehicle, and no person other than the defendant.[478] Even though the friend was running late to class, the defendant did not offer Blackwell a ride.[479] Cellular-telephone records showed that Lane called Blackwell around 8:55 a.m., apparently so that Blackwell would have the defendant's phone number in his address book.[480]

> According to Dungey, Lane called her briefly to mention that he was going to Banika Jones' house to pick up more clothes for Bianca. Some time after that, Lane called back, crying and saying that someone had taken Bianca. Lyons testified that she could hear Lane screaming on Dungey's phone. Dungey testified that she heard a woman take Lane's phone. The woman said that someone had taken Bianca; that she was going to call the police, and hung up.
>
> According to Ford-Gandy, who lived with Jones, she was still in bed when someone began banging on her door and yelling outside. It was between 9:00 and 9:15 a.m. [Bianca's grandmother, Lilia Jones] Weaver[,] testified that he heard a

472. *Id.*
473. *Id.* at 45, 862 N.W.2d at 452.
474. *Id.*
475. *Id.* at 45, 862 N.W.2d at 453.
476. *Id.*
477. *Id.*
478. *Id.*
479. *Id.*
480. *Id.* at 45–46, 862 N.W.2d at 453.

> loud crash that sounded like "someone was busting down the door."[481]

Lane was "sobbing uncontrollably" and reported that he was a victim of carjacking, and that the carjackers "got her."[482]

Mary Ford-Gandy, the (apparently unrelated) woman who lived at Bianca's home, testified she telephoned 911 after the defendant admitted he had not yet alerted authorities about the carjacking.[483] Detroit police responded within five minutes of the call, and the first responding officer observed that defendant appeared "shaken up" and was slow to respond to his questions.[484] The defendant said he was driving a "black Crown Vic" and pointed to the intersection of Brush and Custer streets.[485]

> In his recorded interview, Lane stated that he met Blackwell on Howard Street. Then he drove along Woodward to Warren, turned right, took Warren to Brush, turned left, and headed south on Brush to Grand Boulevard. On Grand Boulevard, he stopped at a stop sign and someone behind him was honking at him. The other car was small, red, and had square headlights. Someone in the other car said that Lane's lights were out, so he left his car to see if they were out. At that point, the front seat passenger got out of the other car holding a gun, jumped into Dungey's car, and drove off.[486]

Officer Richard Anslanian responded to a broadcast for a black Mercury vehicle and began looking in the Brush-Custer area.[487] The officer reported that "the car's door was open, the car had its keys in the ignition and was running, and there was a child's car seat on the backseat that was covered by a blanket. The car was about half a mile from Custer."[488] Anslanian's colleague, David LeValley, testified that in light of his experience investigating crime, he would have expected the carjackers to leave the child in the vehicle and that, despite extensive search efforts, police never found Bianca.[489]

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481. *Id.* at 46, 862 N.W.2d at 453.
482. *Id.*
483. *Id.*
484. *Id.*
485. *Id.* at 46–47, 862 N.W.2d at 453.
486. *Id.* at 47, 862 N.W.2d at 453–54.
487. *Id.*
488. *Id.*, 862 N.W.2d at 454.
489. *Id.*

Christopher Hess, an agent with the Federal Bureau of Investigation, testified that Lane's statement that he was on Brush at the time of the carjacking did not make sense given that the defendant's telephone records showed the call came from an area four blocks west of Brush.[490]

The agent took the defendant for a "ride-along" view of the area on December 9.[491]

> On the ride-along, Lane stated that he met Blackwell at the corner of Lafayette and Cass. Then he took Lafayette to Griswold, turned left, took Griswold to Grand River, turned right, took Grand River to Woodward, and turned left. According to Hess, Lane's body language during the ride-along was "significant." Lane "would not look to the left" when they passed the alley where Officer Arslanian had found Dungey's car. Lane also got "worked up" when Hess drove along St. Aubin, east of I-75: he began breathing faster and shallower and started covering his face more than he had previously.[492]

A forensic scientist tested a DNA sample from the paddle.[493] She could exclude Bianca's mother and Dungey (an adult cohabitating with the defendant) as contributors, but not Lane or Bianca.[494] A DNA sample from a pillow matched Bianca's profile.[495]

Two more FBI personnel testified as to the canine involvement in the investigation.[496] The manager of the FBI canine program testified to the processes the FBI took to ensure the reliability of its dogs, that the accuracy approximated ninety percent, and that "dogs have been able to smell the odor of decomposition as soon as 2 hours after a victim's death, or years after a victim's burial."[497]

Martin Grime testified that he used two cadaver dogs, one to search for the odor of decomposing human remains, and another to search for blood.[498] Grime explained what happened:

> [O]n December 4, 2011, he took his dogs to an enclosed warehouse that contained 31 vehicles. Grime was told that

490. *Id.* at 48, 862 N.W.2d at 454.
491. *Id.*
492. *Id.*
493. *Id.*
494. *Id.*
495. *Id.*
496. *Id.*
497. *Id.* at 48–49, 862 N.W.2d at 454.
498. *Id.* at 49, 862 N.W.2d at 454.

> Bianca had been in one of the vehicles at the time of the carjacking, but was not told which vehicle was involved. Morse alerted Grime to the presence of the odor of decomposition in the back seat and trunk of a silver Grand Marquis. Keela later screened the car and did not alert Grime to the presence of human blood.
>
> Grime testified that, after the vehicle screening, he took the dogs to an administrative building to screen the items removed from Dungey's car. Grime did not know where the objects were located in the building, and the objects had been placed in a room filled with 'all sorts of things. Morse alerted Grime to the odor of decomposition in Bianca's car seat and a bag containing Bianca's blanket. Grime later took the dogs to Dungey's house. Morse alerted him to the odor of decomposition in a room that contained bunk beds and a closet without a door.[499]

The defendant appealed his conviction to the Michigan Court of Appeals, which affirmed in a unanimous *per curiam* opinion bearing the signatures of Judge Christopher M. Murray and now-retired Judges E. Thomas Fitzgerald and William C. Whitbeck.[500] In evaluating whether the prosecutor's conduct violated the defendant's right to a fair trial, the panel quoted portions of her opening and rebuttal closing comments:

> At around 9:00 a.m., the defendant claims he was car-jacked. He claims that the car-jackers took the car with Bianca inside and just drove off.
>
> * * *
>
> After the car-jacking, the defendant was left with his cellphone. He claims that he called Lisa Dungey, and ran to the Custer home, the home where he was right near, for help.
>
> This is where the defendant's car-jacking story goes from implausible and unlikely to unequivocally false.
>
> The evidence will show that in fact the defendant was on the east side of Detroit at 8:55 that morning. He did not call Lisa Dungey until 9:40. The defendant, himself, never called 911. The

499. *Id.* at 48, 862 N.W.2d at 454–55.
500. *Id.* at 41–42, 862 N.W.2d at 451.

> defendant has never accounted for his whereabouts between 8:55 a.m., and 9:40 a.m., when he called Lisa Dungey.
>
> * * *
>
> He even lies about the color of the car, telling the police that it was black, when it was, in fact, a light silver gray.
>
> * * *
>
> The defendant would have you believe that two car-jackers turned from car-jackers to child abductors, in a six block ride, and decided they didn't want the car, but took the baby from beneath the blanket, and then spread out the blanket and took off somewhere.
>
> Eventually, as the investigation continued, the evidence compounded to show that the defendant's story was not only implausible, but it was a complete lie.[501]

The prosecutor, in rebuttal, commented that the evidence led to only one conclusion: the defendant was guilty.[502] During the defendant's closing statement, his attorney contended that Lane was confused during the ride-along with the FBI agent, Hess.[503] The prosecutor attributed the confusion to the defendant's inability to "keep all his lies straight."[504] According to the prosecutor, if the carjacking-kidnapping had really occurred, "[y]ou would remember every moment, every turn, everything you saw. That would be imprinted in your mind, forever. You'd never forget it. It wouldn't be confusing."[505]

The appellate panel did not find a violation and observed that "a prosecutor may argue all the facts in evidence and all reasonable inferences arising from them, as they relate to the prosecutor's theory of the case."[506] On the other hand, a prosecutor may not make arguments

501. *Id.* at 63-64, 862 N.W.2d at 462–63.
502. *Id.* at 64, 862 N.W.2d at 463.
503. *Id.*
504. *Id.* at 65, 862 N.W.2d at 463.
505. *Id.*
506. *Id.* at 63, 862 N.W.2d at 462 (citing People v. Bahoda, 448 Mich. 261, 282, 531 N.W.2d 659, 670 (1995); *see also* People v. Unger, 278 Mich. App. 210, 236, 749 N.W.2d 272, 293 (2008)).

without support from the evidence.[507] Here, the panel concluded, "the prosecutor's statements in closing were arguments about the evidence and inferences arising from it as they related to the prosecutor's statement of the case."[508] The panel similarly concluded that the prosecutor's remarks that "just because you can successfully dispose of a body does not mean you should get away with murder," were not an improper appeal to the jury that it should convict on the basis of its "civic duty" and not the evidence.[509] Taking into context that the prosecutor urged the jury to "apply your common sense and logic to this evidence," the panel did not find the remarks to be improper.[510] Lastly, the panel concluded that the prosecutor did not argue facts not in evidence when commenting on the nephew's testimony that Bianca's eyes were open on the morning of her disappearance, "eyes can be open when you're dead. They can be fixed and dialated [sic]."[511] Here, the panel observed, "[i]t is clear that the prosecutor was offering the *theory* that Bianca's eyes could have been open even though she was dead."[512] Accordingly, the panel affirmed.[513]

*5. Discovery of Evidence*

In *Brady v. Maryland*, the U.S. Supreme Court constitutionalized the criminal discovery process in its holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[514] To establish a *Brady* violation, a defendant must show that "'[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[515] If the evidence is favorable to the defense, the defendant need not establish bad faith by the state.[516] On the

507. *Id.* at 67, 862 N.W.2d at 464 (citing People v. Schultz, 246 Mich. App. 695, 710, 635 N.W.2d 491, 496 (2001)).

508. *Id.* at 65, 862 N.W.2d at 463.

509. *Id.* at 65–66, 862 N.W.2d at 463-64.

510. *Id.*

511. *Id.* at 67, 862 N.W.2d at 464 (internal quotations omitted).

512. *Id.* (emphasis in original).

513. *Id.* at 70, 862 N.W.2d at 466.

514. Brady v. Maryland, 373 U.S. 83, 87 (1963).

515. People v. Bosca, 310 Mich. App. 1, 27-28, 871 N.W.2d 307, 329 (2015) (quoting Strickler v. Greene, 527 U.S. 263, 281–82 (1999)) (internal quotations omitted).

516. *Id.* at 28, 871 N.W.2d at 329 (citing People v. Chenault, 495 Mich. 142, 149–50, 845 N.W.2d 731, 735 (2014)).

other hand, if the evidence is merely "'*potentially* useful,'" the defense *must* establish bad faith.[517]

In Michigan,. Rule 6.201 of the Michigan Court Rules governs discovery in criminal cases.[518] The rule generally requires that either party, upon its counterpart's request, must disclose information such as witnesses' names, statements by witnesses, and summaries of the findings of possible expert witnesses.[519] The prosecution must turn over, among other items, "any plea agreement, grant of immunity, or other agreement for testimony in connection with the case."[520] *Brady* requires that "'the prosecutor must disclose any information that would materially affect the credibility of his witnesses.'"[521]

However, in *People v. Bosca*, a *Survey* period case, the Michigan Court of Appeals held that the defendant failed to show that the prosecutor violated either *Brady* or the court rules[522]

In *Bosca*, four boys had broken into Vincent R. Bosca's Sterling Heights home in 2011 to steal marijuana.[523] In revenge, the defendant and two accomplices laid in wait in the defendant's home and enticed the boys to return.[524] When four of the boys returned, Bosca and his accomplices trapped three of them inside.[525] One escaped, but Bosca and his cohorts forced one of the already trapped boys to call the escapee and trick him into returning.[526] They then forced another boy to call two of the other minor burglars and trick *those two* into returning.[527] The defendant and his accomplices threw one of these two down the stairs and smashed the sheath of a sword over his head before duct taping his hands and legs.[528] Later, while searching the home, police found not only a "grow operation" as well as "jars of marijuana 'all over the place,'"[529] but also,

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517. *Id.* at 27, 871 N.W.2d at 328 (quoting Arizona v. Youngblood, 488 U.S. 51, 57 (1988)) (internal quotations omitted).

518. *See* MICH. CT. R. 6.201; *see also* People v. Phillips, 468 Mich. 583, 587, 663 N.W.2d 463, 466 (2003).

519. *Phillips*, 468 Mich. at 590, 663 N.W.2d at 467.

520. MICH. CT. R. 6.201(B)(5).

521. *Bosca*, 310 Mich. App. at 32, 871 N.W.2d at 331 (quoting People v. McMullan, 284 Mich. App. 149, 157, 771 N.W.2d 810, 816 (2009)) (internal quotations omitted).

522. *Id.* at 26–35, 871 N.W.2d at 327–32.

523. *Id.* at 7, 871 N.W.2d at 318.

524. *Id.* at 7–8, 871 N.W.2d at 318.

525. *Id.* at 8, 871 N.W.2d at 319.

526. *Id.*

527. *Id.*

528. *Id.*

529. *Id.* at 9, 871 N.W.2d at 319.

> a sword and broken sheath, duct tape, a cigar cutter, an electric circular saw, pliers, and a loaded handgun possessed by [accomplice Allen] Brontkowski. Officers found blood stains on the basement floor and walls, as well as on the sword sheath and Brontkowski's pants; the blood on the sheath and pants was DNA-matched to one of the boys. Defendant admitted to duct-taping the boys to chairs.[530]

At the trial's conclusion, a Macomb County jury convicted Bosca of extortion, four counts of unlawful imprisonment, four counts of felonious assault, felony firearm, delivery/manufacture of marijuana, and maintaining a drug house.[531] The boys had testified "that they were duct-taped to chairs, hit with a pistol, kicked and beaten, and threatened with a sword, hatchet, pliers, cigar cutter, flammable liquids, and a circular saw."[532] As to the most serious charge, the defendant received a sentence of fifty-seven months to twenty years in prison.[533]

On appeal, Bosca argued that the prosecution's failure to tender certain records warranted the court's reversal of the conviction.

*i. Medical Records*

Judge Mark J. Boonstra, writing for a panel that included Judges Jane M. Beckering and Michael J. Riordan,[534] rejected the defense's contention that the failure to turn over the victims' medical records *prior to the examination* warranted reversal.[535] (Defense counsel eventually received these records four months before trial.)[536] In rejecting Bosca's position, the court found no authority supporting the defendant's proposition that the prosecution's failure to turn over the documents "impaired defendant's ability to demonstrate the lack of credibility of the boys as witnesses at the preliminary examination."[537] Second, at the time of the examination, "there was no indication by defense counsel of any need for discovery materials that had not been received from the prosecution."[538] Third, the appellate panel recognized the prosecutor's low burden at the examination stage (where the judge needs only

530. *Id.*
531. *Id.* at 6–7, 871 N.W.2d at 318.
532. *Id.* at 8, 871 N.W.2d at 319.
533. *Id.* at 7, 871 N.W.2d at 318.
534. *Id.* at 5, 871 N.W.2d at 318.
535. *Id.* at 29, 871 N.W.2d at 328.
536. *Id.* at 29, 871 N.W.2d at 318.
537. *Id.* at 28–29, 871 N.W.2d at 329.
538. *Id.* at 29, 871 N.W.2d at 329.

determine that probable cause supports the charge, not whether the defense can raise a reasonable doubt as to guilt).[539] Fourth, there was no evidence to suggest the records were exculpatory.[540] Finally, there was no evidence that the prosecution possessed the records at the time of the examination, and the court recognized that the prosecution had no duty to obtain them merely at the defense's request.[541]

*ii. Telephone Records*

Bosca further argued that the prosecution's failure to preserve the victim's cellular telephone records warranted reversal of the convictions.[542] The panel rejected this argument again and observed that the record established that the prosecution had obtained cellular records of the defendant and an accomplice.[543] The defense failed to establish that the records would have exculpated Bosca.[544] Second, the panel observed that the "defendant also has not shown bad faith on the part of the police deriving from the failure of various cellular service providers to maintain data beyond a specific time period."[545]

"The prosecution is not required to seek and find exculpatory evidence or assist in building or supporting a defendant's case, nor is it required to negate every theory consistent with defendant's innocence."[546] Because the prosecution tendered the records it *did* have (the cellular records of the defendant and an accomplice), and there was no evidence that it had suppressed (or even possessed) the other phone records, the panel rejected the defendant's *Brady* claim.[547]

539. *Id.* at 29–30, 871 N.W.2d at 329–30 (quoting People v. Laws, 218 Mich. App. 447, 451–52, 554 N.W.2d 586, 589 (1996)) ("'[W]here the evidence conflicts and raises a reasonable doubt regarding the defendant's guilt, the issue is one for the jury, and the defendant should be bound over.'").

