MICHIGAN CRIMINAL LAW SURVEY

MATTHEW P. ALLEN,[†] GERALD J. GLEESON II,[‡] & JEFFREY A. CRAPKO[*]

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† Senior Principal, Miller, Canfield, Paddock, and Stone, PLC. B.A., 1997, State University of New York at Fredonia; J.D., 2000, Wayne State University Law School. Mr. Allen served as the Editor-in-Chief of the *Wayne Law Review*. Mr. Allen is a business, securities, and white collar defense lawyer with Miller Canfield. Mr. Allen is listed as one of the Best Lawyers in America, a Michigan Super Lawyer, and a Leading Lawyer. Prior to his employment at Miller Canfield, Mr. Allen clerked for the Honorable Lawrence P. Zatkoff, then the Chief Judge of United States District Court for the Eastern District of Michigan.

‡ Senior Principal, Miller, Canfield, Paddock, and Stone, PLC. B.A., 1992, Kalamazoo College; J.D., 1995, Wayne State University Law School. Mr. Gleeson is an experienced trial lawyer who focuses his practice on criminal defense and difficult civil matters. Mr. Gleeson is a Fellow of the American College of Trial Lawyers, and he has tried over 200 jury trials to verdict. Prior to joining Miller Canfield, Mr. Gleeson practiced as an Assistant Oakland County Prosecuting Attorney.

* Associate, Miller, Canfield, Paddock, and Stone PLC. B.A., *magna cum laude*, 2008, Kalamazoo College; J.D., with Honors, 2011, University of Chicago Law School. Mr. Crapko's practice consists of a mixture of criminal and commercial litigation. While in law school, Mr. Crapko served on the Managing Board of the *University of Chicago Law Review* as Topic Access and Recruitment Editor. Prior to his employment at Miller Canfield, Mr. Crapko clerked for the Honorable Helene N. White on the United States Court of Appeals for the Sixth Circuit and for the Honorable Robert H. Cleland on the United States District Court for the Eastern District of Michigan.

I. CONSTITUTIONAL LAW

A. Ex Post Facto: State and Federal Courts Find Unconstitutional Michigan's Sentencing Statute That Was Enacted in Response to the U.S. Supreme Court's Decision in Miller v. Alabama

1. People v. Wiley[1]

In *Wiley*, the Michigan Court of Appeals held that MCLA § 769.25a(6), a Michigan statute that eliminated disciplinary credits for prisoners re-sentenced to a term of years after initial sentences of life without parole, violated the Ex Post Facto Clause of the Michigan Constitution because the statute retroactively increased potential sentences for criminal acts that were completed before the statute took effect: "[W]e declare MCL 769.25a(6) to be unconstitutional."[2] Defendants were resentenced in response to the U.S. Supreme Court decision in *Miller v. Alabama* that held it unconstitutional to impose mandatory life without parole sentences on juveniles.[3] The authors of this Article have already seen the import of *Wiley* in various pro bono matters they and their firm have handled, in which juvenile offenders resentenced under *Miller* have been released on parole years before they otherwise may have been before *Wiley* was decided.

The *Wiley* decision is significant in several respects:

- The statute at issue, MCLA § 769.25a(6), was enacted by the Michigan Legislature based on a decision by the U.S. Supreme Court;
- *Wiley* was decided while another case involving the same defendants was pending before a federal trial court considering whether MCLA § 769.25a(6) violated the Ex Post Facto Clause under the United States Constitution;
- The parties in *Wiley* completely flipped their respective appellate positions mid-appeal based on various rulings in the federal case;
- The majority opinion in *Wiley* essentially adopted the federal court's reasoning on the ex post facto constitutional question;

1. People v. Wiley, 324 Mich. App. 130, 919 N.W.2d 802 (2018).
2. *Id.* at 168, 918 N.W.2d at 823.
3. *See* Miller v. Alabama, 567 U.S. 460 (2012).

- The *Wiley* court applied two different standards of review because one defendant preserved the constitutional ex post facto issue below and was thus entitled to de novo review, while the other defendant did not and was thus was entitled to the more deferential review of "plain error affecting the defendant's substantial rights;"[4] and
- The dissent in *Wiley* posited a persuasive position that the state court lacked subject matter jurisdiction to decide what the dissent suggested was essentially a parole decision within the exclusive province of the parole board and the executive branch of Michigan government.

2. The Michigan Legislature Enacts MCLA § 769.25(a) in Response to a U.S. Supreme Court Decision Holding that Mandatory Sentences of Life Without Parole Imposed On Juvenile Offenders Violate the Eighth Amendment

In the 2012 decision of *Miller v. Alabama*,[5] the U.S. Supreme Court held that it violated the Eighth Amendment's ban on cruel and unusual punishment to mandate a sentence of lifetime incarceration without the possibility of parole for a juvenile "regardless of their age and age-related characteristics and the nature of their crimes."[6] To remedy the constitutional violation, the Court required that the affected prisoners be resentenced and that mitigating factors be taken into consideration before a prisoner could be re-sentenced to life without parole.[7]

In 2014, the Michigan Legislature enacted MCLA § 769.25, "which set forth the procedure for resentencing criminal defendants who fit *Miller*'s criteria. . . ."[8] Anticipating that either the Michigan or United States Supreme Court would retroactively apply *Miller*, the Michigan Legislature enacted MCLA § 769.25a, which would retroactively apply *Miller* to cases that were final.[9] And, in fact, the United States Supreme Court in 2016 determined that "*Miller* was to be afforded retroactive application."[10] MCLA § 769.25a gave the state the option of moving to resentence a defendant to life without parole, and if not, then required the

4. *Wiley*, 324 Mich. App. at 149, 919 N.W.2d at 813.

5. *Miller*, 567 U.S. 460 (2012).

6. *Wiley*, 324 Mich. App. at 134, 919 N.W.2d at 805 (quoting *Miller*, 567 U.S. at 489).

7. *Id.* (quoting *Miller*, 567 U.S. at 489).

8. *Id.* at 137, 919 N.W.2d at 806.

9. *Id.*

10. *Id.* at 136, 919 N.W.2d at 806 (citing Montgomery v. Louisiana, 136 S. Ct. 718 (2016)).

court to resentence the defendant to a maximum term of imprisonment of sixty years, and a minimum term of not less than twenty-five or more than forty years.[11] However, the legislature included a provision in MCLA § 769.25a—MCLA § 769.25(a)(6)—that precluded defendants resentenced under *Miller* from having their minimum or maximum sentences reduced and their parole eligibility dates moved up by applying good time or disciplinary credits received pursuant to Michigan's Prison Code.[12]

The two defendants in *Wiley* were resentenced by the Wayne County Circuit Court to a term of years under MCLA § 769.25a and were denied application of disciplinary credits to their parole eligibility dates pursuant to MCLA § 769.25a(6).[13]

3. The Parties Swap Positions in Wiley Based on Federal Court Considering the Same Ex Post Facto Issue under the U.S. Constitution

Just "a few weeks" before the *Wiley* court issued its decision, the U.S. District Court for the Eastern District of Michigan ruled in a civil rights case that MCLA § 769.25a(6) violated the Ex Post Facto Clause of the U.S. Constitution.[14] Interestingly, the federal court also certified a class of plaintiffs challenging the statute—a class which included the named defendants in *Wiley*.[15]

The simultaneous consideration of the sentencing statute by state and federal courts caused some procedural jousting and "position-flopping" in *Wiley*. When defendants initially filed their appeal in *Wiley*, the People filed briefs challenging the court's subject matter jurisdiction to address the constitutionality of MCLA § 769.25(a).[16] The People argued that the questions of credits under MCLA § 769.25(a)(6) raised issues for the parole board to consider when determining eligibility for parole, a decision within the exclusive province of the department of corrections, not the judicial branch.[17] But after the U.S. Court of Appeals for the Sixth Circuit remanded the federal case to the federal trial court for a decision about whether MCLA § 769.25(a) violated the federal Ex Post Facto Clause, the People filed a motion to expedite decision of the *Wiley*

11. MICH. COMP. LAWS ANN. § 769.25a(4)(b)–(c) (West 2019).

12. *See* MICH. COMP. LAWS ANN. § 800.33(2)–(3), (5) (West 2019).

13. *Wiley*, 324 Mich. App. at 134, 919 N.W.2d at 805.

14. *Id.* at 154, 919 N.W.2d at 815 (citing Hill v. Snyder, 308 F. Supp. 3d 893, 911, 915 (E.D. Mich. 2018)).

15. *Id.* at 148, 919 N.W. 2d at 812.

16. *Id.* at 145–46, 919 N.W.2d at 810–11.

17. *Id.*

appeal "on the merits."[18] Concomitantly, defendants filed a motion to withdraw their appeals, now agreeing with the People's previous position that the court lacked subject matter jurisdiction over the ex post facto question—a motion which the People now opposed.[19] The court granted the People's motion to expedite the appeal and denied the defendants' motion to dismiss it, and the matter proceeded to argument before the court.[20]

There were two primary issues on appeal: (1) because MCLA § 769.25(a)(6) only applies to the department of corrections' use of disciplinary credits when calculating parole eligibility, it was argued the court had no subject matter jurisdiction on a criminal sentence appeal to decide issues of parole eligibility; but if the court did have subject matter jurisdiction, (2) whether MCLA § 769.25(a)(6) violated the Ex Post Facto Clause of the Michigan Constitution.