540. *Id.* at 30, 871 N.W.2d at 330.

541. *Id.*; *see also* People v. Coy, 258 Mich. App. 1, 21, 669 N.W.2d 831 (2003) (citing People v. Burwick, 450 Mich. 281, 289 n.10, 537 N.W.2d 813 (1995)) (holding that "neither the prosecution nor the defense has an affirmative duty to search for evidence to aid in the other's case.")).

542. *Id.*

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.*

*iii. Agreements with Witnesses*

One of the witnesses for the prosecution in the Bosca case was Gerald King, one of the defendant's accomplices.[548]

> King confirmed being contacted by defendant and being asked to be present at defendant's home in the event of another home invasion on the date of the second incident. When defendant and his associates heard a knock on the front door on the second occasion, they did not act to prevent another home invasion by answering the door, but instead waited, anticipating that the boys would enter the home. Testimony was also elicited indicating that defendant coerced two of the boys to contact others who may have been involved in the prior break-in to attempt to induce them to return to the residence. King testified that he had a hatchet and that Brontkowski had a handgun. King further acknowledged that he, defendant and Brontkowski hit the boys with their fists, pushed them down the basement stairs, blocked their escape, struck them with the blunt end of a hatchet, a sword sheath, and their fists, threatened them with a cigar cutter, a circular saw and a handgun, and subjected them to a plethora of verbal threats. Physical evidence corroborated a great deal of this testimony.[549]

During his testimony, King acknowledged that he had reached an agreement with the prosecution whereby the state would drop two of the drug charges he faced contingent on the trial court sentencing him to no *less* than five years, six months in prison before he would become eligible for parole, *after he testified.*[550] King did not know what the *eventual sentence would be*, only that it would be at least sixty-six months (but presumably less than it could have been had the State pursued the drug charges).[551]

Inasmuch as the defense suggested a *Brady* or discovery-rule violation for the prosecution's failure to disclose what the "actual sentence" would be, the panel observed here that "[i]t is one thing to require disclosure of facts (immunity or leniency) which the jury should weigh in assessing a witness's credibility. It is quite another to require

548. *Id.* at 14, 871 N.W.2d at 321–22.
549. *Id.* at 14, 871 N.W.2d at 322.
550. *Id.* at 32, 871 N.W.2d at 332.
551. *Id.*

disclosure of future possibilities for the jury's speculation."[552] The purpose of *Brady* and the discovery rule is for the jury to be cognizant of matters affecting the credibility of a witness, "not on factors which may motivate a prosecutor in dealing subsequently with a witness."[553] Thus, "[a]lthough defendant contends that the trial court ultimately imposed . . . . a more lenient sentence than the prosecution had recommended, nothing indicated that the more lenient sentence was the result of any undisclosed sentencing agreement."[554] Finding that the defense had ample information on which to cross-examine King and allow the jury to evaluate its credibility, the panel rejected the defendant's discovery arguments as they related to King.[555] The panel thus affirmed Bosca's conviction.[556]

*6. Substantive Due Process*

Courts distinguish between procedural due process and substantive due process. "Procedural due process involves the fairness of procedures used by the state that result in the deprivation of life, liberty, or property."[557] In *People v. Bosca*, which we previously discussed in Part V.A.5, the defendant argued that the trial court's ordering him to register as a sex offender upon his conviction for unlawful imprisonment violated his right to due process.[558] However, the unanimous panel concluded that the sentence did not implicate procedural due process concerns because "the law's requirements turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest.'"[559] Accordingly, the only other possible claim in the due-process arena was one of *substantive* due process.

"[T]he right to substantive due process bars certain government actions regardless of the fairness of the procedures used to implement

552. *Id.* (quoting People v. Atkins, 397 Mich. 163, 174, 243 N.W.2d 292, 296 (1976), *overruled in part on other grounds,* People v. Woods, 416 Mich. 581, 331 N.W.2d 707 (1982)) (internal quotations omitted).

553. *Id.* at 32–33, 871 N.W.2d at 331.

554. *Id.* at 33, 871 N.W.2d at 331.

555. *Id.*

556. The panel remanded the matter to the trial court to correct what appeared to be a clerical error in the judgment of sentence. *Id.* at 6 n.1, 871 N.W.2d at 318.

557. *Id.* at 73–74, 871 N.W.2d at 352 (citing *In re* Parole of Hill, 298 Mich. App. 404, 412, 827 N.W.2d 407 (2012)).

558. *Id.* at 73, 871 N.W.2d at 352.

559. *Id.* at 75, 871 N.W.2d at 353 (quoting Conn. Dep't of Public Safety v. Doe, 538 U.S. 1, 7 (2003)).

them."[560] To be consistent with principles of substantive due process, government action must satisfy "rational-basis" review, that is, it must be "rationally related to a legitimate government purpose."[561] If the governmental classification, however, involves a suspect class (e.g., distinguishes between persons on the account of race) or implicates a fundamental right (e.g., the right to privacy), the courts will subject the classification to a much higher standard of "strict scrutiny." [562]

The *Bosca* panel noted that Michigan courts have already held that the Sex Offender Registration Act, as it applies to all sex offenders, "is rationally related to a legitimate state interest of protecting the public."[563] That purpose is "protecting the people of Michigan from those who have committed offenses that pose a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state."[564] But the court also noted a split of authority in other states in determining whether requiring individuals convicted of unlawful imprisonment to register as sex offenders — where the elements of the charge do not include "sexual purpose" on the part of the defendant — is reasonably related to the state's purpose.[565] The majority view at the time of the opinion in *Bosca* was that such classifications survive rational-basis review.[566]

The panel sided with the majority view, concluding that "including in the SORA registration requirement persons who commit the offense of false imprisonment against minors is not 'arbitrary and wholly unrelated in a rational way'" to the act's purposes.[567] Accordingly, the panel rejected the defendant's due-process claim.[568]

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560. *Id.* at 74, 871 N.W.2d at 352 (quoting Sacramento Cnty. v. Lewis, 523 U.S. 833, 840 (1998)); *see also* Mettler Walloon, L.L.C. v. Melrose Twp., 281 Mich. App. 184, 196, 761 N.W.2d 293 (2008)) (internal quotations omitted).

561. *Id.* at 77, 871 N.W.2d at 354 (quoting Brinkley v. Brinkley, 277 Mich. App. 23, 30, 742 N.W.2d 629, 634 (2007)).

562. *Id.*

563. *Id.* at 78, 871 N.W.2d at 354 (quoting People v. Golba, 273 Mich. App. 603, 620, 729 N.W.2d 916, 927(2007)).

564. *Id.* at 78, 871 N.W.2d at 355 (quoting MICH. COMP. LAWS ANN. § 28.721a (West 2015)).

565. *Id.* at 78–80, 871 N.W.2d at 354–56.

566. *Id.* at 80, 871 N.W.2d at 356.

567. *Id.* at 80–81, 871 N.W.2d at 356 (quoting Wysocki v. Kivi, 248 Mich. App. 346, 354, 639 N.W.2d 572, 577–78 (2001)).

568. *Id.* at 81, 871 N.W.2d at 356.

### *B. The Double Jeopardy Clause*

The Double Jeopardy Clause of the Fifth Amendment provides that no person "subject for the same offence [shall] be twice put in jeopardy of life or limb."[569] The Michigan Constitution similarly provides, "No person shall be subject for the same offense to be twice put in jeopardy."[570] The clause encompasses "three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense."[571] An acquittal is final, even "[a] mistaken acquittal is an acquittal nonetheless," and would not be subject to review 'without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'"[572]

#### *1. The "Same Elements" Test*

What makes a particular crime the "same offense" as another such as to trigger the Double Jeopardy Clause? Both Michigan and the federal system employ the "same-elements" test that practitioners associate with *United States v. Blockburger*.[573] In *People v. Nutt*, a five-person majority of the seven-member Michigan Supreme Court held that offenses which each contain an element the other lacks are *not* the "same offence" for purposes of double jeopardy.[574] This is true "notwithstanding a substantial overlap in the proof offered to establish the crimes."[575] Prior to *Nutt*, Michigan employed a "transactional" approach to the Double Jeopardy Clause of the Michigan Constitution and prohibited prosecutions for multiple offenses occurring as part of the same criminal transaction.[576] Thus, prior to *Nutt*, "[t]he Double Jeopardy Clause require[d] a prosecutor to bring, in a single proceeding, all known

569. U.S. CONST. amend V.

570. MICH. CONST. art. I, § 15.

571. *Bosca*, 310 Mich. App. at 42, 871 N.W.2d at 336 (quoting People v. Nutt, 469 Mich. 565, 573, 677 N.W.2d 1, 6 (2004)).

572. Evans v. Michigan, 133 S. Ct. 1069, 1074 (2013) (quoting United States v. Ball, 163 U.S. 662, 671 (1896)).

573. People v. Nutt, 469 Mich. 565, 576–77, 677 N.W.2d 1, 7–8 (2004) (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)). One of the authors — Walton — argued *Nutt* on behalf of the prosecution.

574. *Id.* at 576, 677 N.W.2d at 7.

575. *Id.* (quoting Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975)) (internal quotations omitted).

576. Crampton v. 54-A Dist. Judge, 397 Mich. 489, 496, 245 N.W.2d 28 (1976) (citing People v. White, 390 Mich. 245, 255, 212 N.W.2d 222 (1973)).

charges against a defendant arising from a single criminal episode."[577] In *Nutt*, the Michigan Supreme Court discarded the transactional approach and adopted the federal *Blockburger* test to interpret both the federal *and* state provisions pertaining to double jeopardy.[578]

*i. Felonious Assault vs. Unlawful Imprisonment*

In *People v. Bosca*, a case we first discussed in Part V.A.5, the Michigan Court of Appeals held that convictions for unlawful imprisonment and assault with a dangerous weapon (felonious assault, or "FA") do not violate double-jeopardy principles.[579] On appeal, the defendant challenged his convictions for FA and unlawful imprisonment as violative of double-jeopardy principles because, in the appellate panel's characterization, the charges comprised "a sequence of events that were one continuous transaction."[580] However, the unanimous appellate panel of Judge Mark J. Boonstra, writing for himself and Judges Michael J. Riordan and Jane M. Beckering,[581] observed that Michigan follows the *Blockburger* "different-elements" test whereby if each crime requires "proof of a fact" — contains an element — that the other does not, the prohibition against double jeopardy is not violated.[582] The court then observed that the crimes contain the following elements:

| **Felonious Assault**[583] | **Unlawful Imprisonment**[584] |
|---|---|
| (1) an assault, | (1) restraint of an individual by 'means of a weapon or dangerous instrument,' |
| (2) with a dangerous weapon, | (2) the restrained person is secretly confined, |
| (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. | (3) the 'person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.' |

577. *Id.* at 500, 245 N.W.2d at 32 (quoting Commonwealth v. Campana, 304 A.2d 432, 441 (Pa. 1973)) (internal quotations omitted).

578. *Nutt*, 469 Mich. at 596, 677 N.W.2d at 336.

579. *Id.* at 41, 871 N.W.2d at 335–36.

580. *Id.* at 94, 871 N.W.2d at 363.

581. *Id.* at 94, 871 N.W.2d at 363.

582. *Id.* at 42, 871 N.W.2d at 336 (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).

583. *Id.* at 20, 871 N.W.2d at 325 (quoting People v. Avant, 235 Mich. App. 499, 505, 597 N.W.2d 864, 869 (1999)).

584. *Id.* at 18, 871 N.W.2d at 324 (quoting MICH. COMP. LAWS ANN. § 750.349b(1) (West 2015)).

After considering the elements of each offense, the court observed that "[i]t is readily apparent that the elements of assault with a dangerous weapon and unlawful imprisonment are separate and distinct offenses and that 'each [offense] requires proof of a fact that the other does not.'"[585] Furthermore, Boonstra acknowledged existing cases that "[t]wo or more separate criminal offenses can occur within the 'same transaction.'"[586] Accordingly, the panel rejected the defendant's double-jeopardy claim and affirmed his conviction and sentence, on this ground and other grounds.[587]

*ii. First- vs. Second-Degree Criminal Sexual Conduct*

A St. Clair County jury convicted Robin Scott Duenaz of three counts of first-degree criminal sexual conduct (CSC) and one count of second-degree CSC, which led to a sentence of fifty to seventy-five years in prison as a fourth-time habitual offender.[588] Following the defendant's appeal, a *per curiam* panel of the Michigan Court of Appeals held that the defendant's convictions for first- and second-degree CSC do not violate the Double Jeopardy Clause.[589] The court then examined the elements of each of the offenses and described those elements as follows:

| **First-degree CSC** | **Second-degree CSC** |
|---|---|
| (1) the defendant engaged in sexual penetration | (1) the defendant engaged in sexual contact |
| (2) with a person under 13.[590] | (2) with a person under 13.[591] |

Obviously, the second element of both offenses are the same, so the question became whether the first element of each offense required proof of a fact the other lacked. The court further expanded on the first element of each offense by defining "sexual penetration" and "sexual contact":

585. *Id.* at 42, 871 N.W.2d at 336 (quoting People v. Nutt, 469 Mich. 565, 576, 677 N.W.2d 1, 7 (2004)).

586. *Id.* at 43, 871 N.W.2d at 336 (quoting People v. Ryan, 295 Mich. App. 388, 402, 819 N.W.2d 55, 63 (2012)).

587. *Id.* at 94, 871 N.W.2d at 363.

588. People v. Duenaz, 306 Mich. App. 85, 89, 854 N.W.2d 531, 536 (2014) (citing MICH. COMP. LAWS ANN. § 769.12 (West 2015)), *appeal denied,* 498 Mich. 969, 873 N.W.2d 303.

589. *Id.* at 107, 854 N.W.2d at 546.

590. *Id.* at 106, 854 N.W.2d at 545 (citing MICH. COMP. LAWS ANN. § 750.520b(1)(a) (West 2015)).

591. *Id.* (citing MICH. COMP. LAWS ANN. § 750.520c(1)(a) (West 2015)).

| First-degree CSC | Second-degree CSC |
|---|---|
| "Sexual penetration" | "Sexual *contact*" |
| "[S]exual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body."[592] | "[T]he intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose."[593] |

Accordingly, in a *per curiam* opinion, Judges Jane E. Markey, David H. Sawyer and Kurtis T. Wilder,[594] held that because "[s]exual penetration is an element of CSC-I but not CSC-II [and because] CSC-II requires that sexual contact be done for a sexual purpose, an element not included in CSC-I," the offenses were not the "same" for the purpose of *Blockburger* and the defendant's convictions for both did not violate the Double Jeopardy Clause.[595]

### 2. *The Collateral Estoppel Strand of the Double Jeopardy Clause*

The doctrine of collateral estoppel provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."[596] In *Ashe v. Swenson*, the U.S. Supreme Court incorporated collateral estoppel into its double-jeopardy jurisprudence.[597] The *Ashe* case concerned an armed robbery of six individuals playing poker.[598] Missouri charged Ashe with armed robbery

592. *Id.* (citing MICH. COMP. LAWS ANN. § 750.520a(r) (West 2015)).

593. *Id.* at 106–07, 854 N.W.2d at 545 (citing MICH. COMP. LAWS ANN. § 750.520a(q) (West 2015)).

594. *Id.* at 115, 854 N.W.2d at 550.

595. *Id.* at 107, 854 N.W.2d at 545–46 (internal quotations omitted).