4. MCLA § 769.25(a)(6) and the Ex Post Facto Clause

First, the court noted that statutes are presumed constitutional and that the party opposing the statute must rebut the presumption by proving that the statute's unconstitutionality is clearly apparent.[21] The court then indicated that statutes which violate the ex post facto protections of the Constitution exhibit two elements: "(1) they attach legal consequences to acts before their effective date, and (2) they work to the disadvantage of the defendant."[22] "The critical question [for an ex post facto violation] is whether the law changes the legal consequences of acts completed before its effective date."[23] After finding that the Michigan Ex Post Facto Clause did not provide any broader protections than its federal counterpart,[24] the court looked to U.S. Supreme Court precedent to note that the Ex Post Facto Clause does not create a right to less punishment, but rather it is meant to ensure individuals receive fair notice before the government increases punishment "'beyond what was prescribed when the crime was first committed.'"[25]

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18. *Id.* at 148–49, 919 N.W.2d at 812.

19. *Id.*

20. *Id.* at 149, 919 N.W.2d at 812–13.

21. *Id.* at 151, 919 N.W.2d at 813.

22. *Id.* at 152, 919 N.W.2d at 814 (quoting People v. Callon, 256 Mich. App 312, 318, 662 N.W.2d 501 (2003)) (internal quotation marks omitted).

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

24. *Id.*

25. *Id.* at 153, 919 N.W.2d at 814–15 (quoting Weaver v. Graham, 450 U.S. 24, 29–31 (1981)).

Applying these principles to find application of MCLA § 769.25a(6) unconstitutional under the Michigan Constitution, the *Wiley* court adopted as its own the federal district court analysis finding the statute violative of the U.S. Constitution, which states in relevant part:

> The crux of Plaintiffs' claim . . . hinges on an interpretation of the good time and disciplinary credit statutes, and whether these statutes previously afforded credit to individuals who were sentenced to life without parole.
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> . . . [T]he Court concludes that state law regarding good time and disciplinary credits is unmistakably clear and solidly supports [the incarcerated] Plaintiffs' position. Before modification by the Michigan legislature in 2014, Michigan law regarding good time and disciplinary credits made no distinction based on whether the prisoner was serving a life sentence and allowed such a prisoner to earn credit if otherwise eligible.
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> * * *
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> Good time and disciplinary credits are applied to a prisoner's minimum and/or maximum sentence in order to determine his or her parole eligibility dates. Thus, if Michigan's statutory scheme permitted any Plaintiff to earn good time or disciplinary credits at the time the Plaintiff's crime was committed, the removal of such credits increases the Plaintiff's punishment and violates the Ex Post Facto Clause.[26]

After analysis of the relevant disciplinary credit statutes under the Michigan Prison Code, and the case law interpreting same, the court concluded that disciplinary and good time credits can still be earned and accrued by inmates serving life in prison given the chance, however slim, that those sentences could be reduced to terms of years, to which credits could be applied for earlier parole eligibility.[27]

Thus, the *Wiley* court held that the elimination of those credits pursuant to MCLA § 769.25a(6) for defendants resentenced under *Miller* "violates the Ex Post Facto Clause of the Constitution," and that the state

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26. *Id.* at 155–56, 919 N.W.2d at 816 (quoting Hill v. Snyder, 308 F. Supp. 3d 893, 900–11 (E.D. Mich. 2018)).

27. *Id.* at 155–63, 919 N.W.2d at 816–20.

"must apply good time and disciplinary credits in calculating parole eligibility dates for prisoners under [MCLA §] 769.25a."[28]

5. Subject Matter Jurisdiction

The *Wiley* majority rejected the argument that the court lacked subject matter jurisdiction because parole eligibility is within the "sole discretion" of the department of corrections.[29] According to the argument, any challenge to a parole decision must be made directly against the department of corrections in a habeas corpus or mandamus action, as opposed to appealing the sentence in the criminal case.[30] Rejecting the argument as "gamesmanship" by the People—partly because "appointment of counsel for the indigent is discretionary, not mandatory" in habeas and mandamus cases—the court pointed out the defendants were challenging the constitutionality of a statute, not a decision of the parole board.[31] So according to the court, it was "neither usurping nor trespassing on the parole board's authority and 'exclusive discretion to grant or deny parole.'"[32] In any event, the court noted that the Michigan Attorney General would represent the department of corrections, part of the executive branch, in any action against the parole board for any decision it made as to parole eligibility; and because the Michigan Attorney General was representing the People in the instant appeal, "the executive branch . . . has stated its position."[33]

6. The Dissent

In a well-reasoned dissent, Judge Boonstra took the position that the constitutional challenge was not properly before the court because the defendants in *Wiley* never challenged the sentences themselves but rather simply sought a declaration that the statute under which they were sentenced was unconstitutional.[34] Because defendants were not seeking relief from their convictions or their sentences as imposed by the trial court, they were not "aggrieved" parties that did not suffer "a concrete and particularized injury."[35] And the court rules limit the court's

28. *Id.* at 163, 919 N.W.2d at 820.
29. *Id.* at 146, 919 N.W.2d at 811.
30. *Id.* at 144–47, 919 N.W.2d at 810–12.
31. *Id.* at 146, 919 N.W.2d at 811.
32. *Id.* (quoting Hopkins v. Parole Bd., 237 Mich App 629, 637, 604 N.W.2d 686 (1999)).
33. *Id.*
34. *Id.* at 168–69, 919 N.W.2d at 823 (Boonstra, J., dissenting).
35. *Id.* at 176, 919 N.W.2d at 827 (Boonstra, J., dissenting).

jurisdiction over appeals by right "to those filed by an 'aggrieved party' from an order of the trial court."[36]

Because, in the dissent's view, the parties were seeking essentially declaratory relief that binds the parole board and department of corrections, the action should have been filed against these state agencies in the court of claims.[37] *A fortiori,* the court lacked jurisdiction because "the parties have not identified any errors by the trial court that they seek to have us correct, and the declaratory relief that defendants essentially sought (and plaintiff now seeks) was never even considered by a court with original jurisdiction over such matters."[38]

The dissent also posited that the ripeness doctrine precluded the court's consideration of the constitutional question because the disciplinary credits at issue for the defendants had not yet been finally determined; thus, the defendants had not yet sustained an actual injury, only a hypothetical one.[39] The dissent first noted that, under the Prison Code, disciplinary credits were deducted from a prisoner's sentence "in order to determine his or her parole eligibility date and discharge date."[40] Moreover, the prison warden and parole board could reduce or restore credits based on the prisoner's conduct.[41] Thus, according to the dissent, the Prison Code does not contain any language that a trial court may consider disciplinary credits then earned by a defendant upon resentencing "because the amount of credits earned is not yet known or even a sum certain — a defendant may gain and lose credits on the basis of his or her conduct in prison."[42] Rather, the parole board or department of corrections only consider these credits in the future to determine the prisoner's parole eligibility.[43] Therefore, when the defendants in *Wiley* were resentenced, they had not yet suffered any injury to their parole eligibility, and their claims were not ripe.[44]

The dissent found its point buttressed by the fact that a prisoner has no constitutional right to parole and may not appeal the denial of his or her parole by leave or as of right.[45] Instead, a prisoner must use the

36. *Id.* at 144–47, 919 N.W.2d at 810–12 (citing Mich. Ct. R. 7.203(A)).
37. *Id.*
38. *Id.*
39. *Id.* at 177, 919 N.W.2d at 828 (Boonstra, J., dissenting).
40. *Id.* (Boonstra, J., dissenting) (quoting MICH. COMP. LAWS ANN. § 800.33(5) (West 2019)).
41. *Id.* (Boonstra, J., dissenting) (citing MICH. COMP. LAWS ANN. § 800.33(8), (10), (13)).
42. *Id.* (Boonstra, J., dissenting).
43. *Id.* (Boonstra, J., dissenting).
44. *Id.* at 178, 919 N.W.2d at 828. (Boonstra, J., dissenting).
45. *Id.* (Boonstra, J., dissenting).

"'legal tools of habeas corpus and mandamus' actions in order to 'have the judiciary review the legality of an inmate's imprisonment.'"[46]

For these reasons, the dissent would not have reached the constitutional issue presented.[47]

B. There is No Constitutional Right to Counsel Before a One-Person Grand Jury

In *People v. Green*, the defendant argued that his trial counsel was ineffective because he failed to object to the use of a statutory "one-person grand jury"[48] to indict defendant on the basis that it unduly impinged on his Sixth Amendment right to counsel and to confront witnesses against him.[49] The court rejected the defendant's Sixth Amendment claims because the one-person grand jury is used only to determine whether criminal proceedings should be instituted against an individual by way of an indictment.[50] Because there is not yet a formal charge, there is not yet a constitutional right to counsel.[51] "Moreover, defendant did not have a statutory right to the presence of counsel at the one-person grand jury proceeding because defendant was not called before the grand jury."[52] Because the court found no constitutional right to counsel during grand jury proceedings, it rejected the defendant's claim that his trial counsel was ineffective.[53]

C. Defendant Can be Convicted of Both Possession and Delivery of Controlled Substances and Discovery Violations Did Not Warrant Mistrial

In *People v. Dickinson*,[54] the defendant, Dickinson, was convicted of delivery of a controlled substance, possession of a controlled substance, and furnishing a controlled substance to a prisoner.[55] The court convicted Dickinson of providing heroin to an inmate who she visited in prison.[56] The Michigan Court of Appeals rejected the double jeopardy argument