596. People v. Wilson, 496 Mich. 91, 98, 852 N.W.2d 134 (2014) (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)) (internal quotations omitted). One of this Article's authors — Walton — wrote an amicus brief in support of the state's position.

597. Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Black, J., concurring) ("The opinion of the Court in the case today amply demonstrates that the doctrine of collateral estoppel is a basic and essential part of the Constitution's prohibition against double jeopardy.").

598. *Id.* at 437–38.

of one of the poker players, but the state lost a jury trial where the sole issue in dispute was the robber's identity.[599] The state then retried, and convicted, Ashe for the armed robbery of a different player.[600] Writing for a majority, Justice Potter Stewart observed that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[601] Applying the doctrine to the facts of *Ashe*, Stewart wrote that, after the jury determined that the State failed to prove Ashe was the robber, "the State could [not] constitutionally hale him before a new jury to litigate that issue again."[602] The Court held that

> the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'[603]

Stewart clarified that "[t]he inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."[604]

Much later, in 2009, the U.S. Supreme Court considered the case of F. Scott Yeager, the defendant in a 2005 federal trial in Texas in which the jury acquitted him of the inchoate crimes of conspiracy to commit securities fraud and conspiracy to commit wire fraud, and the substantive offenses of securities fraud and wire fraud.[605] The jury hung on the charges of insider trading and money laundering.[606] On appeal, the Fifth Circuit determined that

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599. *Id.* at 438–40.
600. *Id.* at 439–40.
601. *Id.* at 443.
602. *Id.* at 446.
603. *Id.* at 444 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38–39 (1960)).
604. *Id.* (quoting Sealfon v. United States, 332 U.S. 575, 579 (1948)) (internal quotations omitted).
605. Yeager v. United States, 557 U.S. 110, 113 (2009).
606. *Id.*

> in acquitting Yeager, the jury must have made a finding that Yeager did not have any insider information at [an investment analysts'] conference, and thus, did not have insider information when he later conducted his trades. Accordingly, the panel concluded that this factual determination would normally preclude retrial for insider trading.[607]

The appellate court then considered whether the hung-jury mistrials on the insider trading and money laundering charges would receive the same treatment as acquittals (acquittals bar further prosecution).[608] In light of both the acquittals and mistrials, the Fifth Circuit determined that it was "impossible 'to decide with any certainty what the jury necessarily determined . . . , [so it] concluded that the conflict between the acquittals and the hung counts barred the application of issue preclusion in this case."[609]

However, the U.S. Supreme Court reversed the Fifth Circuit and determined that a hung count "is not a relevant part of the record of [the] prior proceeding."[610] Now-retired Justice John Paul Stevens, writing on behalf of a five-member majority,[611] explained that "[b]ecause a jury speaks only through its verdict, its failure to reach a verdict cannot — by negative implication —yield a piece of information that helps put together the trial puzzle."[612]

Thus, the hung counts would not defeat the preclusive effect of the acquittals if a court determined — which the Fifth Circuit later *did* determine — that "the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element."[613]

The result was different in *United States v. Powell*,[614] in which the Court considered whether *guilty* verdicts on some charges would defeat

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607. United States v. Yeager, 334 Fed. Appx. 707, 708-09 (5th Cir. 2009) (on remand) (citing United States v. Yeager, 521 F.3d 367 (5th Cir. 2008)).

608. *Yeager*, 557 U.S. at 116–17.

609. *Id.* at 116 (quoting *Yeager*, 521 F.3d at 378–79) (internal quotations omitted).

610. *Id.* at 121 (citing *Ashe*, 397 U.S. at 444 (holding that a collateral-estoppel analysis requires the reviewing court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.")) (internal quotations omitted).

611. *Id.* at 111–12.

612. *Id.* at 121.

613. *Id.* at 123.

614. United States v. Powell, 469 U.S. 57 (1984).

the preclusive effect of acquittals on related charges.[615] Rejecting the defendant's request to overturn her convictions,[616] then-Associate (subsequently Chief) Justice William H. Rehnquist, writing on behalf of a unanimous High Court, observed that

> where truly inconsistent verdicts have been reached, [the] most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.[617]

This is true even if a jury convicts a defendant of a compound felony (such as first-degree murder on a felony-murder theory) but acquits him of the predicate felony.[618] An inconsistent verdict could result, Rehnquist observed, because "the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense."[619] Defendants have numerous protections to protect themselves against unfair verdicts, such as voir dire and appellate review for sufficiency of the evidence,[620] and American law has long supported deferring to the jurors' judgment, as a verdict provides "an element of needed finality."[621] Rehnquist saw no reason to disturb the convictions merely because the verdicts were inconsistent, as "[t]he possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest."[622]

| **Scenario 1: Defendant goes to trial on the charges in Group 1 and obtains a verdict of acquittal after the state fails to prove the only issue in dispute (*e.g.*, identity). The state files new charges (Group 2) against the defendant, but proving guilt in Group 2 requires the new jury to reconsider the same issue the previous jury already adjudicated.** | | |
|---|---|---|
| Charges: | Will the acquittals in Group 1 | Precedent |

615. *Id.* at 60–61.
616. *Id.* at 69.
617. *Id.* at 64–65 (quoting Dunn v. United States, 284 U.S. 390, 393 (1932)) (internal quotations omitted).
618. *Id.* at 65.
619. *Id.*
620. *Id.* at 66–67.
621. *Id.* at 67.
622. *Id.* at 65.

| Group 1 (first trial) | preclude a trial in Group 2 and require the court to dismiss Group 2? | |
|---|---|---|
| Not guilty | Yes. Where the jury has adjudicated the sole issue in dispute in the defendant's favor in the first trial, collateral-estoppel / double-jeopardy principles preclude a retrial where the new jury would necessarily have to consider that same issue. The court must dismiss Group 2. | *Ashe.* |
| **Scenario 2: Defendant goes to trial on various charges. The only issue in dispute at trial is an element of both Group 1 and Group 2 charges. In theory, consistency dictates that the jury should convict or acquit the defendant on all charges. Nevertheless, the jury acquits on Group 1 but hangs on Count 2.** | | |
| Charges: Group 1 | Charges: Group 2 | Will the acquittals in Group 1 require the court to dismiss Group 2 (or will the mistrial defeat the preclusive effect of the acquittals)? | Precedent |
| Acquittals | Mistrial (hung jury) | The court must dismiss Group 2. The mistrial in Group 2 does not defeat the preclusive effect of Group 1. The jury "speaks" through its verdict (acquittal), not through its nonverdict (hung jury). The acquittals have preclusive effect. | *Yeager.* |
| **Scenario 3: Defendant goes to trial on various charges. The only issue in dispute at trial is an element of both Group 1 and Group 2 charges. In theory, consistency dictates that the jury should convict or acquit the defendant on all charges.** | | |
| Charges: Group 1 | Charges: Group 2 | Will the acquittals in Group 1 require the court to dismiss Group 2, overruling the jury's guilty verdict on those counts? | Precedent |
| Not guilty | Guilty | The guilty verdicts defeat the otherwise preclusive effect of the acquittals. There is no prohibition on inconsistent | *Powell.* |

| | | | |
|---|---|---|---|
| | | verdicts. The convictions should stand. | |

A Macomb County jury convicted Dwayne Wilson of first-degree felony murder, second-degree murder, assault with intent to do great bodily harm less than murder, felony firearm, and unlawful imprisonment.[623] However, the jury acquitted Wilson of both first-degree premeditated murder and first-degree home invasion, the latter being the sole predicate felony for the felony-murder charge.[624] These decisions, in the later words of a Michigan Supreme Court justice reviewing the proceedings, rendered the verdict "plainly[] inconsistent."[625] In other words, if the defendant was not guilty of first-degree home invasion, in theory, he could not be guilty of felony murder. The Michigan Court of Appeals vacated the convictions, finding a Sixth Amendment violation of the defendant's right to represent himself at trial, and ordered a retrial.[626]

After its successful appeal, the defense moved the trial court to dismiss the felony-murder charge on double-jeopardy grounds, convincing the trial court "that a second jury could not reconsider the home-invasion element of felony murder given the preclusive effect of the defendant's acquittal of home invasion."[627] A unanimous panel of the Michigan Court of Appeals disagreed, finding no double-jeopardy violation, and thus permitted the prosecution to reinstate the felony-murder charge.[628] (There was no dispute that the state could not retry Wilson for *premeditated* murder or first-degree home invasion, as the jury actually acquitted him of those counts.)[629] The defendant applied for leave to appeal to the Michigan Supreme Court, which the court granted.[630]

Thus, before Michigan's highest court was the question of whether guilty verdicts that a higher court later *vacated* would defeat the preclusive effect of not-guilty verdicts.[631] In other words, would the guilty (but vacated) verdicts have the same effect as the hung-jury non-verdict in *Yeager* (zero effect, not defeating the acquittals) *or* the guilty

623. People v. Wilson, 496 Mich. 91, 96–97, 852 N.W.2d 134, 136–37 (2014).
624. *Id.*
625. *Id.* at 97, 852 N.W.2d at 136.
626. *Id.* (citing People v. Wilson, No. 2009–002637–FC, 2011 WL 1778729 (Mich. Ct. App. May 20, 2011)).
627. *Wilson*, 496 Mich. at 97, 852 N.W.2d at 136–37.
628. *Id.* (citing People v. Wilson, No.2009–002637–FC, 2012 WL 5854885 (Mich. Ct. App. Nov. 15, 2012) (Docket No. 311253)).
629. *Wilson*, 496 Mich. at 109 n. 1, 852, N.W.2d at 143 (Markman, J., dissenting).
630. People v. Wilson, 494 Mich. 853, 830 N.W.2d 383 (2013)).
631. *Wilson*, 496 Mich. at 95–96, 852 N.W.2d at 135.

(but not vacated) verdicts in *Powell* (defeating the preclusive effect of the acquittals)? Whether the state could retry Wilson on the felony-murder charge turned on the court's resolution of this question.

| **Scenario 4: Defendant goes to trial on various charges. The only issue in dispute at trial is an element of *both* Group 1 and Group 2 charges. In theory, the jury should convict or acquit the defendant on all charges after resolving the sole issue in dispute. The jury convicts the defendant of the Group 2 charges, but acquits him of the charges in Group 1.** | | |
|---|---|---|
| Charges: Group 1 | Charges: Group 2 | Will the acquittals in Group 1 preclude a retrial and/or require the court to dismiss Group 2? |
| Not guilty | Guilty (but vacated) | This was the question in *Wilson*. |

Justice Bridget M. McCormack, writing for a four-member majority including Chief Justice Robert P. Young Jr. and now-retired Justices Michael F. Cavanagh and Mary Beth Kelly,[632] concluded that subsequently vacated convictions have no preclusive effect, and thus the acquittals on the predicate home-invasion charge required the trial court to dismiss the compound felony of felony murder.[633]

First, McCormack concluded that *Powell* did not concern the viability of charges on *retrial*, rather the propriety of the court allowing an inconsistent guilty verdict to stand.[634] "The very application of the Double Jeopardy Clause necessarily requires more than one trial: Again, double jeopardy is irrelevant within the scope of a single prosecution . . . because the defendant is in continuing jeopardy in any single trial."[635] Similarly, the doctrine of collateral estoppel, just like double jeopardy, "necessarily presupposes some passage of time between a final adjudication of an issue at one time, and the threat of a subsequent adjudication of the same issue."[636] Rather than *Powell*, it was the *Yeager* holding precluding a retrial that controlled the outcome in *Wilson*.[637]

632. *Id.* at 108, 852 N.W.2d at 142.

633. *Id.*

634. *Id.* at 101–02, 852 N.W.2d at 139.

635. *Id.* at 102, 852 N.W.2d at 139 (citing Yeager v. United States, 557 U.S. 110, 117, 130 (2009)).

636. *Id.* at 103, 852 N.W.2d at 139.

637. *Id.*

McCormack contended that "a reversed count is not a final adjudication; by operation of law the finality of the conviction has been undone. By holding that a legal error required the reversal of a defendant's convictions, we have legally proclaimed that those convictions are no longer adjudications at all."[638] The justice pointed to two cases that supported the proposition that vacated convictions have no legal effect – one, where the Michigan Court of Appeals held that a sentencing court cannot consider a previously vacated conviction,[639] and in another, where the same court held that the prosecution cannot use a vacated conviction to impeach a defendant.[640] "A reversed conviction is of even less legal consequence than a hung count."[641] The appellate court's reversal of the felony-murder conviction rendered it a "nonevent" similar to a hung jury.[642] In essence, the acquittal on the predicate home-invasion charge was not contradicted, or "undisturbed" now that the felony-murder conviction no longer stood.[643] Thus, by removing from the collateral-estoppel analysis the jury's guilty verdict on the compound felony of felony murder, the only relevant verdict remaining was the acquittal on the predicate felony.[644] The state could not retry the defendant on felony-murder where the sole predicate felony was home invasion.[645] "We see no available way to bring that legally vacated conviction back to life."[646] Concluding, the justice noted that the state could retry the defendant on a second-degree murder charge because there was no determination as to whether Wilson murdered the victim, only as to whether he committed the predicate felony.[647]

Justice Stephen J. Markman, writing on behalf of a three-person minority that included Justices David F. Viviano and Brian K. Zahra,[648] would have affirmed the Court of Appeals' decision to permit the prosecution to retry the defendant on the felony-murder charge.[649] Markman emphasized that U.S. Supreme Court precedent provides that it is the defendant's burden "to demonstrate that the issue whose

638. *Id.* at 105, 852 N.W.2d at 141.
639. *Id.* at 105 n.5, 852 N.W.2d at 141 (citing People v. Holt, 54 Mich. App. 60, 63–64, 220 N.W.2d 205, 206–07 (1974)).
640. *Id.* (citing People v. Crable, 33 Mich. App. 254, 257, 189 N.W.2d 740, 742 (1971)).
641. *Id.* at 106 n.7, 852 N.W.2d at 141.
642. *Id.*
643. *Id.* at 106–07, 852 N.W.2d at 141–42.
644. *Id.*
645. *Id.*
646. *Id.* at 107, 852 N.W.2d at 142.
647. *Id.*
648. *Id.* at 108, 852 N.W.2d at 142 (Markman. J., dissenting).
649. *Id.* at 131–32, 852 N.W.2d at 155.

relitigation he seeks to foreclose was actually decided in the first proceeding."[650] Markman emphasized that the majority "entirely overlook[ed] that *defendant* bears the burden of demonstrating what issues of ultimate fact were decided during the first trial."[651]

When the jury renders an inconsistent verdict, Markman noted, "it is simply not possible" to determine whether the jury's factual determination was in the defendant's favor or in the prosecution's favor.[652] The justice suggested that it was quite possible that the jury acquitted Wilson of some charges (after convicting him of others) as a demonstration of mercy or due to mistake or compromise.[653] In focusing its collateral-estoppel analysis on the acquittal of home invasion, while ignoring that the felony-murder count remained unresolved (after the appellate court reversed the conviction for felony-murder), Markman contended that the majority "necessarily assumes that the acquittal on the predicate offense was proper — the one the jury really meant. This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent."[654] The justice observed that, in fact, in *Powell*, the U.S. Supreme Court held that "when the jury renders a truly inconsistent verdict, principles of collateral estoppel are 'no longer useful."[655] Here, where the jury convicted and acquitted in an irrational fashion, the verdict did not lend itself to having preclusive effect.[656] "Put in practical terms, absent a finding in the defendant's favor that is part of a rational and consistent verdict, the defendant cannot sustain his burden and prevail on a collateral-estoppel defense."[657] In overlooking the jury's verdict (that an appellate court later vacated), Markman continued, "run[s] afoul of *Ashe*'s requirement that a court reviewing a defense of collateral estoppel do so 'with an eye to all the circumstances of the proceedings."[658]

Markman rejected the majority's claim that he overlooked the fact that the appellate court vacated Wilson's felony-murder conviction.[659] The reversal nullified "only the *legal consequences* associated with the

650. *Id.* at 111, 852 N.W.2d at 144 (Markman, J., dissenting) (quoting Schiro v. Farley, 510 U.S. 222, 233 (1994) (internal quotations omitted).