46. *Id.* at 178–9, 919 N.W.2d at 828 (Boonstra, J., dissenting) (quoting Morales v. Parole Bd., 260 Mich. App. 29, 42, 676 N.W.2d 221 (2003)).
47. *Id.* at 181, 919 N.W.2d at 829–30 (Boonstra, J., dissenting).
48. *See* MICH. COMP. LAWS ANN. §§ 767.3–4 (West 2019).
49. People v. Green, 322 Mich. App. 676, 682–83, 913 N.W.2d 385, 389 (2018).
50. *Id.* at 685, 913 N.W.2d at 390.
51. *Id.*
52. *Id.*
53. *Id.* at 687, 913 N.W.2d at 391.
54. People v. Dickinson, 321 Mich. App. 1, 909 N.W.2d 24 (2017).
55. *Id.* at 4, 909 N.W.2d at 28.
56. *Id.*

and affirmed the trial court's decision not to declare mistrial after a report was not provided to the defense.[57]

Defendant argued that the trial court violated the double jeopardy clause by convicting her of possessing and delivering the same controlled substance.[58] The court of appeals cited *People v. Miller*[59] for the proposition that the court must:

> [F]irst determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If the legislative intent is clear, courts are required to abide by this intent. If, however, the legislative intent is not clear, courts must then apply the abstract legal elements test... to discern legislative intent.[60]

After reviewing the elements of each offense and finding no express statement of legislative intent, the court applied the "abstract legal elements test" to discern legislative intent.[61]

Noting that possession is not a lesser, necessarily included offense of delivery, the court of appeals found that "[w]hile this defendant may indeed have possessed the heroin before delivering it, the prosecution was not required to prove possession to convict her of delivery, or vice versa."[62] The court stressed the "Supreme Court's directive" to "examine the abstract legal elements of the two offenses, rather than the fact of the case, to determine whether the protection against multiple punishments for the same offense has been violated."[63] Ultimately, the court found that "'[t]ransfer is the element which distinguishes delivery from possession.'"[64] And, "two offenses will only be considered be considered the 'same offense' where is impossible to commit the greater offense without also committing the lesser offense."[65]

A factual question remains, in that the defendant more than likely possessed with the intent to deliver the controlled substance, rather than merely possessing it for personal use, and then delivered it once she reached the prison. The prosecution's decision not to charge the more

57. *Id.*
58. *Id.* at 10, 909 N.W.2d at 31.
59. People v. Miller, 498 Mich. 13, 869 N.W.2d 204 (2015).
60. *Dickinson*, 321 Mich. App. at 11, 909 N.W.2d at 31 (quoting People v. Miller, 498 Mich. 13, 19, 869 N.W.2d 204 (2015)) (internal quotations omitted).
61. *Id.* at 14, 909 N.W.2d at 33.
62. *Id.* at 15, 909 N.W.2d at 33.
63. *Id.*
64. *Id.* at 12, 909 N.W.2d at 32.
65. *Id.* at 14, 909 N.W.2d at 33.

serious "intent to deliver" crime (or the jury's return of a lesser possession verdict) may have prevented the court from examining the jeopardy question in the proper legal context. Such charging decisions allow convictions for multiple felonies, which has consequences in various areas from sentencing guidelines to expungements.

In *Dickinson*, the Michigan State Police destroyed the container of the controlled substances—a balloon—which prevented the defendant from conducting DNA testing on it.[66] The court of appeals found that the prosecution was not required to perform a DNA test for defendant's benefit and that ". . . a failure to preserve the evidence does not amount to a due process violation unless the defendant establishes bad faith."[67] Noting that the defendant could only state that the balloon was "potentially exculpatory," the court found no evidence of bad faith, and, because the other evidence against the defendant was "overwhelming," the preservation of the balloon would not have changed the outcome of the trial.[68]

Likewise, the Michigan Court of Appeals denied relief where the prosecution failed to produce a second police report, regarding a drug detecting dog, as discovery to the defendant.[69] Noting the favorable admissions secured by defense counsel from the dog's handler, the court's review of the record led it to conclude that the disclosure of the report prior to trial would have made no difference to the outcome of the trial.[70]

D. Manufacturing and Possession of a Controlled Substance Do Not Violate Double Jeopardy and Personal Use Exemption Not Available For Cooking Methamphetamine

In *People v. Baham*,[71] the defendant pleaded guilty to manufacturing methamphetamine, operating a laboratory involving methamphetamine, and possession of methamphetamine.[72] Although the Michigan Supreme Court denied leave to appeal, the court remanded to the court of appeals for consideration as on leave granted.[73] The court of appeals rejected the defendant's arguments.[74]

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66. *Id.* at 6, 909 N.W.2d at 29.
67. *Id.* at 16, 909 N.W.2d at 34.
68. *Id.* at 17, 909 N.W.2d at 34 (internal citations and quotations omitted).
69. *Id.*
70. *Id.* at 20, 909 N.W.2d at 36.
71. People v. Baham, 321 Mich. App. 228, 909 N.W.2d 836 (2017).
72. *Id.* at 231, 909 N.W.2d at 838–39.
73. *Id.* at 231–32, 909 N.W.2d at 839.
74. *Id.* at 232, 909 N.W.2d at 839.

1. Personal Use Exemption/Ineffective Assistance of Counsel

The defendant argued that his manufacturing plea should be set aside because there is a personal use exception to prohibitions on manufacturing a controlled substance in MCLA § 333.7106(3)(a).[75] Because the defendant challenged the accuracy of his plea and did not move to withdraw his plea in the trial court, MCR 6.310(D) precluded appellate review.[76] Therefore, the court only reviewed the ineffective assistance of counsel issue.[77]

"Effective assistance of counsel is presumed," and, in this case, a "defendant bears a heavy burden to prove otherwise."[78] In order to demonstrate ineffective assistance of counsel, a defendant must show that: (1) trial counsel's performance was deficient; and (2) the deficient performance prejudiced the defense.[79] An attorney's performance is deficient if it falls below an objective standard of reasonableness and a deficient performance prejudices the defense is "it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different."[80]

The court dispensed with the defendant's argument by holding that ". . . it is also readily apparent that the personal-use exception applies only to a controlled substance already in existence, and it does not encompass the creation of a controlled substance."[81] The court found that the "plain intent of the statutory personal use exception is to avoid imposing felony liability on individuals who, already in possession of a controlled substance, make it ready for their own use or combine it with other ingredients for use."[82] It is also an affirmative defense.[83] As a result, "one may not claim the personal-use exception for making or cooking methamphetamine."[84]

The defendant admitted to cooking and making methamphetamine during his plea colloquy.[85] The alleged failure by the trial court to exclude the possibility of personal use was immaterial and did not

75. *Id.* at 240, 909 N.W.2d at 843. Manufacturing has six associated activities. The exception only applies to two: preparation and compounding. It does not apply to production, propagation, conversion or processing. *Id.*

76. *Id.* at 235, 909 N.W.2d at 840.

77. *Id.* at 234, 909 N.W.2d at 840.

78. *Id.* at 236, 909 N.W.2d at 841 (internal citations and quotation omitted).

79. *Id.*

80. *Id.*

81. *Id.* at 240, 909 N.W.2d at 843.

82. *Id.*

83. *Id.* at 243–444, 909 N.W.2d at 845.

84. *Id.* at 242, 909 N.W.2d at 844.

85. *Id.* at 232, 909 N.W.2d at 839.

undermine the plea.[86] Having pleaded guilty with an adequate factual basis, and the personal-use exception being unavailable, trial counsel was not ineffective for failing to raise meritless claims in the trial court.

2. Double Jeopardy

The Michigan Court of Appeals held that convictions for possession and manufacture of methamphetamine do not violate double jeopardy. A comparison of the statutes at issue showed that:

> [M]anufacturing methamphetamine requires proof the defendant manufactured methamphetamine, while a conviction of possession of methamphetamine does not require proof of manufacturing. Conversely, possession of methamphetamine requires proof that the defendant possessed methamphetamine, while proof of manufacture of methamphetamine does not require proof of possession.[87]

The court of appeals did not ignore the "practical reality" that in many cases proof of manufacturing a controlled substance would also establish possession of the controlled substance.[88] But "[b]ecause it is not impossible to manufacture a controlled substance without also possessing that controlled substance, there is no double-jeopardy violation arising from convictions for manufacture and possession of the same substance."[89]

II. CRIMINAL PROCEDURE

A. Appointment of Special Prosecutor to Handle Resentencing Under Prior Prosecutor's Motion Filed Pursuant to the U.S. Supreme Court Decision in Miller v. Alabama Did Not Require a New, and Thus Untimely, Motion by The Special Prosecutor

In *People v. Hayes,*[90] the Oakland County Prosecutor's Office filed motions pursuant to MCLA § 769.25a(4)(b) to resentence three defendants to life without the possibility of parole.[91] The defendants had received this as a mandatory sentence when they were juveniles, which

86. *Id.* at 243, 909 N.W.2d at 845.
87. *Id.* at 248, 909 N.W.2d at 847.
88. *Id.*
89. *Id.* at 250, 909 N.W.2d at 848.
90. People v. Hayes, 323 Mich. App. 470, 917 N.W.2d 748 (2018).
91. *Id.* at 479, 917 N.W.2d at 748.

the Supreme Court subsequently found unconstitutional in *Miller v. Alabama*.[92]

Defendants filed motions to disqualify the prosecutor because she had previously served as the trial and sentencing judge when they were sentenced to mandatory life without parole as juveniles.[93] While the motions were pending, the prosecutor filed a motion with the Michigan Attorney General to appoint a special prosecutor in defendants' cases pursuant to MCLA § 49.160.[94] The Attorney General granted the request, took over the prosecution, and exercised its independent judgment not to withdraw the prosecutor's motions seeking a sentence of life without parole.[95]

Defendants argued that the prosecutor's disqualification should operate "retroactively," thus requiring that the prosecutor's timely motions for imposition of a life without parole sentence be stricken, the effect of which would bar the Attorney General from re-filing the motion because it would be untimely under MCLA § 769.25(4)(b).[96]

The court rejected this argument based on a plain reading of the statute that vested the Attorney General with power as the special prosecutor, MCLA § 49.160:

> MCL 49.160(2) provides, in pertinent part, that "the attorney general may elect *to proceed* in the matter . . . ." (Emphasis added.) To "proceed" means to go forward, to continue, to go on, to move along, or to advance. Accordingly, under MCL 49.160(2), when the Attorney General, upon request, intervened in the three cases and took over the prosecutions in regard to sentencing, the Attorney General did so for purposes of going forward or continuing the existing cases, wherein the motions for mandatory life sentences had already been timely filed. The procedural history of the case up to that point in time was not wiped out by the transfer of prosecutorial power from the prosecutor to the Attorney General.[97]

92. *Id.* at 474–75, 917 N.W.2d at 750; *see supra* notes 5—51 and accompanying text.
93. *Id.*
94. *Id.* at 475, 917 N.W.2d at 750.
95. *Id.* at 476, 917 N.W.2d at 750–51.
96. *Id.*
97. *Id.* at 477, 917 N.W.2d at 752 (internal citations omitted).