651. *Id.* at 111 n.4, 852 N.W.2d at 144.

652. *Id.* at 115, 852 N.W.2d at 146.

653. *Id.* at 116–17, 852 N.W.2d at 147.

654. *Id.* at 118, 852 N.W.2d at 148 (internal quotations omitted).

655. *Id.* at 120–21, 852 N.W.2d at 149 (quoting U.S. v. Powell, 469 U.S. 57, 68 (1984)) (internal quotations omitted).

656. *Id.* at 123–24, 852 N.W.2d at 151.

657. *Id.* at 124–25, 852 N.W.2d at 151.

658. *Id.* at 125, 852 N.W.2d at 152 (quoting Ashe v. Swenson, 397 U.S. 436, 444 (1970)) (internal quotations omitted).

659. *Id.* at 127–28, 852 N.W.2d at 152–53.

conviction and not the *factual elements* of the first trial."[660] The justice conceded that if a court vacated a conviction, a prosecutor could not use that conviction to impeach a defendant, but he emphasized that the fact that the conviction was vacated did not render every aspect of the trial a nullity.[661] There would be no prohibition on the prosecution using the defendant's testimony at the prior trial to impeach his testimony in a later trial, even if the *conviction* was no longer valid.[662]

> When the ability to retry a defendant on a reversed conviction is foreclosed, the reversal, coupled with the inability to retry the defendant, necessarily implies something about defendant's guilt or innocence. The premise of a collateral-estoppel defense is that, on the basis of factual findings by a jury, defendant cannot be guilty of the charged offense, thus implying something about defendant's guilt or innocence . . . . [T]he majority opinion employs principles of collateral estoppel to forever foreclose the possibility of retrying defendant for first-degree felony murder, thus in fact implying something significant about defendant's guilt or innocence on that charge.[663]

Because the defendant was unable to establish that the jury "actually and necessarily determined any issue of ultimate fact," Markman would have declined to apply collateral estoppel and thus permitted the prosecution to retry the defendant on the charge of felony murder.[664]

*3. Mistrials and Retrials*

In a jury trial, jeopardy "attaches" (defendant is *in jeopardy*) once the court has sworn the jury.[665] In a bench trial, it attaches once the court begins taking testimony.[666] An exception to the Double Jeopardy Clause is that a trial court may grant a mistrial and *permit retrial*, if the defendant moves for or acquiesces to a mistrial, assuming "the consent

660. *Id.* at 127 n. 13, 852 N.W.2d at 153 n. 13.
661. *Id.*
662. *Id.* (citing United States v. Havens, 446 U.S. 620, 627–28 (1980)).
663. *Id.* at 128–29, 852 N.W.2d at 153.
664. *Id.* at 131–32, 852 N.W.2d at 155.
665. People v. Anderson, 409 Mich. 474, 482, 295 N.W.2d 482, 485 (1980) (citing Crist v. Bretz, 437 U.S. 28 (1978)).
666. People v. Hicks, 447 Mich. 819, 826–27, 528 N.W.2d 136, 139–40 (1994) (citing Serfass v. United States, 420 U.S. 377, 388 (1975)).

was not precipitated by prosecutorial or judicial goading."[667] The courts have held that mistrial should only occur after "an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial."[668] If there exists some remedy other than a mistrial that can restore fairness to the trial, the court should not grant a mistrial.[669]

Absent a request or consent from the defense, a mistrial and retrial may occur when there exists "manifest necessity."[670] Under *United States v. Perez*, trial courts should not declare a mistrial "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."[671] Such necessity can occur, for example, "when an impartial verdict cannot be obtained, or when a guilty verdict could be returned but would be reversed on appeal because of an obvious procedural error occurring during the trial."[672]

In *People v. Lane*, a case we first discussed in Part V.A.4, the defendant claimed on appeal that the trial court erred in denying his request for a mistrial after the jury heard the defendant's admission that he used to be in a gang.[673] The admission occurred during a recorded interview the prosecution played for the jury, which the prosecution redacted from the recording's audio pursuant to an agreement with the defense.[674] However, the prosecution, for some reason, did not remove the gang statement from the subtitles.[675] The prosecutor remarked, "I don't know what happened."[676] The trial court rejected the defendant's request for a mistrial and found that the error was unintentional and that a proper jury instruction could cure any prejudice.[677] Because "[t]he record does not support Lane's assertion that the prosecutor intentionally included the evidence," the appellate panel found the trial court did not

667. *Id.* at 828, 852 N.W.2d at 140 (citing Oregon v. Kennedy, 456 U.S. 667, 676 (1982)).

668. People v. Lane, 308 Mich. App. 38, 60, 862 N.W.2d 446, 460–61 (quoting People v. Schaw, 288 Mich. App. 231, 236, 791 N.W.2d 743, 746 (2010)).

669. *Id.* at 60, 862 N.W.2d at 461 (citing People v. Horn, 279 Mich. App. 31, 36, 755 N.W.2d 212 (2008)).

670. People v. Hicks, 447 Mich. 819, 828, 528 N.W.2d 136, 140 (citing United States v. Perez, 22 U.S. 579, 580 (1824)).

671. *Id.* at 829, 528 N.W.2d at 141 (quoting United States v. Jorn, 400 U.S. 470, 485 (1971)) (internal quotations omitted).

672. *Id.* at 830, 528 N.W.2d at 141.

673. *Lane*, 308 Mich. App. at 61–62, 862 N.W.2d at 461.

674. *Id.* at 61, 862 N.W.2d at 461.

675. *Id.*

676. *Id.*

677. *Id.*

abuse its discretion in denying Lane's request for a mistrial.[678] Accordingly, Judge Christopher M. Murray and now-retired Judges E. Thomas Fitzgerald and William C. Whitbeck, in a *per curiam* opinion, affirmed.[679]

#### *4. Multiple Punishments*

While case law is settled that the Double Jeopardy Clause generally "protects against multiple punishments for the same offense,"[680] this means only that the clause "protect[s] the defendant from having more punishment imposed *than the Legislature intended*" and does not prohibit more than one kind of punishment if the Legislature authorized those punishments.[681] "'The Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the Legislature.'"[682] In *People v. Hallak*, a case we discussed in Part IV.D, the defendant on appeal challenged his sentence to lifetime electronic monitoring (following his incarceration) as a violation of double-jeopardy principles.[683] The Michigan Court of Appeals, however, rejected the claim, noting the statutory grounds for electronic monitoring as part of Hallak's sentence.[684] "Because the Legislature intended that both defendant's prison sentence and the requirement of lifetime monitoring be sanctions for the subject crime, there was no double jeopardy violation[,]" the panel concluded.[685]

### *C. Privilege Against Self-Incrimination*

The Fifth Amendment further provides that no person "shall be compelled in any criminal case to be a witness against himself."[686] The Michigan Constitution has an identical provision.[687] While the Self-Incrimination Clause appears only in the Fifth Amendment, the U.S. Supreme Court has held that it nevertheless applies to the states via the

678. *Id.* at 61–62, 862 N.W.2d at 461.
679. *Id.* at 42, 862 N.W.2d at 451.
680. People v. Nutt, 469 Mich. 565, 574, 677 N.W.2d 1, 6 (2004).
681. People v. Hallak, 310 Mich. App. 555, 582, 873 N.W.2d 811, 827 (2015) (emphasis added) (quoting People v. Ford, 262 Mich. App. 443, 447–48, 687 N.W.2d 119, 119 (2004)).
682. *Id.* (quoting *Ford*, 262 Mich. App. at 447–48, 687 N.W.2d at 119) (additional citations omitted) (internal quotations omitted).
683. *Id.* at 583, 873 N.W.2d at 827.
684. *Id.*
685. *Id.*
686. U.S. CONST. amend. V.
687. MICH. CONST. art. I, § 17.

Due Process Clause of the Fourteenth Amendment.[688] Another restraint on the government is that a prosecutor may not comment at trial on a defendant's choice not to take the stand in his own defense.[689]

The Self-Incrimination Clause, and a long line of cases interpreting it, is arguably the most significant restraint on the prosecution's conduct and introduction of evidence in any criminal proceeding. Before a trial court will admit a confession, the court must be satisfied that it is *voluntary* – certainly not a product of conduct that breaks the will of a person the police interrogate.[690]

*1. Miranda and the Requirement that Incriminating Statements are Voluntary*

In *Miranda*, the high court went further and required that police officers must advise the person they interrogate of his rights.[691]

> If a person in custody is to be subjected to interrogation, *he must first be informed in clear and unequivocal terms that he has the right to remain silent.* For those unaware of the privilege, the warning is needed simply to make them aware of it - the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.[692]

Thus, before the prosecutors introduce a confession resulting from interrogation of an in-custody defendant, police must have read the defendant a *Miranda* warning.[693] Under *Doyle v. Ohio*, the prosecution

688. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

689. People v. Clary, 494 Mich. 260, 265, 833 N.W.2d 308, 312 (2013) (citing Griffin v. California, 380 U.S. 609, 615 (1965)).

690. Chambers v. Florida, 309 U.S. 227, 239–40 (1940).

691. Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).

692. *Id.*

693. People v. Mendez, 225 Mich. App. 381, 382–83, 571 N.W.2d 528, 528–29 (1997).

may not impeach a testifying defendant who received *Miranda* warnings with his post-arrest/post-*Miranda* silence, nor may it comment on the defendant's silence after receiving such warnings.[694]

In *People v. Tanner*,[695] the Michigan Supreme Court overruled past precedent and held that police officers need not inform an in-custody subject when an attorney for the arrestee is present and has made contact with police.[696] Justice Stephen J. Markman wrote the opinion for a five-member majority comprising Chief Justice Robert P. Young, Jr. and Justices David F. Viviano, Brian K. Zahra, and now-retired Justice Mary Beth Kelly.[697]

After his arrest for murder and receiving his *Miranda* rights, George Robert Tanner invoked his right to counsel.[698] The defendant later told a jail staffer that he wanted to "get something off his chest."[699]

> The psychologist told defendant that he should not further discuss the case with her, that he might wish to speak to an attorney, and that she could make arrangements for him to speak to the police officers. Defendant again stated that he wanted to 'get things off his chest,' so the psychologist told defendant that she would inform jail staff of his request. She then contacted the jail administrator and informed him that defendant wished to speak to police officers about his case.
>
> The administrator spoke with defendant, told him that the psychologist had indicated that he wanted to 'get something off his chest,' and inquired whether he still wished to speak to someone about his case. Defendant replied 'yes' and asked if the administrator could obtain an attorney for him. The administrator responded that he could not, because this was not his role, but explained that he could contact the police officers who were handling the case. Defendant replied that this would be fine, and the administrator contacted the officers. The administrator also called the prosecutor, who advised him that the court would appoint an attorney for defendant should he request one. The

694. *See* Doyle v. Ohio, 426 U.S. 610, 618–19 (1976); *see also Clary*, 494 Mich. at 265, 833 N.W.2d at 312 (citing *Doyle*, 426 U.S. at 618–19).

695. People v. Tanner, 496 Mich. 199, 853 N.W.2d 653 (2014).

696. *Id.* at 203–04, 853 N.W.2d at 656.

697. *Id.* at 257, 853 N.W.2d at 684.

698. *Id.* at 204, 853 N.W.2d at 656.

699. *Id.*

> prosecutor apparently informed the court of defendant's request, as a result of which an attorney was sent to the jail.[700]

An attorney did arrive at the jail and waited there as officers proceeded to interview Tanner as he made incriminating statements about the murder.[701] While the defendant waived his *Miranda* rights, the officers did not tell him that an attorney was at the department and available to consult with him.[702] The prosecution subsequently charged the defendant with open murder and mutilation of a dead body.[703]

The trial court suppressed the confession under *People v. Bender*,[704] which had held that police officers must promptly tell arrestees when an attorney is available,[705] or else render any *Miranda* waiver not "knowing and intelligent" and thus any resulting statements violative of the state constitution's prohibition against self-incrimination.[706] The Michigan Court of Appeals had denied the prosecution's interlocutory application for leave to appeal, but the Michigan Supreme Court granted leave to consider whether to overrule *Bender*.[707]

Under the U.S. Supreme Court's holding in *Moran v. Burbine*,[708] failing to inform the arrestee that an attorney is present "is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident."[709]

In *Moran*, now-retired Justice Sandra Day O'Connor, writing for a six-person majority,[710] held that a *Miranda* waiver is valid when a "*voluntary decision to speak* [i]s made with full awareness and comprehension of all the information Miranda requires the police to convey."[711] In *Bender* — which was binding precedent at the time of the facts of *Tanner* — the Michigan Supreme Court held that "'the *Michigan*

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700. *Id.* at 204–05, 853 N.W.2d at 656–57.
701. *Id.* at 205, 853 N.W.2d at 657.
702. *Id.*
703. *Id.*
704. People v. Bender, 452 Mich. 594, 620, 551 N.W.2d 71, 82 (1996).
705. *Id.* at 607, 551 N.W.2d at76.
706. People v. Tanner, 496 Mich. 199, 213, 853 N.W.2d 653, 662 (2014) (citing MICH. CONST. art I, § 17).
707. *Id.* at 206, 853 N.W.2d at 657 (citing People v. Lombreras, 493 Mich. 958, 828 N.W.2d 384 (2013)).
708. Moran v. Burbine, 475 U.S. 412 (1986).
709. *Id.* at 423.
710. *Id.* at 415.
711. *Id.* at 424 (emphasis added).

Constitution imposes a stricter requirement for a valid waiver of the rights to remain silent and to counsel than those imposed by the federal constitution.'"[712]

However, the *Tanner* court overturned *Bender*, explaining that "the lead and majority opinions in that case engaged in an unfounded creation of 'constitutional rights[.]'"[713] Examining the plain meaning of the clause appearing in the 1963 constitution,[714] the court saw no reason to interpret it differently than the federal clause, emphasizing that the constitution's prohibition on "compelled" incrimination focused on whether the confession itself was *voluntary*, with no bearing on the validity on whether an in-custody individual is capable of making a *knowing* waiver of her *Miranda* rights.[715] The panel also examined records from the Michigan constitutional convention of the early 1960s and found no clues that could assist the judges in interpreting the clause.[716] After reviewing pre-*Bender* case law, the justices concluded that the state constitution only requires a *voluntary* confession (and not a knowing waiver of one's *Miranda* rights).[717]

> Even after *Miranda* and *Bender*, this Court has referred to *Moran* for the appropriate "knowing and intelligent" waiver standard, and stated that "[t]o knowingly waive Miranda rights, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him" and "[l]ack of foresight is insufficient to render an otherwise proper waiver invalid."[718]

*Miranda* was a prophylactic rule, not a constitutional right in itself,[719] and "the *Miranda* warnings alone 'are sufficient to dispel

712. *Tanner*, 496 Mich. at 235 n.26, 853 N.W.2d at 673 n.26 (emphasis added) (quoting People v. Bender, 452 Mich. 594, 611, 551 N.W.2d 71, 78 (1996)).

713. *Id.* at 218, 853 N.W.2d at 664.

714. *Id.* at 225, 853 N.W.2d at 667 (citing Webster's Third New International Dictionary (1961)) ("[A]t the time of the ratification of Article 1, § 17, the word 'compel' referred to the use of coercion, violence, force, or pressure, all of which are relevant factors in assessing the genuine voluntariness of a confession.").

715. *Id.*

716. *Id.* at 227, 853 N.W.2d at 668.

717. *Id.* at 240–42, 853 N.W.2d at 676 (citing People v. Louzon, 338 Mich. 146, 153–54, 61 N.W.2d 52, 56 (1953) and People v. Conte, 421 Mich. 704, 721, 365 N.W.2d 648, 654 (1984)).

718. *Id.* at 244, 853 N.W.2d at 678 (quoting People v. Cheatham, 453 Mich. 1, 28–29, 551 N.W.2d 355, 367 (1996)).