B. Tolling Provisions Bind Defendant to New Limitations Periods Reviving Claims That Would be Stale Under Previous Limitations Periods

In *People v. Kasben,*[98] defendant was charged in 2015 with first-degree criminal sexual conduct (CSC-I) for the 1983 act of sexual intercourse with his sister.[99] Defendant argued that CSC-I charged was barred by the 6 year limitations period applicable to such claims in 1983 pursuant to MCLA § 767.24.[100] The court rejected this argument and held that defendant was subject to the limitations period enacted in 2001, which amended MCLA § 767.24 to permit CSC-I charges to be filed at any time.[101]

In so holding, the court held that defendant's absence from the state of Michigan since 1989 tolled the limitations period under MCLA § 767.24(10) for any period of time defendant did not "usually and publicly reside" in Michigan.[102] Defendant's absence from the state caused him to miss two iterations of the limitations period in MCLA § 767.24 that would have barred the CSC-I charges.[103] In 1987, before the original six year limitations period would have barred the 1983 charge, the Legislature amended MCLA § 767.24 to provide for a limitations period that is the later of six years or the victim's twenty-first birthday.[104] This extended the limitations period to 1991, the victim's twenty-first birthday.[105] But at the time of the victim's twenty-first birthday, the defendant was not "usually and publicly" residing in Michigan, having left sometime in 1989 or 1990.[106] And before defendant returned to Michigan in 2004, the Legislature again amended MCLA § 767.24 to remove any limitations period for a CSC-I charge, which then applied to the 1983 charge.[107] Thus, defendant was timely prosecuted in 2015 for his 1983 act of CSC-I.

98. People v. Kasben, 324 Mich. App. 1, 919 N.W.2d 463 (2018).
99. *Id.* at 3–4, 919 N.W.2d at 464–65.
100. *Id.* at 5, 919 N.W.2d at 465.
101. *Id.* at 10–11, 919 N.W.2d at 468.
102. *Id.* at 8–9, 919 N.W.2d at 467.
103. *Id.* at 10, 919 N.W. 2d at 468.
104. *Id.* at 4, 919 N.W.2d at 464.
105. *Id.*
106. *Id.*, 919 N.W.2d at 465.
107. *Id.*

C. Sufficiency of Miranda Warnings

In *People v. Mathews*,[108] the court held that *Miranda* did not require police to inform suspects that they could cut off questioning at any point, but that a warning that the suspect had the "right to a lawyer" did not "adequately inform defendant of her right to have an attorney present before and during the interrogation."[109]

Miranda requires the police to provide four essential warnings to a suspect:

> [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[110]

Police are not required to provide a verbatim recital of *Miranda;* a "fully effective equivalent will suffice."[111]

The *Mathews* court found that the "right to remain silent" warning did not require a further warning that the defendant had the right to cut off questioning at any point in the interrogation.[112] "Instead, the right to end the interrogation is merely a means of exercising the right to remain silent."[113]

However, the court did find that warning a suspect that he has the "right to a lawyer" did "not adequately inform defendant of her right to have an attorney present before and during the interrogation."[114] "We conclude that the essential information required by *Miranda* includes a temporally-related warning regarding the right to consult an attorney and to have an attorney present during the interrogation, not merely general information regarding the 'right to an attorney.'"[115]

> In this case, neither [detective] explained to defendant that she had the right to the presence of counsel. Although defendant was

108. People v. Matthews, 324 Mich. App. 416, 922 N.W.2d 371 (2018).

109. *Id.* at 429, 922 N.W.2d at 378.

110. *Id.* (quoting Florida v. Powell, 559 U.S. 50, 59 (2010) (quoting Miranda v. Arizona, 384 U.S. 436, 479 (1966))).

111. *Id.* at 425, 922N.W.2d at 376 (quoting Duckworth v. Eagan, 492 U.S. 195, 202 (1989)).

112. *See id.* at 428–29, 922 N.W.2d at 377–78.

113. *Id.* at 428, 922 N.W.2d at 378.

114. *Id.* at 429, 922 N.W.2d at 378.

115. *Id.* at 438, 922 N.W.2d at 383.

> generally advised that she had a right to an attorney, this broad warning failed to reasonably convey to defendant that she could consult an attorney before she was questioned and during her interrogation. Because defendant was not adequately advised of her right to the presence of counsel, her subsequent statements are inadmissible at trial. Accordingly, the trial court did not err by granting defendant's motion to suppress statements.[116]

D. For Delivery of a Controlled Substance Causing Death, Venue Lies in the County in Which the Controlled Substance was Delivered

In *People v. McBurrows*,[117] the defendant was charged with delivery of a controlled substance causing death (fentanyl).[118] The defendant challenged the venue of the action (Monroe County Circuit Court) based on the fact that although the death occurred in Monroe County, the act of delivering the substance occurred in Wayne County.[119] Generally, venue lies in the county in which the crime was committed.[120] The statute at issue provided:

> A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person ... that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.[121]

This is a general intent crime, in that it does not require the defendant's intent that the death occur, just that the outlawed substance be placed into a stream of commerce and ultimately cause another person's death.[122] The court explained that the statute is therefore properly understood as a penalty enhancement when the underlying act (delivery of a controlled substance) has the result of causing a death.[123] The act itself is complete upon the delivery of the controlled substance, which is when criminal liability attaches.[124] Because the only criminal act

116. *Id.* at 441, 922 N.W.2d at 385 (internal quotation marks omitted).
117. People v. McBurrows, 322 Mich. App. 404, 913 N.W.2d 342 (2017).
118. *Id.* at 409–10, 913 N.W.2d at 345.
119. *Id.*
120. *Id.* at 412, 913, N.W.2d at 346.
121. MICH. COMP. LAWS ANN. § 750.317a (West 2019).
122. *McBurrows*, 322 Mich. App. at 412, 913 N.W.2d at 346.
123. *Id.* at 413, 913 N.W.2d at 347.
124. *Id.*

occurred in Wayne County, venue properly lay in Wayne County.[125] In so holding, the court rejected the prosecution's argument that the criminal poisoning statute allowed venue to sit in either the county in which the poison was delivered or the county in which the death occurred.[126] The court reasoned that unlike cases involving poisoning, there was no indication that the fatal substance ended up in the decedent's body through any act but the decedent's own.[127] The court further rejected the prosecution's argument that fentanyl constituted a "poison" per se, given that it was undisputed that fentanyl retained medicinal application when used properly.[128]

E. Deprivation of Criminal Counsel During a Preliminary Examination Does Not Warrant Automatic Reversal

In *People v. Lewis*, the court held that deprivation of counsel at a preliminary examination, a critical stage of proceedings, did not require automatic reversal but would instead be reviewed for harmless error.[129] In *Lewis*, the defendant had been denied counsel at his preliminary examination despite requesting that he receive counsel.[130] In determining whether such error was harmless, a court must consider: (1) whether a skilled examination by a lawyer might lead a magistrate to refuse to bind the case over, (2) whether the skilled interrogation of witnesses might create a vital impeachment tool to be used at a later trial, (3) whether trained counsel might more effectively conduct early discovery through the examination to better prepare for trial, and (4) whether counsel could have better made arguments for preliminary matters such as the necessity of a psychiatric evaluation and/or bail.[131]

The court examined each of these four factors in turn.[132] First, it determined that the presentation of sufficient evidence to convict at trial rendered any erroneous bind over decision harmless.[133] It further dismissed the defendant's argument that potential cross-examination could have been useful at trial as "speculative."[134] Regarding any alleged additional pretrial discovery that would have been uncovered, the court

125. *Id.* at 414, 913 N.W.2d at 347.
126. MICH. COMP. LAWS ANN. § 762.5 (West 2019).
127. *McBurrows*, 322 Mich App at 417–18, 913 N.W.2d at 349–50.
128. *Id.* at 418–19, 913 N.W.2d at 349–50.
129. People v. Lewis, 322 Mich. App. 22, 26–27, 910 N.W.2d 404, 406 (2017).
130. *Id.* at 26, 910 N.W.2d at 406.
131. *Id.* at 28–29, 910 N.W.2d at 407–08.
132. *Id.* at 30–34, 910 N.W.2d at 408–10.
133. *Id.* at 30, 910 N.W.2d at 408.
134. *Id.* at 32, 910 N.W.2d at 409.

noted that the defendant failed to identify any such evidence that would have been discovered earlier had counsel been present at the preliminary examination.[135] Assessing the final factor, the court noted that the defendant had already received a forensic psychiatric evaluation prior to the preliminary examination and that he had not lost any opportunity to negotiate a plea deal.[136]

Thus, it appears to the authors of this Article that although deprivation of counsel at the preliminary examination stage constitutes technical error, absent specific evidence of the benefit that would have been obtained had counsel been present, such error is likely to be held harmless on review.