719. *Id.* at 215, 853 N.W.2d at 662.

whatever coercion is inherent in the interrogation process.'"[720] Accordingly, the supreme court reversed the trial court's suppression of Tanner's confession and remanded the matter to the trial court.[721]

*2. Whether the State Can Prosecute Public Officers Who Must Make Statements to Protect Their Jobs After the State Discovers Those Statements are Lies*

In some situations, such as in internal investigations, a public officeholder (such as a police officer) can lose her job by invoking her Fifth Amendment privilege against self-incrimination.[722] In *Garrity v. New Jersey*, however, the U.S. Supreme Court held that such a "choice" — forfeiting one's job or incriminating oneself — is not a true choice, thus prosecutors may not introduce statements in criminal trials that are a product of such policies.[723] Writing for a five-member majority,[724] Justice William O. Douglas observed: "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."[725] The High Court equated such statements with *Miranda* violations, held such statements are *coerced* for the purpose of Fifth Amendment analysis and concluded that, in criminal cases, they "cannot be sustained as voluntary under our prior decisions."[726]

Similarly, state law provides that "[a]n involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding."[727]

During the *Survey* period, the Michigan Court of Appeals, in *People v. Hughes*, held that the Constitution and state law, however, do not operate to exclude *false* statements officers may make in *Garrity* situations, and thus *are* admissible in prosecutions for obstruction of justice, perjury, and similar crimes.[728] In doing so, the appellate court

720. *Id.* at 249, 853 N.W.2d at 681 (quoting Moran v. Burbine, 475 U.S. 412, 422–424, 427 (1986)).

721. *Id.* at 256–57, 853 N.W.2d at 684.

722. *See* Garrity v. New Jersey, 385 U.S. 493 (1967).

723. *See id.*

724. *See id.* at 493–94, 500.

725. *Id.* at 497.

726. *Id.* at 498.

727. MICH. COMP. LAWS ANN. § 15.393 (West 2015).

728. People v. Hughes, 306 Mich. App. 116, 128, 855 N.W.2d 209, 215 (2014), *appeal docketed,* People v. Harris, 497 Mich. 958, 858 N.W.2d 465 (2015).

overturned *People v. Allen*.[729] "[U]ntruths and false denials, . . . are not protected by the Fifth Amendment."[730] The Michigan Supreme Court, however, granted leave to appeal the court of appeals' ruling during the *Survey* period[731] and heard oral argument on November 4, 2015.[732] A decision is pending.[733]

### 3. *Asserting a Privilege on Behalf of a Non-Party Witness*

Michigan case law is clear that a party cannot assert another person's Fifth Amendment privilege.[734] Having said that, in the *Survey* period case of *People v. Allen*,[735] the Michigan Court of Appeals had occasion to observe that, when it appears that a witness is "intimately connected"[736] with the defendant's offense, "[t]he judge must hold a hearing outside the jury's presence to determine if the witness' [Fifth Amendment] privilege is valid, explaining the privilege to the witness."[737] If the court determines there is a valid privilege, the court cannot take the witness' testimony[738] unless the prosecution applies for, and receives from the court, a grant of immunity for that witness' testimony.[739] Because the defendant has no standing to assert another person's privilege, however, the defendant cannot raise a court's failure to properly *voir dire* a witness on appeal.[740]

729. *Id.* at 128, 855 N.W.2d at 215 (citing People v. Allen, 15 Mich. App. 387, 388, 166 N.W.2d 664 (1968)).

730. *Id.* (citing United States v. Wong, 431 U.S. 174, 178 (1977); United States v. Apfelbaum, 445 U.S. 115, 117 (1980)).

731. People v. Harris, 497 Mich. 958, 858 N.W.2d 465 (2015).

732. Michigan Courts, People v. Harris, Appellate Docket, ECF. 149872, http://courts.mi.gov/opinions_orders/case_search/Pages/default.aspx?SearchType=1&CaseNumber=149872&CourtType_CaseNumber=1 (last visited Feb. 3 2016).

733. *Id.*

734. People v. Wood, 447 Mich. 80, 90, 523 N.W.2d 477, 482 (1994); Paramount Pictures Corp. v. Miskinis, 418 Mich. 708, 715, 344 N.W.2d 788, 790 (1984).

735. People v. Allen, 310 Mich. App. 328, 872 N.W.2d 21, *appeal docketed*, 498 Mich. 910, 870 N.W.2d 293 (2015).

736. *Id.* at 345, 872 N.W.2d at 31, *appeal docketed*, 498 Mich. 910, 870 N.W.2d 923 (2015) (citing People v. Poma, 96 Mich. App. 726, 732, 294 N.W.2d 221, 222 (1980)).

737. *Id.* (quoting People v. Gearns, 457 Mich. 170, 202, 577 N.W.2d 422, 436 (1998), *overruled on other grounds*, People v. Lukity, 460 Mich. 484, 494, 596 N.W.2d 607, 612 (1999)).

738. *See id.* (citing People v. Paasche, 207 Mich. App. 698, 709, 525 N.W.2d 914, 919 (1994)).

739. MICH. COMP. LAWS. ANN. § 780.701 (West 2015).

740. *See Allen*, 310 Mich. App. at 342–43, 872 N.W.2d at 30.

## VI. THE SIXTH AMENDMENT

### *A. Speedy Trial*

The United States and Michigan Constitutions guarantee defendants the right to a speedy trial.[741] As part of the right to a speedy trial, a defendant is entitled to be sentenced in a reasonably prompt time.[742] The Michigan Supreme Court recently dealt with a related issue — whether a defendant had a statutory right to speedy *sentencing*. In *People v. Smith*, the court confronted whether the delayed-sentencing statute in "MCL 771.1(2) divests a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence."[743] MCLA § 771.1(2) states the following:

> In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082. When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay.[744]

The statute provides the maximum amount of time the judge may delay sentencing in order to provide defendant the chance to establish "his worthiness for leniency."[745] After a year, the court is required to sentence the defendant.[746]

In *Smith*, the defendant was charged with carrying a concealed weapon (which had previously been stolen from a nearby police department).[747] The defendant was permitted to plead guilty to the reduced charge of attempted CCW and the prosecution recommended a

741. U.S. CONST. amend. VI; MICH. CONST. art I, § 20; People v. Williams, 475 Mich. 245, 250, 716 N.W.2d 208, 212 (2006).

742. People v. Smith, 496 Mich. 133, 142, 852 N.W.2d 127, 133 (2014).

743. *Id.* at 134, 852 N.W.2d at 12.

744. MICH. COMP. LAWS ANN. §771.1 (West 2015).

745. *Smith*, 496 Mich. at 135, 852 N.W.2d at 129.

746. *Id.*

747. *Id.* at 135 n. 2, 852 N.W.2d at 129 n.2.

probationary sentence.[748] Defense counsel requested a delayed sentence over the prosecution's objection.[749] The judge expressed her displeasure with the fact that the defendant would incur a felony conviction. "Expressing its unhappiness with the prosecutor's position, the court stated that it would consider 'the delayed sentence with one day over a year; the [the court] would have lost jurisdiction.'"[750] On the record, the court scheduled sentencing within the year; however, the court's written order reflected a sentence date one day beyond the year.[751] On that date, the judge dismissed the case, finding that it had lost jurisdiction over the case.[752]

The prosecution appealed and the court of appeals denied leave.[753] However, the Michigan Supreme Court eventually reversed the sentencing judge's order of dismissal.[754] The court said that there was no legal basis for a judge to dismiss a case over the objection of the prosecutor even if more than a year had elapsed after the defendant's plea.[755] The court found that the judge had usurped the prosecutor's authority.[756] The court indicated that there was no basis for the judge to essentially trump the prosecutor's charging decision, much less dismiss the case after the defendant had pled to the charge.[757] The court also rejected the claim that a court lost jurisdiction to sentence a defendant after the year elapsed.[758] The court determined that to ensure a defendant's right to a speedy sentence, the court had to weigh "1) the length of delay, 2) the reason for delay, 3) a defendant's assertion of his right, and 4) prejudice to the defendant."[759] The court found that, considering those factors in Smith's case, the defendant had failed to show that the court lost jurisdiction to sentence him. The delay was one day past the statutory period, the reason for the delay was the trial court's efforts to circumvent the law, the defendant did not assert his desire to be sentenced beforehand, and there was no claim of prejudice.[760] Though the Michigan Supreme Court found that Michigan appellate courts apply the speedy trial factors to a delay in sentencing, the United States

748. *Id.* at 136, 852 N.W.2d at 129 n.2.
749. *Id.*
750. *Id.* at 136, 852 N.W.2d at 129.
751. *Id.* at 137, 852 N.W.2d at 130.
752. *Id.*
753. *Id.* at 138, 852 N.W.2d at 130.
754. *Id.* at 135, 852 N.W.2d at 129.
755. *See id.* at 140–41, 852 N.W.2d at 132.
756. *Id.* at 141, 852 N.W.2d at 132.
757. *Id.*
758. *Id.*
759. *Id.* at 142–43, 852 N.W.2d at 133.
760. *Id.* at 143, 852 N.W.2d at 134.

Supreme Court in *Betterman v. Montana* found that the Sixth Amendment's speedy trial guarantee does not apply to the sentencing phase of criminal prosecution.[761]

### B. *Effective Assistance of Counsel*

The Sixth Amendment guarantees a criminal defendant's right "to have the Assistance of Counsel for his defense."[762] Additionally, article 1, section 20 of the Michigan Constitution guarantees that a criminal defendant "shall have the right . . . to have the assistance of counsel for his or her defense . . . ."[763] The U.S. Supreme Court has recognized that "the right to counsel is the right to the *effective* assistance of counsel"[764] and the right to the effective assistance of counsel applies to the states via the Due Process Clause of the Fourteenth Amendment.[765] "[T]he intention underlying the Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel."[766]

In *Strickland v. Washington*, the Supreme Court of the United States stated that in order to receive a new trial on the basis of ineffective assistance of counsel, a defendant must establish that "counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[767]

However, the Court uniformly found constitutional error ("*Cronic* error") without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.[768]

*Woods v. Donald*[769] involved the absence of counsel during a portion of Cory Donald's trial.[770] Donald and two of his codefendants, Rashad Moore and Dewayne Saine, were tried for first-degree felony murder and

761. Betterman v. Montana, 136 S. Ct. 1609 (2016).

762. MICH. CONST. art. 1, § 20.

763. U.S. CONST. amend. VI.

764. Strickland v. Washington, 466 U.S. 668, 669 (1984).

765. Powell v. Alabama, 287 U.S. 45, 70 (1932).

766. People v. Vaughn, 491 Mich. 642, 669 n.104, 821 N.W.2d 288, 305 n.104 (2012) (citing People v. Pickens, 446 Mich. 298, 302, 521 N.W.2d 797, 799 (1994)).

767. *Id.* at 669, 821 N.W.2d at 305 (citing Strickland v. Washington, 466 U.S. at 688, 694 (1984)).

768. United States v. Cronic, 466 U.S. 648, 659 n.25 (1984).

769. Woods v. Donald, 135 S. Ct. 1372 (2015).

770. *Id.* at 1375.

two counts of armed robbery.[771] Donald's defense was that he was present at the scene of the crime but did not participate.[772] At trial, the government sought to admit a chart chronicling phone calls from the day of the crime among Moore, Saine, and a third party, Fawzi Zaya.[773] Moore and Saine's attorneys objected but Donald's attorney said "I don't have a dog in this race. It does not affect me at all."[774] The Court admitted the exhibit and took a recess.[775] When trial resumed, Donald's counsel was not present in the courtroom.[776] The Court proceeded without him because Donald's counsel had said that the exhibit and testimony did not apply to his client.[777] The attorney returned ten minutes later. [778] He again reiterated that he had no interest in that issue. Donald was subsequently found guilty on all three counts.[779]

Defendant claimed in the state appellate courts that he was entitled to a new trial due to his attorney's absence during the phone call testimony.[780] However, the Michigan Court of Appeals rejected his claim and the Michigan Supreme Court denied review.[781] The U.S. District Court for the Eastern District of Michigan granted federal habeas relief, however, and the Sixth Circuit affirmed.[782] Both courts found that, because counsel was absent during a critical phase of the proceedings, Woods was entitled to relief without a showing of prejudice and that Michigan courts had unreasonably applied clearly established federal law.[783] Federal courts may grant habeas corpus relief if the underlying state court decision was contrary to or involved unreasonable application of, clearly established federal law as determined by the Supreme Court.[784] The Sixth Circuit held that Donald's attorney provided *per se* ineffective assistance under *Cronic* when he was briefly absent during testimony during other defendants.[785]

771. *See id.*
772. *See id.*
773. *See id.*
774. *Id.*
775. *See id.*
776. *See id.*
777. *See id.*
778. *See id.*
779. *See id.*
780. *See id.*
781. *See id.*
782. *See id.*
783. *See id.*
784. 28 U.S.C.A. § 2254(d)(1) (West 2015).
785. *Woods*, 135 S. Ct. at 1374.

The U.S. Supreme Court disagreed in a unanimous *per curiam* opinion.[786] The High Court held that because none of its decisions clearly established that Donald was entitled to relief, Donald did not meet the standard for habeas relief.[787] The Court held that, to satisfy grounds for relief, a habeas petitioner is required to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement."[788] The Court determined that it had never addressed whether the rule it announced in *Cronic* applies to testimony regarding codefendants' actions and that, because none of its cases confronted the specific question presented in *Donald*, the state court's decision could not be contrary to any holding from the Supreme Court.[789] The Court also held that the state court's decision was not an unreasonable application of the court's cases because, "where the 'precise contours' of the right remain 'unclear', state courts enjoy 'broad discretion' in their adjudication of a prisoner's claims."[790] The Court concluded that "[w]ithin the contours of *Cronic,* a fair-minded jurist could conclude that a presumption of prejudice is not warranted by counsel's short absence during testimony about other defendants where that testimony was irrelevant to the defendant's theory of the case."[791] However, the Court expressed no view regarding the merits of the underlying Sixth Amendment principle.[792]

### *C. Right to Counsel of Defendant's Choice*

An indigent defendant is guaranteed the right to counsel under the Sixth Amendment.[793] The Michigan Court of Appeals in *People v. McFall* examined the circumstances in which an indigent defendant is dissatisfied with his or her appointed counsel.[794] The court emphasized that an indigent defendant "is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced."[795] Instead, substitution of counsel is only

786. *Id.*
787. *Id.* at 1377.
788. *Id.* at 1376 (citing Harrington v. Richter, 562 U.S. 86, 103 (2011)).
789. *Id.* at 1377.
790. *Id.*
791. *Id.* at 1377–78.
792. *Id.* at 1378.
793. People v. McFall, 309 Mich. App. 377, 382, 873 N.W.2d 112, 115 (2015).
794. *Id.* at 382–83, 873 N.W.2d at 115.
795. *Id.* at 382, 873 N.W.2d at 115 (citing People v. Traylor, 245 Mich. App. 460, 462, 628 N.W.2d 120, 122 (2001)).

allowed upon a showing of good cause and where substitution will not "unreasonably disrupt the judicial process."[796] The panel of Judge Henry William Saad, writing on behalf of a trio that included Judges Donald S. Owens and Kirsten Frank Kelly,[797] observed that good cause may exist where "'a legitimate difference of opinion develops between a defendant and his appointed counsel as to a fundamental trial tactic,' where there is a 'destruction of communication and a breakdown in the attorney-client relationship,' or where counsel shows a lack of diligence or interest."[798] On the other hand, "[a] mere allegation that a defendant lacks confidence in his or her attorney, unsupported by a substantial reason, does not amount to adequate cause. Likewise, a defendant's general unhappiness with counsel's representation is insufficient."[799]

In *McFall,* John Beman McFall requested new counsel after jury selection concluded.[800] After conviction, the defendant claimed on appeal that he should have received new counsel in his case because his attorney had prosecuted him for sex offenses in 1995 (and obtained the conviction that led to his imprisonment), waived the preliminary examination over his objection, did not communicate with him and provide him materials related to his trial, and disagreed on the defense to pursue.[801]

However, the Michigan Court of Appeals found that none of these assertions had merit.[802] The court pointed out that while the case had been pending the defendant *knew* that his attorney had previously prosecuted him but did not voice any concerns to his attorney until the night before trial.[803] Instead, earlier in the proceedings he had expressed his satisfaction with him.[804] Also, there was nothing in the record supporting defendant's other claims and therefore, he failed to show good cause for appointment of substitute counsel during the midst of trial.[805]

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796. *Id.* (citing *Traylor,* 245 Mich. App. at 462, 648 N.W.2d at 122).

797. *Id.* at 386, 873 N.W.2d at 116.

798. *Id.* at 383, 378 N.W.2d at 115 (citations omitted).

799. *Id.* (citing People v. Strickland, 293 Mich. App. 393, 398, 810 N.W.2d 660, 663 (2011)).

800. *Id.* at 380, 873 N.W.2d at 114.

801. *Id.* at 383, 873 N.W.2d at 115.

802. *Id.*

803. *Id.*

804. *Id.*

805. *See id.* at 383–384, 873 N.W.2d at 115.

## VII. SEPARATION OF POWERS

In *Makowski v. Governor,*[806] the Michigan Supreme Court grappled with whether courts have the authority to determine the scope of the executive's commutation powers under the Michigan Constitution.[807] Then-Gov. Jennifer Granholm had granted and then revoked a commutation to Matthew Makowski, prompting the inmate's attorney to sue the Governor, claiming the executive lacked authority to revoke a completed commutation.[808]

In 1998, Makowski had been a manager at a Dearborn health club and gave money to one of his employees to act as a courier to a bank to obtain a money order.[809] Makowski then conspired with a second employee and the employee's roommate to rob the courier en route to the bank.[810] The courier fought back and the employee's roommate stabbed and killed the courier.[811] Makowski was subsequently convicted of first-degree felony murder and armed robbery and sentenced to life in prison without the possibility of parole.[812]

In 2010, Makowski filed an application for commutation.[813] This application was considered by the parole board, which recommended that the case proceed to public hearing.[814] Notice had not been given to the victim's family since they had failed to register as crime victims under the Crime Victim's Rights Act.[815] On December 22, 2010, Granholm signed the commutation and sent the signed commutation to the secretary of state, who affixed the Great Seal and autopenned the secretary's signature to the commutation.[816] The Governor's deputy legal counsel then e-mailed several state officials announcing that Granholm had approved Makowski's request for commutation.[817]

On December 23, 2010, an attorney for the victim's family contacted the Governor's legal counsel objecting to the commutation as well as to the lack of notice.[818] On December 27, 2010, the Governor's deputy legal

806. *See* Makowski v. Governor, 495 Mich. 465, 852 N.W.2d 61 (2014) *as amended on rev.* (Sept. 17, 2014).
807. MICH. CONST. art. V, § 14.
808. *Makowski*, 495 Mich. at 469–70, 852 N.W.2d at 64.
809. *Id.* at 468, 852 N.W.2d at 64.
810. *Id.*
811. *Id.*
812. *Id.*
813. *Id.*
814. *Id.* at 468–69, 852 N.W.2d at 64.
815. *Id.* at 469, 852 N.W.2d at 64.
816. *Id.*
817. *Id.*
818. *Id.*

counsel delivered a letter from Granholm to the parole board chair directing the chair to halt all commutation proceedings and declared that the Governor intended to revoke the commutation.[819] Legal counsel then had all copies of the certificate of commutation destroyed.[820] Granholm subsequently left office and, on March 25, 2011, the parole board voted against recommending Makowski for commutation.[821] Governor Rick Synder then denied Makowski's commutation.[822] Makowski subsequently sued.[823]

Though the trial court determined that it lacked jurisdiction to consider the issue and the court of appeals agreed,[824] the Michigan Supreme Court reached the opposite conclusion.[825] The court indicated that, when considering whether the judicial branch has the authority to review an executive act, it must determine 1) whether the issue involved resolution of questions committed by the text of the constitution solely to the executive branch, 2) whether resolution of the question demand that a court move beyond areas of judicial expertise, and 3) whether "prudential considerations for maintaining respect between the three branches counsel against judicial intervention."[826]

The court determined that, although the Michigan Constitution provides the governor with the power to grant commutations, the executive lacks *sole* control of this power.[827] The constitution provides:

> The governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law. He shall inform the legislature annually of each reprieve, commutation and pardon granted, stating reasons therefor.[828]

The court also noted that the constitutional debate surrounding the pardon and commutation power suggested that the governor's power to grant commutations was in fact limited.[829] The court ultimately

819. *Id.*
820. *Id.*
821. *Id.*
822. *Id.* at 469–70, 852 N.W.2d at 64.
823. *Id.* at 470, 852 N.W.2d at 64.
824. *Id.*
825. *Id.* at 490, 852 N.W.2d at 75.
826. *Id.* at 472, 852 N.W.2d at 65 (citing Goldwater v. Carter, 444 U.S. 996, 998 (1979)).
827. *Id.* at 473, 852 N.W.2d at 66.
828. MICH. CONST. art. V, § 14.
829. *Makowski*, 495 Mich. at 473–76, 852 N.W.2d at 66–68.

concluded that the constitution granted the executive absolute discretion *regarding whether to grant or deny a commutation*, but restricted the procedure governing the exercise of a commutation to that which is provided by law.[830] The court found that resolving of the issue posed in the case did not encompass areas outside of judicial expertise.[831]

The court, in an opinion by now-retired Justice Michael F. Cavanagh which bore the signatures of all of his colleagues except Justice Brian K. Zahra, who concurred separately, and Justice Bridget M. McCormack, who did not participate,[832] held that the Governor completed all the steps legally required to grant Makowski a commuted sentence.[833] The court held that a commutation is complete "when it is signed by the Governor, signed by the Secretary of State, and affixed with the Great Seal."[834] The court also determined that the state constitution did not confer a power upon the Governor to revoke commutations except when the executive specifically grants a "conditional commutation" — which the Governor did not do in this case.[835] The court determined that once the Governor granted the commutation, the executive's attempt to revoke the commutation "impermissibly impinged upon the parole board's powers by wresting plaintiff away from its jurisdiction."[836]

## VIII. THE EIGHTH AMENDMENT

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[837] On appeal, the defendant in *Bosca*, a case we first discussed in Part V.A.5, contended that the trial court's requiring him to register as a sex offender following convictions for unlawful imprisonment (but no convictions for sexual misconduct) violated the prohibition on cruel and unusual punishment.[838] For reasons similar to those it articulated in denying the defendant's *ex post facto* claim, the court held that because SORA is a non-punitive civil regulatory scheme, it necessarily cannot be a punishment.[839] "SORA's registration requirement, as applied to adult offenders, does not constitute

830. *Id.* at 476, 852 N.W.2d at 68.
831. *Id.* at 477, 852 N.W.2d at 68.
832. *Id.* at 490, 852 N.W.2d at 75.
833. *Id.* at 486–87, 852 N.W.2d at 73.
834. *Id.* at 490, 852 N.W.2d at 75.
835. *Id.* at 487–88, 852 N.W.2d at 74.
836. *Id.* at 488, 852 N.W.2d at 74.
837. U.S. CONST. amend. VIII.
838. People v. Bosca, 310 Mich. App. 1, 56, 871 N.W.2d 307, 343 (2015).
839. *Id.* at 72, 871 N.W.2d at 351.

punishment and is, instead, structured or focused on the protection of the public."[840]

## IX. JOINDER AND SEVERANCE

### *A. Joinder of Multiple Defendants*

The Michigan Court Rules generally permit the prosecution to charge two defendants in the same information.[841] However, the rules require the court to sever the trials for unrelated offenses,[842] or related offenses "on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant."[843] Case law on the matter provides that such prejudice occurs when the defenses are antagonistic — when "it appears that one defendant may testify to exculpate [himself or herself] and to incriminate his or her codefendant."[844] Rather than merely present "inconsistent" defenses, the party seeking severance must show that the "tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other."[845]

In *People v. Bosca*, a case we first discussed in Part V, the defendant claimed the trial court erred in denying his request for a separate trial from his codefendant, Allen Brontkowski.[846] The appellate panel rejected Bosca's claim, observing that:

> With the exception of the drug charges against defendant, defendant and Brontkowski were charged with precisely the same crimes. The witnesses and evidence to be admitted on the shared charges did not vary between defendant and Brontkowski. Defendant and Brontkowski did not deny that the events transpired or that they participated in them. Both, however, challenged the intent element for their actions and asserted the right to defend a home against intruders. Because the defenses asserted at trial were fully consistent and in concert with one

840. *Id.* (citing People v. Pennington, 240 Mich. App. 188, 193–97, 610 N.W.2d 608, 610–12 (200)).

841. MICH. CT. R. 6.121(A).

842. MICH. CT. R. 6.121(B).

843. MICH. CT. R. 6.121(C).

844. *Bosca*, 310 Mich. App. at 44, 871 N.W.2d at 337 (quoting People v. Harris, 201 Mich. App. 147, 153, 505 N.W.2d 889, 892 (1993)).

845. *Id.* (quoting People v. Hana, 447 Mich. 325, 349, 424 N.W.2d 682, 692 (1994).

846. *Id.* at 43, 871 N.W.2d at 337.

> another and were neither mutually exclusive nor irreconcilable, there exists no basis or requirement for severance of the trials.[847]

### B. *Joinder of Multiple Charges Against the Same Defendant*

A prosecutor may charge a defendant with multiple crimes in the same charging document.[848] After charging, a trial court generally may also join multiple offenses in a single information or sever offenses from one information "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense."[849] Joinder is appropriate if the offenses are "related," which means "they are based on (a) the same conduct or transaction, or (b) a series of connected acts, or (c) a series of acts constituting parts of a single scheme or plan."[850] The court, however, must sever unrelated offenses upon a defendant's request.[851] Having said that, the rules provide that

> [o]ther relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.[852]

In *People v. Gaines*, a case we first discussed in Part V, the defendant argued on appeal that the trial court erred in joining the charges.[853] Judge Kurtis T. Wilder, however, writing on a behalf of a unanimous panel that included Judge Jane E. Markey and now-retired Judge E. Thomas Fitzgerald,[854] concluded that joinder was appropriate.[855]

Had the trial court held a separate trial for the offenses involving each different victim, the panel noted that the defendant's actions against *all* the victims would have been admissible in each of the trials pursuant

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847. *Id.* at 45, 871 N.W.2d at 337.
848. MICH. CT. R. 6.120(A).
849. MICH. CT. R. 6.120(B).
850. MICH. CT. R. 6.120(B)(1).
851. MICH. CT. R. 6.120(C).
852. MICH. CT. R. 6.120(B)(2).
853. People v. Gaines, 306 Mich. App. 289, 304, 856 N.W.2d 222, 235 (2014).
854. *Id.* at 324, 856 N.W.2d at 245.
855. *Id.* at 304, 856 N.W.2d at 235.

to section 27a of the Michigan Code of Criminal Procedure.[856] Furthermore,

> [t]he evidence demonstrated that defendant engaged in ongoing acts related to his scheme of preying upon young, teenage girls from his high school. In each case, defendant used text messages to communicate with the victims and encouraged them to keep their communications secret. In at least two cases, defendant requested naked photographs from the victims and, if they refused, threatened to cut off ties with them. He also used his parents' basement to isolate two of the young girls and sexually penetrate them.[857]

The court found that the facts of the case were not complex and there was a minimal likelihood of confusion.[858] Accordingly, the panel affirmed the defendant's convictions and sentences but vacated the restitution order (for unrelated reasons).[859]

## X. DNA TESTING

In 2001, the Legislature added a mechanism for defendants whose cases were otherwise final to petition for DNA testing.[860] Gilbert Lee Poole cited this statute when petitioning for DNA testing of evidence from a 1988 murder.[861] Poole had been convicted in 1989 for the slaying of Robert Meijia, whose body had been found in a field in Pontiac on

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856. *Id.* at 305, 856 N.W.2d at 235 (citing MICH. COMP. LAWS ANN. § 768.27a (West 2015)). This exception to the general prohibition on evidence establishing a defendant's *propensity* to commit crime (*see* MICH. R. EVID. 404(b)), provides that

> in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

MICH. COMP. LAWS ANN. § 767.27a(1) (West 2015).

857. *Gaines*, 306 Mich. App. at 305, 856 N.W.2d at 235.

858. *Id.*

859. *Id.* at 324, 856 N.W.2d at 245.

860. MICH. COMP. LAWS ANN. § 770.16 (West 2015).

861. People v. Poole, No. 315982, 2015 WL 4094486 (Mich. Ct. App. July 7, 2015), *appeal denied*, 871 N.W.2d 197 (Mich. 2015).

June 7, 1988.[862] There was blood covering Meijia's shirt and pants and an autopsy showed that he had sustained eight stab wounds, multiple superficial cuts and bruises, and a bite mark on his right arm.[863] The medical examiner indicated that he had died approximately forty-eight hours before his body had been discovered.[864]

Witnesses had identified Poole leaving a bar with Meijia on the night of June 5, 1988.[865] The defendant's then-girlfriend later reported to authorities that Poole had confessed to the murder.[866] She said that in June 1988, she and Poole had an argument about money and he left saying that he was "going out to get some money."[867] When he returned between 1:00 a.m. and 4:00 a.m., he was all scratched up and told her that he had been in a fight.[868] Poole also admitted that he killed someone.[869] He explained that he had gone to the bar (where the witnesses had placed Meija and the defendant together) and left with a man and had walked out to the woods where the defendant "pulled a knife on the guy and told him to give him all his money."[870] Poole then said that a fight ensued "with a lot of biting and scratching and pulling of hair."[871] The defendant told his girlfriend that he eventually slit the man's throat and said that there had been a lot of blood.[872] The girlfriend told Poole that she didn't believe him, but he "proved it" to her by retrieving a watch from his vehicle covered in blood.[873]

At trial, Melinda Jackson, an expert in serology, testified that the blood found on Meijia's clothing was type O, which matched Meijia's blood type.[874] There was also evidence that some blood found on stones and grass connected to the crime scene was type O.[875] Defendant possessed blood type AB.[876] Additionally, a stone found on Meijia's pants had type A blood on it.[877] Therefore the jury was informed that

862. *Id.*
863. *Id.*
864. *Id.*
865. *Id.*
866. *Id.*
867. *Id.*
868. *Id.*
869. *Id.*
870. *Id.*
871. *Id.*
872. *Id.*
873. *Id.*
874. *Id.*
875. *Id.*
876. *Id.*
877. *Id.*

none of the blood found at the crime scene matched the defendant's blood type.[878]

Poole had appealed his convictions but his appeals were rejected by both the Court of Appeals and Supreme Court.[879] On November 21, 2005, the defendant filed a motion for new trial relying in part on the DNA statute, MCLA § 770.16.[880] The trial court rejected defendant's motion and the court of appeals and supreme court rejected his subsequent appeals.[881] On July 10, 2008, Poole filed a petition in federal court which was denied and his subsequent appeals to the Sixth Circuit as well as the U.S. Supreme Court were unsuccessful.[882]

The defendant then filed a petition for DNA testing solely under MCLA § 770.16.[883] He sought testing of the bloody stones as well as other evidence.[884] The trial court denied his motion and the court of appeals found that the law of the case precluded consideration of defendant's motion. [885] The supreme court found, however, that the previous orders of the appellate courts did not have issue preclusive affect.[886] The supreme court also found "no provision set forth in MCL 770.16 prohibited the issuance of an order granting DNA testing of previously tested biological material" and remanded for the court of appeals to address defendant's issue.[887]

On remand, the court of appeals — in an opinion by Judge William B. Murphy on behalf of a unanimous panel comprising Judges David H. Sawyer and Michael J. Talbot — concluded that defendant was entitled to DNA testing, despite the fact that the jury had already been informed that the blood on the stone was not defendant's blood.[888] The court found that defendant had presented prima facie proof that the biological evidence sought to be tested was material to the question of defendant's identity as the perpetrator of the murder and that there was clear and convincing evidence that the defendant's identity as the perpetrator was at issue during his trial.[889]

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878. *Id.*
879. *Id.*
880. *Id.*
881. *Id.*
882. *Id.*
883. *Id.*
884. *Id.*
885. *Id.*
886. *Id.*
887. Alonzo v. State, 497 Mich. 1022, 862 N.W.2d 654 (2015).
888. *Poole*, 2015 WL 4094486.
889. M.C.L.A. § 770.16 states in pertinent part:

(1) Notwithstanding the limitations of section 2 of this chapter, a defendant convicted of a felony at trial before January 8, 2001 who is serving a prison

The court concluded that because the DNA testing could possibly connect another person to the crime scene or exclude defendant, the sample would have a logical relationship to the issue of identity. [890] It rejected the prosecution's argument that because the jury was already aware that the blood at the scene could not have been defendant's, testing would not relate to a material issue. [891] The court opined that the blood identified as consistent with the victim's blood type may or may not have been his blood, considering that other people had type O blood, and the blood identified as being inconsistent with both the victim and defendant's blood type suggested the possibility that another individual (with type O blood) was involved in the crime.[892] The court observed, "[r]easonable doubt would more likely flow from the identification of a specific individual, especially if the person was present in the area at the time of the murder, as opposed to a wholly unknown figure."[893] However, the order for DNA testing did not resolve the issue of whether

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sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing. Notwithstanding the limitations of section 2 of this chapter, a defendant convicted of a felony at trial on or after January 8, 2001 who establishes that all of the following apply may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing:

(a) That DNA testing was done in the case or under this act.
(b) That the results of the testing were inconclusive.
(c) That testing with current DNA technology is likely to result in conclusive results.