III. SEARCHES AND SEIZURES

A. The Analysis of Drawn Blood is Not a Separate "Search" Under the Fourth Amendment

Does analysis of a drawn blood sample from a criminal defendant constitute a separate search under the Fourth Amendment apart from the withdrawal of the blood itself? In *People v. Woodard*, the Michigan Court of Appeals answered, "No."[137] The defendant had consented to withdrawal of his blood after being arrested on suspicion of driving while intoxicated but later issued a letter to the state laboratory withdrawing her consent *before* any analysis of the blood sample was performed.[138] The state laboratory conducted its test anyway, concluding that the defendant's blood alcohol content was well in excess of the state limits.[139]

The defendant raised a novel legal theory on appeal, arguing that because he had withdrawn his consent for the "search" of his blood through analysis before said analysis was conducted, in the absence of a warrant the State's analysis of the blood constituted an unlawful search.[140] The court began its analysis by noting that the search, the physical intrusion under the skin, was complete upon the drawing of the blood.[141] From that point, the drawn blood was "evidence seized during the course of the consent search.[142] Having consented to the search itself

135. *Id.* at 32, 910 N.W.2d at 409–10.
136. *Id.* at 33, 910 N.W.2d at 410.
137. People v. Woodward, 321 Mich. App. 377, 909 N.W.2d 299 (2017).
138. *Id.* at 380, 909 N.W.2d at 302.
139. *Id.* at 381, 909 N.W.2d at 302.
140. *Id.* at 380–381, 909 N.W.2d at 302.
141. *Id.* at 385, 909 N.W.2d at 299.
142. *Id.*

and surrendered the possessory interest in the blood, the defendant was left with no basis on which to object to the seizure of her blood.[143]

The court analyzed the subsequent "search" of the blood (through laboratory analysis) and concluded that "society is not prepared to recognize a reasonable expectation in the alcohol content of a blood sample voluntarily given by a defendant to the police for the purposes of blood alcohol analysis."[144] Once the blood had been withdrawn from the body, the court held that there were no longer any relevant privacy concerns because analysis of the voluntarily given sample did not involve any further search or seizure of the defendant's person.[145] "[A] defendant cannot withdraw consent after the seizure and thereby demand the return of evidence lawfully obtained during the consent search."[146]

B. Evidence of Drug Use Found as a Result of an Illegal "Plain View" Search Will Still Be Suppressed

In *People v. Wood*, the defendant was pulled over by an officer who noticed certain nitrous oxide cans in the back seat of the defendant's car.[147] When the officer inquired as to the use of the cans, the defendant admitted to snorting them several days before the encounter.[148] The defendant denied consent to search his vehicle, but the officer ordered the defendant out of the car and searched it anyway, finding an unlabeled pill bottle with codeine pills inside.[149]

The circuit court granted the defendant's motion to suppress this evidence, but did not specifically grant or deny the defendant's motion to dismiss the case for lack of untainted evidence.[150] At a later hearing, the court stated its intent to proceed directly to trial, and, in response, the prosecutor announced that the government could not proceed in light of the court's ruling suppressing the crucial evidence; on the defendant's motion, the court dismissed the charges.[151]

The prosecutor appealed the court's ruling on the motion to suppress.[152] Initially, the defendant argued that the appeal was moot

143. *Id.* at 386, 909 N.W.2d at 305.
144. *Id.* at 387, 909 N.W.2d at 305.
145. *Id.* at 389–90, 909 N.W.2d at 306–07.
146. *Id.* at 394, 909 N.W.2d at 309.
147. People v. Wood, 321 Mich. App. 415, 418, 910 N.W.2d 364, 365 (2017).
148. *Id.*
149. *Id.* at 419, 910 N.W.2d at 366.
150. *Id.*
151. *Id.* at 419–20, 910 N.W.2d at 366.
152. *Id.* at 420–21, 910 N.W.2d at 366–67.

because the prosecutor had more or less voluntarily dismissed the case.[153] The court rejected this argument, noting that because the court's dismissal was based on the defense's motion (rather than the prosecution's) the case was not mooted.[154]

Proceeding to the merits of the appeal, the court affirmed the trial court's suppression of the evidence.[155] It rejected the prosecution's argument that the defendant's admission that he had previously inhaled nitrous oxide gave the police probable cause to suspect that the car contained evidence of a crime.[156] In doing so, the court noted that, although inhaling nitrous oxide is illegal, mere possession of canister is not and, thus, distinguished the case from those involving substances that are wholly illegal.[157]The court further rejected the prosecutor's attempt to justify the search as a search incident to arrest and noted that the defendant's arrest was not valid because it was for possession of codeine pills not for inhaling nitrous oxide.[158] Because the officers only discovered the pills as a result of an illegal search, the arrest could not survive.[159] The court explained that "[j]ustifying the arrest by the search and at the same time the search by the arrest, just will not do."[160]

Judge Murray wrote a partial dissent.[161] He noted that Michigan law permits a warrantless arrest when the trooper "has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony *has been committed.*"[162] Because the defendant admitted to the officer and made him aware that the defendant had abused nitrous oxide in the past, Judge Murray reasoned that an arrest was permissible; therefore, the officer had the ability to conduct a search incident to that arrest.[163] Judge Murray emphasized that it was of no importance that nitrous oxide canisters are not, in and of themselves, illegal.[164] Instead, the defendant's candid admission that he had used the canisters illegally

153. *Id.*
154. *Id.*
155. *Id.* at 423, 910 N.W.2d at 368.
156. *Id.* at 424–25, 910 N.W.2d at 368–69.
157. *Id.* at 425, 910 N.W.2d at 369; *see* MICH. COMP. LAWS ANN. § 752.272 (criminalizing the intentional inhalation of any chemical substance for the purpose of causing intoxication or impairment).
158. *Wood*, 321 Mich. App. at 427, 910 N.W.2d at 370.
159. *Id.*
160. *Id.* at 428, 910 N.W.2d at 370 (quoting Smith v. Ohio, 494 U.S. 541, 543 (1990)).
161. *Id.* at 429, 910 N.W.2d at 371.
162. *Id.* at 430, 910 N.W.2d at 371–72 (emphasis original).
163. *Id.* at 430–31, 910 N.W.2d at 372.
164. *Id.* at 432, 910 N.W.2d at 372.

in the past created probable cause to attach a degree of suspicion that the otherwise legal canisters were in fact evidence of a crime.[165]

C. The Court Rejected a State Trooper's Testimony and Found No Basis to Prolong a Traffic Stop That Resulted in an Arrest For Delivery of Marijuana

In *People v. Kavanaugh,*[166] the Michigan Court of Appeals found that prolonging a traffic stop for fifteen minutes to allow for the arrival of a drug-detecting dog was unconstitutional.[167] The court flatly rejected the Michigan State Trooper's explanations for why he believed new circumstances revealed themselves after he pulled the car over.[168] The court ordered to suppress the evidence seized from the trunk of the car (more than ten pounds of marijuana).[169]

Because the entire episode was captured on video, the facts of the stop were not in dispute.[170] The State Trooper stopped the defendant's car for two traffic violations.[171] After learning that the defendant had recently purchased the car and had no registration, the trooper asked the defendant to follow him back to his patrol car where he had the Defendant sit in the front passenger seat.[172] The trooper performed a computer check and asked the defendant a few questions.[173] After confirming the defendant's title, the trooper had the defendant stay in the patrol car while he questioned the defendant's passenger.[174] The trooper returned and told the defendant he was going to give him a warning (rather than a ticket), but also asked for consent to search the car.[175] When the defendant refused, the trooper radioed for a drug-sniffing dog and told the Defendant and his passenger that they would have to wait for the dog and handler to arrive.[176] The dog arrived fifteen minutes later and alerted on the trunk.[177] When the trunk was opened, the police discovered the marijuana.[178]

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165. *Id.* at 433, 910 N.W.2d at 372.
166. People v. Kavanaugh, 320 Mich App 293, 907 N.W.2d 845 (2017).
167. *Id.* at 296, 907 N.W.2d at 846.
168. *Id.* at 302, 907 N.W.2d at 850.
169. *Id.* at 308, 907 N.W.2d at 853.
170. *Id.* at 298, 907 N.W.2d at 847.
171. *Id.* at 296, 907 N.W.2d at 847.
172. *Id.* at 297, 907 N.W.2d at 847.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 298, 907 N.W.2d at 847.