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(4) The court shall order DNA testing if the defendant does all of the following:
(a) Presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.
(b) Establishes all of the following by clear and convincing evidence:
(i) A sample of identified biological material described in subsection (1) is available for DNA testing.
(ii) The identified biological material described in subsection (1) was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted.
(iii) The identity of the defendant as the perpetrator of the crime was at issue during his or her trial.

MICH. COMP. LAWS ANN. § 770.16 (West 2015); *see also Poole*, 2015 WL 40944866.

890. *Poole*, 2015 WL 4094486.

891. *Id.*

892. *Id.*

893. *Id.*

defendant was entitled to a new trial.[894] That issue would be decided after the DNA results were received.[895]

## XI. RESOLUTION OF UNTRIED CHARGES AGAINST PRISONERS: THE 180-DAY RULES

### *A. Out-of-state prisoners: the Interstate Agreement on Detainers*

When an out-of-state jail or prison inmate faces charges in Michigan state courts, and is "wanted" in Michigan to face those charges,[896] he can trigger a 180-day time period during which prosecuting officials must bring the inmate to trial unless the trial court finds good cause to adjourn the matter.[897] This is required by the Interstate Agreement on Detainers (IAD), a compact to which Michigan subscribes.[898] In *People v. Duenaz*, the Michigan Court of Appeals held that the 180-day clock begins to run only when the officials incarcerating the prisoner transmit his request and appropriate certifications to Michigan, not when the inmate merely makes a request to move the case forward.[899] In other words, the time period depends on the speed in which out-of-state prison officials comply with an inmate's request to send a 180-day demand to Michigan.

The purpose of the act "is to encourage speedy disposition of pending charges and prevent undue interference with treatment and rehabilitation programs."[900] The pertinent wording of the compact provides is as follows:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint *on the basis of which a detainer has been lodged against the prisoner*, he shall be brought to trial

894. *Id.*

895. *Id.*

896. "A 'detainer' is generally a 'written notification filed with the institution in which a prisoner is serving a sentence advising that the prison is wanted to face pending charges in the notifying state.'" People v. Duenaz, 306 Mich. App. 85, 110 n.4, 854 N.W.2d 531, 546 n.4 (quoting People v. Gallego, 199 Mich. App. 566, 574, 502 N.W.2d 358, 364 (1993)).

897. *Id.* at 108, 854 N.W.2d at 546.

898. *Id.* at 108–09, 854 N.W.2d at 546 (citing MICH. COMP. LAWS ANN. § 78.608, art. III(a) (West 2015)).

899. *Id.* at 110–11, 854 N.W.2d at 547.

900. *Id.* at 108, 854 N.W.2d at 546 (citing People v. Wilden (*on rehearing*), 197 Mich. App. 533, 535, 496 N.W.2d 801, 802 (1992)).

> within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner *shall* be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.[901]

In *Duenaz*, a case we first discussed in Part V.B.1.b, the defendant was incarcerated in Arizona when he wrote the St. Clair County Prosecutor requesting information as to his then-pending CSC charges dating to 2008.[902] The prosecutor's office did not reply to the letter (which it received on May 17, 2010), which prompted Duenaz to write his Arizona warden on September 27, 2011.[903] The warden replied on September 29, 2011, in apparent error, that "'since the case is for a probation violation and not untried charges the IAD does not apply.'"[904] The defendant wrote another letter on November 2, 2011, this time to the prosecutor and clerk of St. Clair County, "demanding final disposition of the charges under the IAD."[905] He also twice wrote Arizona prison officials demanding that they process the documents necessary for him to trigger the IAD.[906] Arizona eventually transmitted the appropriate IAD certificate to the St. Clair prosecutor on December 19, 2011.[907] The prosecutor time-stamped its receipt of the notice on December 28, 2011.[908]

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901. *Id.* at 108–09, 854 N.W.2d at 547 (quoting MICH. COMP. LAWS ANN. § 780.601, art. III(a) (West 2015) (emphasis added to the statute from the Court of Appeals' opinion)).

902. *Id.* at 109, 854 N.W.2d at 546.

903. *Id.* at 109, 854 N.W.2d at 547.

904. *Id.*

905. *Id.* at 110, 854 N.W.2d at 547.

906. *Id.*

907. *Id.*

908. *Id.*

The trial began on June 5, 2012, 160 days after the Prosecutor received the December 28 IAD certificate.[909] On appeal, the Defendant contended that the 180-day clock had begun to run long before, on May 17, 2010, when the Prosecutor received the first letter he sent from Arizona.[910] If the defense were correct, the trial was 575 days late — 575 days outside the 180-day window.

A unanimous, *per curiam* panel of the Michigan Court of Appeals, however, agreed with the prosecutor and concluded that the 180-day clock began to run when the prosecution received the Arizona prison system's certificate.[911] Looking to what it characterized as the "plain language" of the IAD, the panel emphasized the requirement that the "the defendant 'shall have *caused to be delivered* to the prosecuting officer ... written notice of the place of his imprisonment and his request for a final disposition of the [charges.]'"[912] Judges Jane E. Markey, David H. Sawyer, and Kurtis T. Wilder[913] noted that the defendant's notice "*shall* be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, and other information required by Article III(a)."[914] Thus, because the prosecutor did not receive the notice *and* certificate until December 28, 2011, the 180-day clock did not begin until that date, and the trial occurred within the IAD timeline.[915] The appellate judges observed that the Michigan Supreme Court had interpreted in similar manner "nearly identical language, 'causes to be delivered,'" that appears in a similar 180-day rule for *in-state* prisoners facing untried charges.[916] In *People v. Lown*, Michigan's high court had held that the in-state 180-day rule begins "'on the day after the prosecutor receives the required notice from the [Department of Corrections.]'"[917]

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909. *Id.*

910. *Id.* at 108, 854 N.W.2d at 546.

911. *Id.* at 110–11, 854 N.W.2d at 547.

912. *Id.* at 110, 854 N.W.2d at 547 (quoting MICH. COMP. LAWS ANN. § 780.601, art. III(a) (West 2015) (emphasis added to the statute from the Court of Appeals' opinion)).

913. *Id.* at 115, 854 N.W.2d at 550.

914. *Id.* at 110–11, 854 N.W.2d at 547 (quoting MICH. COMP. LAWS ANN. § 780.601, art. III(a) (West 2015)) (emphasis added).

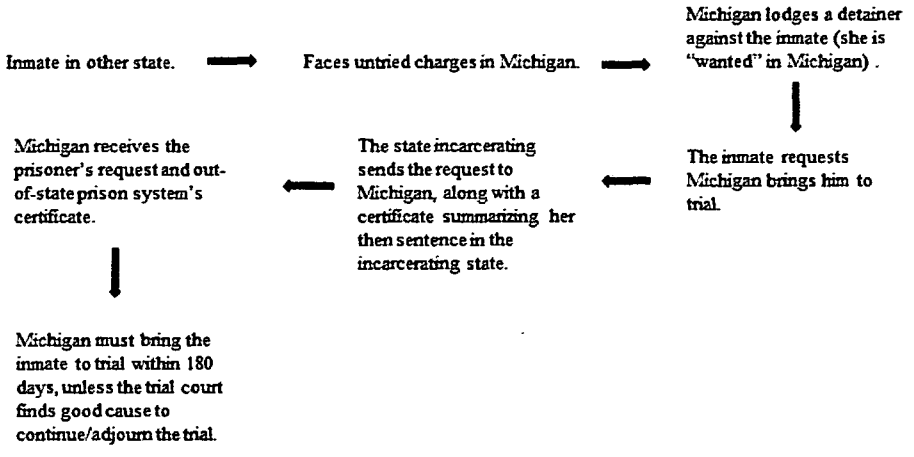
915. *Id.* at 111, 854 N.W.2d at 547–48 (citing Fex v. Michigan, 507 U.S. 43, 52 (1993)).

916. *Id.* at 111, 854 N.W.2d at 548 (citing People v. Lown, 488 Mich. 242, 260, 262, 794 N.W.2d 9, 10, 12 (2011)); *see also* the 180-day rule for in-state prisoners. MICH. COMP. LAWS ANN. § 780.131 (West 2015), MICH. CT. R. 6.004(D).

917. *Id.* (quoting *Lown*, 488 Mich. at 260, 262, 794 N.W.2d at 10, 12).

Accordingly, the panel rejected the defendant's claim that his trial was untimely under the IAD.[918]

**A Summary of the IAD's 180-Day-Rule**




*B. The 180-Day Rule for In-State Prisoners*

A "cousin" to the Interstate Agreement on Detainers' 180-day rule is the 180-day rule for in-state prisoners.[919] To trigger *this* 180-day rule, *actual* charges (and not the prison system's mere learning of an ongoing criminal investigation against a defendant) must be pending, stated the Michigan Supreme Court in a one-paragraph order reversing the Michigan Court of Appeals in *People v. Henderson*.[920] The statute requires the Department of Corrections, upon learning of any untried felony charges pending against one of its inmates, to deliver a notice to the prosecuting official requesting a final disposition of the charge or charges.[921] The prosecution, upon receiving the notice, must "proceed promptly and move the case to the point of readiness for trial within the

918. *Id.* at 111, 854 N.W.2d at 548.
919. MICH. COMP. LAWS ANN. § 780.131 (West 2015).
920. People v. Henderson, 497 Mich. 988, 861 N.W.2d 50 (2015).
921. MICH. COMP. LAWS ANN. § 780.131 (West 2015).

180-day period."[922] Failure to do so requires the trial court to dismiss the charges.[923]

To trigger the 180-day rule, *actual* charges must remain pending,[924] In *Henderson*, police who were executing a search warrant located two handguns in a duffel bag at the residence of Maurice Dante Henderson's mother, along with "many" other items that appeared to be the defendant's property.[925] The defendant admitted to police that he was aware of the guns, which suggested he was guilty of being a felon in possession of a firearm (FIP) and also of possessing a firearm during the commission of a felony (felony firearm, or FF).[926] Committing these crimes constituted a violation of Henderson's parole, which caused his return to the state prison system.[927] After the parole hearing, the Department of Corrections transmitted the following message to the Muskegon County prosecuting attorney:

> The above named prisoner is currently serving a term of incarceration in the Michigan Department of Corrections. We have received information that the above mentioned charge may be a pending violation in your jurisdiction. Thus, as required by MCL 780.131, we are providing you notice of this prisoner's location and status, and request final disposition of this matter. LEIN [the Law Enforcement Information Network] does not indicate the final status of this charge.[928]

The only problem was that it was May 3, 2012, and the Muskegon prosecutor did not initiate the charges until *July 12*.[929] One hundred eighty days after MDOC's letter was October 30, 2012. The 180-day period after the charges commenced was January 8, 2013. In any event, the matter did not go to trial by either date, prompting the trial court to dismiss the charges on March 28, 2013.[930] The trial court determined that, regardless of whether it started the 180-day clock at May 3 (before the charges issued) or July 12 (when the charges actually issued), the

922. People v. Henderson, No. 315983, 2014 WL 5793949, at *3 (Mich. Ct. App. Nov. 6, 2014) (quoting *Lown*, 488 Mich. at 246, 794 N.W.2d at 11) (internal quotation marks omitted), *reversed by* People v. Henderson, 497 Mich. 988, 861 N.W.2d 50 (2015).

923. MICH. COMP. LAWS ANN. § 780.133 (West 2015).

924. *Henderson*, 497 Mich. at 988, 861 N.W.2d at 50.

925. *Henderson*, 2014 WL 5793949, at *3.

926. *Id.* at *3–5 (citing MICH. COMP. LAWS ANN. §§ 750.224f (FIP); 750.227b (FF) (West 2015)).

927. *Id.* at *4.

928. *Id.*

929. *Id.* at *4–5.

930. *Id.* at *5–6.

prosecution's failure to go to trial constituted a violation of the 180-day rule.[931]

The Michigan Court of Appeals, in a *per curiam* opinion bearing the signatures of Judges Douglas B. Shapiro, William C. Whitbeck, and Cynthia Diane Stephens,[932] affirmed.[933] With little analysis,[934] the panel held that the May 3 "letter was sufficient to trigger the 180-day period."[935]

The Michigan Supreme Court, in lieu of granting the prosecutor's application for leave to appeal, reversed in a unanimous two-paragraph order.[936] The May 3 letter was "insufficient" to start the 180-day clock, the justices ruled.[937] "At the time that letter was sent, the Department did not have notice of any pending untried warrant, indictment, information, or complaint against the defendant, and the letter therefore did not meet the statutory requirements for applying the 180-day rule."[938] The justices remanded the matter to the intermediate appellate court to reconsider whether to affirm the trial court's decision in finding a 180-day violation by starting the clock on the date the prosecution filed the charges, an issue the panel did not originally address.[939]

## XII. WITNESS OATHS

Under Rule 603 of the Michigan Rules of Evidence, before taking his testimony, each "witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness'

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931. *Id.* at *6–7.

932. *Id.* at *15.

933. *Id.*

934. *Id.* at *8. The panel explained that, "the DOC did sent a notice as prescribed by MCL 780.131 via certified mail to the prosecutor. The DOC notice also complied with the other requirements of MCL 780.131. Michigan courts have consistently held that receipt of such a DOC request by the prosecutor triggers the 180-day rule." *Id.* at *3 (citing People v. Lown, 488 Mich. 247, 271, 794 N.W.2d 9, 25 (2011); People v. Williams, 475 Mich. 245, 259, 716 NW2d 208, 216 (2006)). The panel appears to have bifurcated the statute's requirement that DOC transmit the notice from the provision requiring it do so upon learning of the existence of "any untried *warrant, indictment, information, or complaint* setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction[.]" *Id.* at *1 (citing MICH. COMP. LAWS ANN. § 780.131(1) (West 2015)) (emphasis added).

935. *Id.* at *9.

936. People v. Henderson, 497 Mich. 988, 861 N.W.2d 50 (2015).

937. *Id.*

938. *Id.*

939. *Id.*; *Henderson*, 2014 WL 5793949, at *6–7.

mind with the duty to do so."[940] More specifically, section 1432 of the Revised Judicature Act provides that:

> [t]he usual mode of administering oaths now practiced in this state, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law except as otherwise provided by law. The oath shall commence, 'You do solemnly swear or affirm'.[941]

Section 1434 allows those who conscientiously object to swearing oaths to "solemnly and sincerely affirm, under the pains and penalties of perjury."[942] A unanimous panel of the Michigan Court of Appeals, in *People v. Putnam*, observed a conflict between the statute and court rule and held that the court rule prevails over the statute.[943] Thus, "witnesses need not raise their right hands when taking an oath to testify truthfully and such oaths need not be prefaced with any particular formal words[,] despite the statutory requirements to the contrary.[944]

A Wayne County jury convicted Michael Brian Putnam of second-degree murder and two counts of assault with intent to commit murder, along with several other felonies.[945] On appeal, Putnam claimed that the trial court erred in failing to adhere to the statutory requirements for swearing witnesses by, for example, asking one witness, "[C]an I get a promise that you will testify truthfully, please?" and another, "I need you to promise that the testimony that you're going to give will be accurate and truthful. So, do you promise?"[946] According to a *per curiam* opinion from Judges Christopher M. Murray, Joel P. Hoekstra, and Kurtis T. Wilder,[947] "[t]his oath was sufficient to awaken the witnesses'

940. MICH. R. EVID. 603.

941. MICH. COMP. LAWS ANN. § 600.1432(1) (West 2015).

942. MICH. COMP. LAWS ANN. § 600.1434 (West 2015).

943. People v. Putman, 309 Mich. App. 240, 870 N.W. 593 (2015). In reaching this conclusion, the court noted that, under the state constitution, it is the Michigan Supreme Court's duty to "establish, modify, amend and simplify the practice and procedure in all courts of this state." MICH. CONST. art. VI, § 5. Under prior case law, "when resolving a conflict between a statute and a court rule, the court rule prevails if it governs purely procedural matters." Donkers v. Kovach, 277 Mich. App. 366, 373, 745 N.W.2d 154, 159 (2007) (citing Staff v. Marder, 242 Mich. App. 521, 530–31, 619 N.W.2d 57, 63 (2000) and People v. Strong, 213 Mich. App. 107, 112, 539 N.W2.d 736, 740 (1995)). In *Donkers*, the Michigan Court of Appeals held that oaths and affirmations are "purely procedural matter[s]." *Id.*

944. *Id.* at 244 (citing *Donkers*, 277 Mich. App. 366, 372–73, 745 N.W.2d 154 (2007)).

945. *Id.* at 242, 870 N.W.2d at 596.

946. *Id.* at 245 n.1, 870 N.W.2d at 597 n.1.

947. *Id.* at 351, 870 N.W.2d at 600.

consciences and impress the witnesses' minds with the duty to testify truthfully."[948] The panel thus affirmed Putnam's conviction.[949]

## XIII. INCONSISTENT VERDICTS

Case law in Michigan remains clear that courts shall not disturb convictions by jury on the sole ground that guilty verdicts, in conjunction with acquittals on related counts, were logically inconsistent. "'[J]uries are not held to any rules of logic nor are they required to explain their decisions.'"[950] (Note, however, that acquittals on related counts can sometimes have preclusive effect for purposes of collateral-estoppel and double-jeopardy analysis if the prosecution must retry the defendant on other counts. See Part V.B.2 of this Article.) In *People v. Putnam*, a case we first discussed in Part XII, the jury convicted the defendant on several charges, including second-degree murder and armed robbery,[951] but acquitted him of first-degree felony murder.[952] It is apparent from the opinion that armed robbery was the predicate felony of the felony-murder charge.[953] In other words, if the jury believed the evidence supported a conviction for both murder and the predicate felony of armed robbery, how could it not convict the defendant of felony murder? Here, where the defense failed to establish "that the jury was confused, that they misunderstood the instructions, or that the jury engaged in an impermissible compromise[,]"[954] the unanimous appellate panel of Judges Christopher M. Murray, Joel P. Hoekstra, and Kurtis T. Wilder[955] denied the defendant's request to overturn the convictions.

## XIV. EX POST FACTO CHALLENGES

In *People v. Bosca*, a case we first discussed in Part V.A.5, the trial court, as part of the defendant's sentence on four counts of unlawful imprisonment, ordered the defendant to register as a sex offender.[956] When the defendant committed the crimes at issue in June 2011,

948. *Id.* at 245, 870 N.W.2d at 597.
949. *Id.* at 241, 870 N.W.2d at 600.
950. *Id.*
951. *Id.* at 242, 870 N.W.2d at 596.
952. *Id.* at 251, 870 N.w.2d at 600.
953. *Id.*
954. *Id.* at 251, 870 N.W.2d at 600 (citing People v. Lewis, 415 Mich. 443, 450–52, n.9, 330 N.W.2d 16 n.9 (1982) and People v. McKinley, 168 Mich. App. 496, 510–11, 425 N.W.2d 460 (1988)).
955. People v. Putman, 309 Mich. App. 240, 251, 870 N.W.2d 593, 600 (2015).
956. People v. Bosca, 310 Mich. App. 1, 55, 871 N.W.2d 307, 344 (citing MICH. COMP. LAWS ANN. § 28.721 *et seq.* (West 2015)).

unlawful imprisonment did not trigger the registration requirements of the Michigan Sex Offender Registration Act (SORA).[957] However, Public Act 17 of 2011 did incorporate unlawful imprisonment as a "listed offense" triggering registration when the victim is a minor.[958] The *ex post facto* clauses[959] operate to invalidate any law that (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a crime; or (4) allows the prosecution to convict on less evidence.[960]

The clauses, however, operate only in the context of punitive/penal measures.[961] Where the law does not operate to impose a punishment, *ex post facto* principles do not apply.[962]

On appeal, Bosca contended that the trial court's requiring him to register as a sex offender — a requirement that did not exist when he *committed* the crime — constituted a retroactive punishment and thus an *ex post facto* violation.[963]

A unanimous appellate panel, however, observed that Michigan case law is clear that SORA requirements are non-punitive.[964] Further, under *People v. Earl*,[965] retroactive application of *non-penal* restrictions or requirements does not violate the *ex post facto* clauses. Accordingly, the trial court's requiring defendant to register as a sex offender, "notwithstanding that defendant's offenses were committed before [the new SORA statute's] effective date, does not violate the ex post facto clause."[966]

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957. Sex Offenders Registration Act, MICH. COMP. LAWS ANN. § 28.721 *et. seq.* (West 2015).

958. *Bosca*, 310 Mich. App. at 58, 871 N.W.2d at 344 (citing MICH. COMP. LAWS ANN. §§ 28.722(s)(iii) (West 2015) (SORA statute); *Id.* § 750.349b (unlawful-imprisonment statute)).

959. U.S. CONST. art. I, §§ 9, 10; MICH. CONST. art. I, § 10.

960. People v. Earl, 495 Mich. 33, 37, 845 N.W.2d 721, 724–25 (2014) (citing Calder v. Bull, 3 U.S. 386, 390 (1798)).

961. *Id.* at 37–38.

962. *Id.*

963. *Bosca*, 310 Mich. App. at 60, 871 N.W.2d at 345.

964. *Id.* (citing People v. Pennington, 240 Mich. App. 188, 193–97, 610 N.W.2d 608, 610–13 (2000) and People v. Golba, 273 Mich. App. 603, 617, 729 N.W.2d 916, 925–26 (2007)).

965. *Earl*, 485 Mich. at 33, 845 N.W.2d at 721. One of this Article's authors — Meizlish — argued the Earl case on the state's behalf.

966. *Bosca*, 310 Mich. App. at 60, 871 N.W.2d at 345 (citing *Pennington*, 240 Mich. App. at 197, 610 N.W.2d at 613).

## XV. PRELIMINARY EXAMINATIONS

In Michigan, an individual facing felony charges has a right to a preliminary examination in district court before the prosecution may file an information charging her with a felony in circuit court (the trial court).[967] Unless the defendant waives her right to an examination,[968] the district court may only transmit the case to circuit court after finding probable cause that defendant committed a felony during a contested hearing in which the rules of evidence apply.[969] Various changes occurred to examination procedures in 2015.

Whereas a preliminary examination previously had to occur within fourteen days of the defendant's arraignment on the complaint and warrant,[970] the new court rule allows for a delay of up to twenty-one days — the district court must schedule a "probable cause conference" (PCC) to occur as late as fourteen days from arraignment, and an examination as late as seven days after the PCC.[971] The district court may adjourn the examination upon a showing of good cause.[972]

The PCC approximates a pre-examination scheduling conference.[973] Under the new court rule, district court magistrates may preside over the conference, but may not conduct the examination or take most pleas, including felony pleas.[974] On the other hand, the rules now specifically authorize district court *judges* to take felony pleas at the conclusion of the examination (or after the defendant has waived same) "if a plea agreement is reached between the parties."[975]

## XVI. BOND FORFEITURES

In 2014, the Michigan Supreme Court considered a case which was of particular interest to bond agencies. In *People v. Gaston (In re Forfeiture of Bail Bond)*, the state charged Corey Deshawn Gaston with home invasion, criminal sexual conduct in the first degree and kidnapping.[976] The bond agent posted a $50,000 bond to obtain Gaston's

967. MICH. COMP. LAWS ANN. § 767.42 (West 2015).
968. *Id.*
969. MICH. CT. R. 6.110(C).
970. 1997 MICH. PUB. ACTS 167.
971. MICH. CT. R. 6.104(E)(4).
972. MICH. CT. R. 6.110(B)(1).
973. MICH. CT. R. 6.108.
974. MICH. CT. R. 6.108(B).
975. MICH. CT. R. 6.111(A). The rule-drafters' inclusion of the words "between the parties" *appears* to suggest that a district court felony plea requires the prosecution's consent.
976. People v. Gaston, 496 Mich. 320, 323–34, 852 N.W.2d 747, 748 (2014).

release from jail.[977] However, on February 7, 2008, Gaston failed to appear at a scheduled conference and, on February 11, 2008, he failed to appear for trial.[978] The court ordered that Gaston be re-arrested and remanded to jail and that his bond be forfeited.[979] MCLA § 765.28(1) required, "After the default is entered the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear." MCR 6.102(I)(2) required that the court "must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bail or bond has been ordered, to anyone who posted bail or bond."[980]

However, in Gaston's case, the court did not mail the surety notice to appear to show cause why judgment should not enter (for forfeiture of the whole amount of the bond) until three years later, February 8, 2011.[981] Gaston was still at large at the time and was one of the U.S. Marshals Service's fifteen most-wanted fugitives.[982] Despite the bond company's claim that it did not receive sufficient notice, the trial court ruled against the surety.[983] The bond company subsequently appealed.[984]

The Michigan Supreme Court concluded there was no question that the trial court failed to provide the surety notice within seven days as required by the statute or "immediately" as required by the court rule.[985] The court of appeals, in *People v. Moore,*[986] had found that the trial court's failure to comply with the statute was not fatal because the Legislature had not provided a remedy when the court failed to comply.[987] However, in *Gaston,* the supreme court overruled *Moore.*[988] The supreme court noted that "shall" was a mandatory term, not a permissive one, and the Legislature had specifically amended the statute in 2002 changing the term "may" to "shall."[989] The court also observed that "whenever an act to be done under a statute is to be done by a public officer, and concerns the public interest or the rights of third persons, which require the performance of the act, then it becomes the duty of the

977. *Id.* at 323–24, 852 N.W.2d at 748.
978. *Id.* at 324, 852 N.W.2d at 748.
979. *Id.* at 324.
980. *Id.* at 326, 852 N.W.2d at 749.
981. *Id.* at 324, 852 N.W.2d at 748.
982. *Id.* at 325, 852 N.W.2d at 748.
983. *Id.* at 324, 852 N.W.2d at 748.
984. *Id.*
985. *Id.* at 326, 852 N.W.2d at 749.
986. People v. Moore, 276 Mich. App. 482, 740 N.W.2d 734 (2007).
987. *Gaston*, 496 Mich. at 326–27, 852 N.W.2d at 749.
988. *Id.* at 339, 852 N.W.2d at 755.
989. *Id.* at 327–28, 852 N.W.2d at 750.

officer to do it."[990] The court concluded that requiring the court to provide notice to the surety within seven days of a defendant's failure to appear protected the rights of the surety by enabling the bond company to promptly initiate a search for the absconder.[991] The court emphasized that a bond company's ability to recover and produce the absconding defendant declined with the passage of time.[992] In like manner, the court noted that the sooner the absconder was located, the safer the public would be.[993] The court ultimately vacated the trial court's orders to the extent that the orders forfeited the bail posted by the surety.[994]

## XVII. CONCLUSION

One of the interesting developments in Criminal Procedure is the trend toward broader protection for defendants under the Fourth Amendment. In *United States v. Jones*[995] and *Florida v. Jardines*,[996] the U.S. Supreme Court applied the common-law trespassory test in addition to the *Katz*[997] reasonable-expectation-of-privacy test. The Court determined that if an individual has an ownership interest in property, that property is protected under the Fourth Amendment.[998] Both the U.S. Supreme Court as well as the Michigan Supreme Court have applied this new expanded test to cases during this *Survey* period.[999]

One of the most significant Michigan cases regarding the Fifth Amendment, *People v. Tanner,* decided in this *Survey* period, signaled the Michigan Supreme Court's trend towards interpreting the protections encapsulated in the Michigan Constitution as consistent with the protection afforded under the U.S. Constitution.[1000] In prior years, as well as in *Tanner* itself, the court had overruled several Michigan cases interpreting the Michigan Constitution as affording more protection than

990. *Id.* (citing Agent of State Prison v. Lathrop, 1 Mich. 438, 444 (1850)).
991. *Id.* at 334, 852 N.W.2d at 753-54.
992. *Id.*
993. *Id.* at 331–332, 852 N.W.2d at 752.
994. *Id.* at 340, 852 N.W.2d at 756.
995. United States v. Jones, 132 S. Ct. 945 (2012).
996. Florida v. Jardines, 133 S. Ct. 1409 (2013).
997. Katz v. United States, 389 U.S. 347 (1967), stood for the proposition that the Fourth Amendment protects a person's "reasonable expectation of privacy." *Id.* at 360–61 (Harlan, J., concurring).
998. *Jones*, 132 S. Ct. at 949–50; *Jardines*, 133 S. Ct. at 1414.
999. Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015); Riley v. California, 134 S. Ct. 2473, 2484, 2489–91 (2014); People v. Hallak, 310 Mich. App. 555, 873 N.W.2d 811 (2015); People v. Gingrich, 307 Mich. App. 656, 658–59, 862 N.W.2d 432 (2014); In re Contempt of Dorsey, 306 Mich. App. 571, 584–85, 858 N.W.2d 84 (2014).
1000. People v. Tanner, 496 Mich. 199, 853 N.W.2d 653 (2014).

the U.S. Constitution.[1001] After the *Survey* period, the Michigan Supreme Court gained yet another new member with the retirement of Justice Mary Beth Kelly, who left the bench for private practice. The Governor appointed a new justice, Joan Larsen, who was a professor at the University of Michigan and had clerked for Justice Antonin Scalia. Her influence on the bench is yet to be seen.[1002] Already, the next *Survey* period is shaping up to be an interesting one and we look forward to the developments in the upcoming year. Again, do not hesitate to send any feedback to the authors.

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1001. *See id.* at 218, 853 N.W.2d at 664, *overruling* People v. Bender, 452 Mich. 594, 551 N.W.2d 71 (1996); People v. Nutt, 469 Mich.565, 596, 677 N.W.2d 1 (2004) (holding, when it overruled *People v. White*, 390 Mich. 245, 212 N.W.2d 222 (1973), "The *White* Court improperly imposed on the text of art 1, § 15 its own notions of prosecutorial policy and, in so doing, conflated the constitutional double jeopardy protection with a self-created procedural mandatory joinder rule. Because it is clear that the ratifiers of our 1963 Constitution intended to continue to accord the same double jeopardy protection under art 1, § 15 that was provided by the Fifth Amendment, we overrule *White* and its progeny as contrary to the will of the people of the state of Michigan."); People v. Davis, 472 Mich. 156, 695 N.W.2d 45 (2005) (holding, when it overruled People v. Cooper, 398 Mich. 450, 247 N.W.2d 866 (1976), "As noted in *Nutt*, the common understanding of the people at the time that our double jeopardy provision was ratified was that the provision would be construed consistently with the federal double jeopardy jurisprudence that then existed."); People v. Smith, 478 Mich. 292, 315, 733 N.W.2d 351 (2007) (holding, when overruling People v. Robideau, 419 Mich. 458, 355 N.W.2d 592 (1984), "We conclude that in adopting Const 1963, art 1, § 15, the ratifiers of our constitution intended that our double jeopardy provision be construed consistently with then-existing Michigan caselaw and with the interpretation given to the Fifth Amendment by federal courts at the time of ratification.")

1002. David Eggert, *UM law professor Joan Larsen appointed to Michigan Supreme Court*, CRAIN'S DETROIT BUSINESS (September 30, 2015), *http://www.crainsdetroit.com/article/20150930/NEWS01/150939859/um-law-professor-joan-larsen-appointed-to-michigan-supreme-court.*