In what appears to be one of the first Michigan cases since the United States Supreme Court decision in *Rodriguez v. United States*,[179] the Michigan Court of Appeals followed the reasoning in *Rodriguez* that "although police officers 'may conduct certain unrelated checks during an otherwise lawful traffic stop,' they 'may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."[180] The court found that "the traffic stop was completed when [the trooper] determined that the vehicle was owned by defendant, gave him a warning about the traffic violations, and told him there would not be a ticket issued."[181] The trooper's directive that the defendant remain at the scene until the drug dog arrived was a "seizure" within the meaning of the Fourth Amendment.[182] Therefore, "the continued detention of the defendant and his vehicle after the traffic stop's conclusion was unconstitutional unless '[t]he traffic stop reveal[ed] a new set of circumstances.'"[183]

The court explained that these "new circumstances" must show "a reasonably articulable suspicion that criminal activity [was] afoot."[184] "'In determining whether [a police] officer acted reasonably... due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw fro the facts in light of his experience."[185] The *Kavanaugh* court found the trooper did not have a suspicion of criminal activity sufficiently reasonable to justify extending the traffic stop."[186] In doing so, the court rejected all the bases of suspicion offered by the trooper during his testimony.[187] Finding that there was no reasonable suspicion of criminal activity after the stop, the court held that the prolonged stop was unconstitutional.[188]

179. Rodriguez v. United States, 135 S. Ct. 1609 (2015).

180. *Kavanaugh*, 320 Mich. App. at 300–01, 907 N.W.2d at 849 (quoting *Rodriguez*, 135 S. Ct. at 1615).

181. *Id.* at 299–300, 907 N.W.2d at 848.

182. *Id.* at 300, 907 N.W.2d at 848–49.

183. *Id.* at 301, 907 N.W.2d at 848 (citing People v. Williams, 472 Mich 308, 315, 696 N.W.2d 636, 641 (2005)).

184. *Id.* (citing People v. Jenkins, 472 Mich 26, 32, 691 N.W.2d 759, 763 (2005)).

185. *Id.* at 302, 907 N.W.2d at 849 (citing Terry v. Ohio, 392 US 1, 27 (1968)).

186. *Id.*, 907 N.W.2d at 850.

187. *Id.* at 302–08, 907 N.W.2d at 850–53.

188. *Id.* at 307, 907 N.W.2d at 852–53.

D. On Remand, Defendant Lacks Standing to Challenge Search of Third Party's Vehicle

The defendant in *People v. Mead*[189] was convicted of possessing methamphetamine following a jury trial.[190] Mead was the front seat passenger in a vehicle stopped for an expired license plate.[191] Mead had a backpack on his lap at the time of the stop.[192] Mead left the backpack on the floorboard, and the driver consented to a search of the vehicle.[193] The police located the drugs in the backpack.[194] Relying on the Michigan Supreme Court's opinion in *People v. LaBelle*,[195] the Michigan Court of Appeals held that Mead lacked standing to challenge the search.[196]

In an unpublished opinion,[197] the court of appeals previously refused to suppress the evidence, and the defendant filed an application with Michigan Supreme Court.[198] The Michigan Supreme Court vacated the first opinion and remanded for the Michigan Court of Appeals to determine whether *LaBelle* was distinguishable, whether the record demonstrated that the officer reasonably believed that the driver had common authority over the backpack in order for the consent to be valid and whether there were other grounds to justify the search.[199]

The Michigan Court of Appeals opinion here noted that "[n]otwithstanding that existing Michigan law provides that a passenger in a motor vehicle does not have standing to contest the search of a third party's vehicle, the [Michigan] Supreme Court . . . has directed our attention to [*Illinois v*] *Rodriguez*."[200] The *Rodriguez* opinion addressed whether consent to search is valid where given by a third party who the police reasonably believed had common authority over the premises but who, in fact, does not.[201] The court of appeals noted that "[i]f Rodriguez and its extension to searches of containers in automobiles as applied in foreign courts were the law in Michigan, an argument that [the police officer] lacked a reasonable belief that [the driver] had common authority

189. 320 Mich. App. 613, 908 N.W.2d 555 (2017).
190. *Id.* at 615, 908 N.W.2d at 558.
191. *Id.* at 616, 908 N.W.2d at 559.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 616–17, 908 N.W.2d at 559 (citing People v. LaBelle, 478 Mich. 891, 732 N.W.2d 114 (2007)).
196. *Id.*
197. People v. Mead, No. 327881, 2016 WL 4804081 (Mich. Ct. App. Sept. 13, 2016).
198. *Mead*, 320 Mich. App. at 616–17, 908 N.W.2d at 559.
199. *Id.*
200. *Id.* at 618, 908 N.W.2d at 559.
201. *Id.* (quoting Illinois v. Rodriguez, 497 U.S. 177, 186–189 (1990)).

over the backpack would have some merit."[202] This is primarily because the officer testified that he believed the backpack belonged to the defendant.[203] However, the court of appeals noted that the Michigan Supreme Court reversed just such an analysis in its *LaBelle* decision.[204] Because "current Michigan law does not apply Rodriguez's common-authority framework to warrantless searches of containers in automobiles, we decline to apply Rodriguez's common-authority framework to this case."[205]

In examining other bases to justify the search, the court of appeals found that the defendant had not abandoned the backpack,[206] the *Terry* search did not apply,[207] the automobile exception did not apply,[208] no evidence existed with respect to any inventory search,[209] and the search did not occur incident to an arrest.[210] Additionally, the court found that the inevitable discovery exception did not apply either.[211] Subsequently, the defendant again filed an application for leave to appeal, and the Michigan Supreme Court directed the Jackson County Circuit Court to appoint counsel for the defendant and the parties to file briefs addressing whether the court should grant leave to appeal—primarily whether *Rodriguez* should control.[212]

IV. PROPERTY CRIMES

A. Larceny From a Person and Larceny in a Building Are Mutually Exclusive Crimes

In *People v. Williams*,[213] the court differentiated between the offenses of larceny from the person and larceny in a building and concluded that the offenses required mutually exclusive findings which prohibited the defendant from being convicted of both offenses.[214] As a

202. *Id.* at 619–20, 908 N.W.2d at 560.
203. *Id.* at 620, 908 N.W.2d at 560.
204. *Id.* at 620, 908 N.W.2d at 561.
205. *Id.*
206. *Id.* at 622, 908 N.W.2d at 562.
207. *Id.* at 613, 623, 908 N.W.2d at 563.
208. *Id.* at 626, 908 N.W.2d at 563.
209. *Id.* at 622, 908 N.W.2d at 562.
210. *Id.* at 624, 908 N.W.2d at 563.
211. *Id.* at 626, 908 N.W.2d at 564.
212. People v. Mead, 501 Mich 1029, 908 N.W.2d 546 (2018) (mem.).
213. People v. Williams, 323 Mich. App. 202, 916 N.W.2d 647 (2018) (quoting United States v. Powell, 469 U.S. 57, 69 n. 8 (1984)).

result, "'a guilty verdict on one count logically excludes a finding of guilt on the other.'"[215]

In *Williams*, defendant had taken a $100 ticket from a casino patron while it rested within one foot of the patron, with no intervening objects between the patron and the ticket but while the patron's back was turned from the ticket.[216] Defendant argued that the ticket was not in the "immediate presence" of the patron, and thus defendant did not take property "from the person of another" as required by the larceny from the person statute.[217] The court noted that the Michigan Supreme Court has defined "immediate presence" in the context of larceny from a person as being consistent with the definition of "immediate," which means "'having no object or space intervening, nearest or next."[218] "'Even objects that are relatively close to a person are not considered to be in the person's immediate presence unless they are *immediately* next to the person.'"[219]

The court acknowledged that the patron not facing the ticket weighs in favor of a finding that the ticket was not in defendant's "immediate presence," but that the it did not negate the other evidence supporting the conviction; namely that defendant encroached within a foot of the patron and there existed no intervening objects when defendant took the ticket.[220]

Because the court confirmed the larceny from a person conviction, the court held it was required to dismiss the larceny from a building conviction because the two were mutually exclusive: larceny from a building requires the property to be "only within the protection of the" building and "not within the 'dominion' of a person," while larceny from a person requires the property to be within the direct of the person.[221] The court concluded that "a larceny may be 'from a person' or 'in a building,' but not both at the same time."[222]

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216. *Id.* at 204, 916 N.W.2d at 648.

217. *Id.* at 205–06, 916 N.W.2d at 648—9.

218. *Id.* at 206, 916 N.W.2d at 649 (quoting People v. Smith-Anthony, 494 Mich. 669, 688, 837 N.W.2d 415, 426 (2013)).

219. People v. Williams, 323 Mich. App. 202, 916 N.W.2d 647 (2018) (quoting *Smith-Anthony*, 494 Mich. at 687, 837 N.W.2d at 425).

220. *Id.* at 206–07, 916 N.W.2d at 649.

221. *Id.* at 209–10, 916 N.W.2d at 650–51.

222. *Id.* at 211, 916 N.W.2d at 651–52.

B. Finders Not Keepers: "Lost" Property Owner is Still Superior in Property Rights to "Finding" Defendant Sufficient to Maintain Larceny Conviction

Larceny requires that the defendant take the property "of another," which includes "any property in which another individual holds the right to possess as against the defendant at the time of the taking."[223] In *People v. Thorne,* the court found that, where a defendant takes possession of a purportedly "lost or abandoned" slot machine ticket after another patron mistakenly left the ticket behind, that defendant was still criminally culpable for larceny because possession of the relevant article can be either actual or constructive.[224] Thus, because the evidence showed that the victim retained "the power and intention to exercise dominion or control" over the slot machine ticket, the property was not considered "lost" given that the victim still retained rights of ownership over the article as against the criminal defendant.[225] "[T]he finder of lost or misplaced property can be guilty of larceny when he or she takes found property with the intent to steal it."[226]

C. Disbursements of Loan Proceeds Can Constitute Larceny by Conversion

In *People v. Spencer*,[227] the court of appeals reviewed the trial court's decision not to reinstate a larceny by conversion charge dismissed by the district court following preliminary examination.[228] Finding sufficient evidence to establish probable cause, the Michigan Court of Appeals reversed the decision of the trial court and remanded for further proceedings.[229]

The preliminary examination record indicated that the Spencer withdrew money from his IRA to loan $241,000 to Mackinac Advisory Services (MAS) to acquire and rehabilitate real estate properties.[230] The defendant held no position with MAS, but he facilitated transactions and

223. People v. Thorne, 322 Mich. App. 340, 344, 912 N.W.2d 560, 564 (2017) (quoting People v. March, 499 Mich. 389, 414, 886 N.W.2d 396, 411 (2016)).

224. *Id.* at 344–45, 912 N.W.2d at 564.

225. *Id.* at 345, 912 N.W.2d at 564.

226. *Id.*

227. People v. Spencer, 320 Mich. App. 692, 909 N.W.2d 17 (2017).

228. *Id.* at 694, 909 N.W.2d at 18. The district court bound over additional charges of false pretenses and embezzlement, and Spencer did not raise them on appeal. *Id.*

229. *Id.* at 694–95, 909 N.W.2d at 18.

230. *Id.* at 695, 909 N.W.2d at 18.

had authority to disburse funds as MAS's real estate agent.[231] The defendant eventually directed at least $20,000 of the loaned $241,000 into accounts held by Mackinac Realty Group, a company solely owned and managed by the Spencer.[232] The defendant spent the $20,000 on personal items.[233] Some of the $241,000 was used for its designated purpose, but the loan was never repaid.[234]

The court addressed the issue of amending the information subsequent to cases being bound over after preliminary examination.[235] Relying on *People v. Goeke*,[236] the court noted that where a motion to reinstate a count after a preliminary examination is held on the count, the defendant is not unfairly surprised or deprived of adequate notice or sufficient opportunity to defend at trial, as required in MCR 6.112(H).[237] As such, the court did not find a procedural barrier to the motion to reinstate the charge.[238]

The substantive issue was "whether a person commits the crime of larceny by conversion when the person, as the recipient of a loan, converts the loan proceeds to his or her own use and employs them in manner that is inconsistent or conflicts with specific restrictions or conditions demanded by the lender..."[239] Noting that the "purpose of the larceny by conversion statute is to cover one of the situations left accounted for by common law larceny, that is, where a person obtains possession of another's property with lawful intent, but subsequently converts the other's property to his own use,"[240] the court of appeals held that "offense of larceny by conversion may be committed when a defendant fails to use money delivered by a complainant for an agreed-upon designated purpose...with the defendant also failing to return the property.[241] It is "a crime against possession and not against title one cannot convert his own funds."[242]

In this case, the court of appeals found the evidence showed that "the complainant intended to retain legal title to the loan proceeds, though not possession of the funds, until such time that the loan proceeds were

231. *Id.*
232. *Id.* at 696, 909 N.W.2d at 19.
233. *Id.*
234. *Id.*
235. *Id.* at 699, 909 N.W.2d at 20.
236. People v. Goecke, 457 Mich. 442, 579 N.W.2d 868 (1998).
237. *Id.* at 699, 909 N.W.2d at 20 (citing *Goecke*, 457 Mich. at 462, 579 N.W.2d at 877).
238. *Id.* at 699, 909 N.W.2d at 20.
239. Spencer, 320 Mich. App. at 699–700, 909 N.W.2d at 20–21.
240. *Id.* at 700–01, 909 N.W.2d at 21.
241. *Id.* at 701–02, 909 N.W.2d at 22.
242. *Id.* at 701, 909 N.W.2d at 21.

actually used to pay for the... properties."[243] The court of appeals distinguished the case from *People v. Christenson*[244] because, in *Christenson*, there were no conditions that prevented title from vesting in the defendant while in the instant case "...there was evidence of an agreement that did not allow MAS to do whatever it wished with the loan proceeds."[245] "Because there was evidence that title to at least $20,000 of the $241,000 did not pass to MAS or defendant, as it was not used as intended and directed under the loan agreement, and that defendant converted that $20,000 or more to his own use contrary to the loan agreement, there was sufficient evidence [to bind over originally and thus reinstate the charges]."[246]

V. HOMICIDE AND ASSAULT

A. Deciding a First Impression Issue, The Court Says Duress is Not Available as a Defense to the Predicate Felony in a Felony Murder Conviction

Deciding a first impression issue on an interlocutory appeal, the court in *People v. Reichard*[247] held that duress was not available as a defense to the predicate felony in a felony murder conviction.[248] In *Reichard,* defendant was charged with open murder, with the predicate felony being armed robbery.[249] The trial court granted defendant's motion to present evidence of duress at trial in defense of the armed robbery component of the felony murder charge.[250]

Defendant acknowledged the general rule that duress is not a defense to homicide but argued that the rule did not apply to the predicate felony to a felony murder charge or when the defendant was an aider and abettor to the felony murder rather than the principal offender.[251]

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243. *Id.*

244. People v. Christensen, 412 Mich. 81, 312 N.W.2d 618 (1981) (dismissing larceny by conversion charges against a mobile home builder who used customer progress payments to pay debts unrelated to the construction project).

245. *Spencer*, 320 Mich. App. at 705, 909 N.W.2d at 23.

246. *Id.* at 705, 909 N.W.2d at 23–24.

247. People v. Reichard, 323 Mich. App. 613, 919 N.W.2d 417 (2018).

248. *Id.* at 614, 919 N.W.2d at 418.

249. *Id.*

250. *Id.* at 614, 919 N.W.2d at 418.

251. *Id.* at 418–19, 919 N.W.2d at 614–16. Defendant also argued the rule did not apply when the defendant was an aider and abettor, as opposed to the principal offender. The court rejected this argument because it was without authority and was contrary to authority rejecting the argument. *See id.*

The court rejected this argument in a first impression decision based on the following rationale:

> We see no logical reason to allow the duress defense to negate the predicate and mitigate the first-degree felony murder down to second-degree murder. As observed in *Henderson*, the public policy of this state is to disallow duress as a defense to homicide. Moreover, this remains true even when the defendant's liability is based upon aiding and abetting. More to the point, because "directly committing a homicide is not subject to a duress defense, assisting a principal in the commission of a homicide cannot be subject to a duress defense either, considering that an aider and abettor to murder is assisting in taking the life of an innocent third person instead of risking or sacrificing his or her own life."
>
> It is the existence of the predicate felony that raises the principal's liability from second-degree murder to first-degree murder. We fail to see why aiding and abetting the murder itself should disallow the duress defense, while aiding and abetting the predicate felony would allow for it. That is, if this were simply a second-degree murder case but the facts otherwise the same, with defendant's liability being based upon an aiding and abetting theory, both defendant and the principal would be guilty of second-degree murder, and the duress defense would be unavailable to defendant. With the addition of the predicate felony, the principal's liability is raised to first-degree murder. Yet defendant's role as an aider and abettor has remained the same, so her criminal responsibility should also be raised to first-degree murder. Simply put, in both cases she aided and abetted a crime that resulted in the taking of a human life.[252]

B. Violent "Self-Help" Against Repo Men Does Not Result in a Breach of the Peace Defense

Individuals who resort to violent self-help to prevent the repossession of property do so at their own risk. In *People v. Anderson*, the defendant awakened in the night to the sounds of his car being towed as part of a repossession.[253] The defendant left his house with a loaded

252. *Id.* at 419, 919 N.W.2d at 616–17 (internal citations omitted).
253. People v. Anderson, 322 Mich. App. 622, 626, 912 N.W.2d 607, 610 (2017).

handgun and confronted the repo-men.[254] Despite being shown valid paperwork for the repossession, the defendant ordered the repo-men to "drop the car" and then brandished his gun at them.[255] When the repo-men tried to take cover, the defendant opened fire and wounded one of the men in the leg.[256] The defendant was ultimately convicted of two counts of assault with intent to murder and two counts of carrying a firearm in the commission of a felony. On appeal, the defendant argued that his trial counsel was ineffective for failing to argue that because the self-help repossession statute[257] only allows repo-men to take possession of property without judicial process if they proceed without breaching the peace, the defendant should not have been convicted as the incident resulted in an undeniable breach of the peace.[258] The court rejected this argument, noting that none of the actions taken by the repo-men breached the peace, instead the defendant's decision to violently confront the repo-men was the inciting incident.[259] Thus, trial counsel was not ineffective for failing to argue this point.[260] The court further rejected the defendant's argument that because the force was ultimately non-lethal, the trial judge ought not instruct on the use of deadly force in self-defense; the mere fact that the force did not ultimately kill either repo-man did not absolve the defendant from using potentially deadly force in the first place.[261]

C. Assault With Intent to do Great Bodily Harm Less Than Murder and Aggravated Domestic Violence Are Mutually Exclusive

In *People v. Davis*,[262] the defendant was convicted of the crimes of assault with intent to do great bodily harm less than murder and aggravated domestic violence.[263] The evidence at trial showed that the defendant beat his girlfriend to the point where her face was "'almost unrecognizable' due to the significant swelling."[264] While the challenge to the admission of certain photographs was "meritless," the Michigan

254. *Id.* at 626, 912 N.W.2d at 610.
255. *Id.*
256. *Id.* at 627, 912 N.W.2d at 610.
257. MICH. COMP. LAWS ANN. § 440.9609 (West 2019).
258. *Anderson*, 322 Mich. App. at 630, 912 N.W.2d at 612.
259. *Id.*
260. *Id.*
261. *Id.* at 629, 912 N.W.2d at 611–12.
262. People v. Davis, 320 Mich. App. 484, 905 N.W.2d 482 (2017), *vacated in part*, No. 156406, 2019 WL 1313778 (Mich. Mar. 22, 2019).
263. *Id.* at 486, 905 N.W.2d at 484.
264. *Id.* at 486–87, 905 N.W.2d at 484.

Court of Appeals vacated the conviction of domestic violence because the two offenses had mutually exclusive provisions.[265]

Upon examining the statutory language, the court of appeals held that the "defendant was improperly convicted for a single act under two statutes with contradictory and mutually exclusive provisions."[266] Comparing the two statutes at issue, the court found that:

> Clearly, these two offenses are mutually exclusive from a legislative standpoint. One requires the defendant to act with a specific intent to do great bodily harm less than murder...; the other is committed without intent to do great bodily harm less than murder.[267]

The court, thus, concluded that "the plain language of the statutes reveals that a defendant cannot violate both statutes with one act as he or she cannot both intend and yet *not* intend to do great bodily harm."[268]

After coming to a common-sense conclusion regarding intent, the Court struggled with whether it could grant relief.[269] Addressing the "general rule" regarding the appellate courts inability to interfere with inconsistent verdicts, the court found that the case "did not fit the mold of inconsistent-verdict jurisprudence."[270] The court distinguished inconsistent verdicts as "situations in which acquittal of one charge renders it seemingly impossible for the jury to have found the existence of all elements of the charge on which it convicts."[271] Quoting *United States v. Powell*,[272] the court of appeals recognized that:

> [I]nconsistent verdicts therefore present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course.
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> ***

265. *Id.* at 486, 489, 905 N.W.2d at 484, 485.
266. *Id.* at 489, 905 N.W.2d at 485.
267. *Id.* at 490, 905 N.W.2d at 486 (internal citations omitted).
268. *Id.*
269. *Id.* at 491, 905 N.W.2d at 486.
270. *Id.*
271. *Id.*
272. 469 U.S. 57 (1984).

> '[T]he best course to take... is simply to insulate jury verdicts from review on this ground.'[273]

The *Davis* court noted, however, the exception to this rule: "a situation where a guilty verdict on one count necessarily excludes a finding of guilt on another.[274] As noted, a conviction for aggravated domestic violence cannot stand where the verdicts indicate a defendant acted with an intent to do great bodily harm.[275]

The court noted that in this case the verdicts were not the fault of the jury because it had not been instructed that aggravated domestic violence cannot stand where a defendant acts with great bodily harm to do less than murder.[276] Despite that an instruction on the "negative" aspect of the statute was not required as it was not an "affirmative defense," the court of appeals observed that such a conviction was still erroneous and chastised the prosecution for "independently" rather than "alternatively" charging the defendant.[277] The court likewise chastised the trial court for failing to either instruct the jury to elect a count of conviction or vacate one of the convictions.[278] The court elected to fashion the remedy itself because it was clear which verdict was supported by "jury-found facts."[279] Given that the jury had found the intent to do great bodily harm to have been proven beyond a reasonable doubt, the court vacated the conviction and sentence for aggravated domestic violence.[280]

VI. MENS REA

A. Recklessness Requires More Than Simple Negligence

In *People v. Murphy*,[281] an eleven-month old child died after consuming a toxic quantity of morphine, leading to her mother's conviction for second-degree child abuse.[282] The defendant appealed her conviction, arguing that the statute only criminalized: (1) an omission that caused seriously physical harm or serious mental harm to a child or

273. *Davis*, 320 Mich. App. at 492–93, 905 N.W.2d at 487 (citing *Powell*, 469 U.S. at 69 (1984)).
274. *Id.* at 493, 905 N.W.2d at 487 (internal quotation marks omitted).
275. *Id.* at 494, 905 N.W.2d at 488.
276. *Id.*
277. *Id.* at 495, 905 N.W.2d at 488–89.
278. *Id.* at 495, 905 N.W.2d at 489.
279. *Id.* at 495–96, 905 N.W.2d at 489.
280. *Id.* at 496, 905 N.W.2d at 489.
281. People v. Murphy, 321 Mich. App. 355, 910 N.W.2d 374 (2017).
282. *Id.* at 357–58, 910 N.W.2d at 375–76.

(2) a reckless act which caused serious physical harm or serious mental harm to the child.[283] The prosecutor's theory was that a "filthy" home environment ensured that spare morphine pills in a deceased relative's bedroom were not removed, and that the child inadvertently discovered and ate the pills. The defendant argued that no reckless "act" caused the child's death—instead, it was at best an omission of the parents in failing to clean their house. The court agreed, noting that "[s]imply failing to take an action does not constitute an act" and that the prosecutor had presented no evidence that any affirmative act taken by the defendant caused the child's death.[284]

Judge Gleicher wrote a concurring opinion and noted that she would have gone further to hold that, even if the defendant's failure to clean her home constituted an "act," it would not meet the mens rea standard for recklessness.[285] She criticized the court's decision in *People v. Gregg*,[286] which resorted to a dictionary definition for "reckless," which, in Judge Gleicher's view, did not accord with fundamental criminal law principles drawing a distinction between mere negligence and recklessness.[287] Judge Gleicher noted that negligence and recklessness are not interchangeable legal concepts and urged that, because gross negligence and recklessness are roughly congruent concepts under Michigan law, the court should find guidance from gross negligence concepts and make clear that recklessness "requires conscious disregard of risk" rather than "mere indifference," which is closer to negligence.[288]

VII. SEXUAL CRIMES

A. Innocent Agent Doctrine Bars Individuals From Using Third-Parties to Advance False Reports of Child Abuse

Because common law doctrines remain in force unless they are changed, amended or repealed by statute, the "innocent agent" doctrine applies; the use of innocent third-parties to make a false report of child abuse is a felony by the originator of the false report.[289] In *People v. Mullins*,[290] a defendant mother of a minor child encouraged her daughter

283. MICH. COMP. LAWS ANN. § 750.136b(3) (West 2019).
284. *Murphy*, 321 Mich. App. at 361, 910 N.W.2d at 377.
285. *Id.* at 362, 910 N.W.2d at 377 (Gleicher, J., concurring).
286. People v. Gregg, 206 Mich. App. 208, 520 N.W.2d 690 (1994).
287. *Murphy*, 321 Mich. App. at 366, 910 N.W.2d at 379–80 (Gleicher, J., concurring).
288. *Id.* at 371, 910 N.W.2d at 382 (Gelicher, J., concurring).
289. People v. Mullins, 322 Mich. App. 151, 162–63, 911 N.W.2d 201, 207 (2017).
290. *Id.*

to tell a school teacher that her father had "hurt her private parts."[291] The mother took this action with the expectation that her daughter's teacher would report the incident to Child Protective Services.[292] During a preliminary examination, the district court concluded that the defendant could not be guilty of making a false report of child abuse,[293] because she did not personally make the false report, but instead encouraged her daughter to do so, which then triggered a teacher to ultimately pass the false information on to the police.[294] The circuit court reversed, noting that the common-law theory of "innocent agent" meant that a person would be liable as a principal even when they had used an "innocent other" to do the actual "making" of the false report.[295] The matter proceeded to trial and the defendant was found guilty of making a false report of felony child abuse.[296] She appealed her convictions.[297]

The court of appeals first dispensed with the defendant's argument that because she was not a mandatory reporter, she could not be held liable under MCLA § 722.633(5).[298] The court noted that while the Child Protection Law mandated that certain persons report suspected child abuse, the law did not preclude others from reporting suspected child abuse.[299] A person who made such a report to a law enforcement agency would still be doing so under the authority of MCLA § 722.624.[300] Thus, a false report is still a criminal act, even if the defendant was not a mandated reporter.[301]

Regarding the defendant's argument that she could not be held liable because she was not the person who actually made the false reports, the court began its analysis by noting that it "does not lightly infer that our legislature intended to abrogate or modify the common law" absent language in the statue indicating that intent.[302] Given the assumption that common law principles remained intact, the court explained when the defendant used an innocent person to accomplish a crime, that the defendant was still guilty of the crime as a principal.[303] Because neither

291. *Id.* at 156, 911 N.W.2d at 204.
292. *Id.*
293. *See* MICH. COMP. LAWS. ANN. § 722.633(5) (West 2019); *see also Mullins*, 322 Mich. App. at 157–58, 911 N.W.2d at 204–05.
294. *Mullins*, 322 Mich. App. at 156, 911 N.W.2d at 204.
295. *Id.* at 157, 911 N.W.2d at 204.
296. *Id.* at 159, 911 N.W.2d at 205.
297. *Id.* at 158-59, 911 N.W.2d at 205.
298. *Id.* at 160, 911 N.W.2d at 206.
299. *Id.*
300. *Id.* at 161, 911 N.W.2d at 206.
301. *Id.* at 161–62, 911 N.W.2d at 206–07.
302. *Id.* at 163, 911 N.W.2d at 207.
303. *Id.* at 163–64, 911 N.W.2d at 208.

the child, nor the teacher nor the school principal intended to make a false report, they acted as innocent agents in the defendant's plan, thereby rendering only her culpable for the false report.[304]

B. Downloading Child Pornography is a Sufficient Act of "Copying" to Support a Conviction

The court of appeals clarified that the definition[305] for "making" child pornography included the act of downloading such illicit pornography onto one's computer.[306] In *People v. Seadorf*,[307] the defendant moved to withdraw his guilty plea by arguing that by downloading pornographic images of children, he had only "possessed" child pornography, not "produced, distributed, or promoted" it.[308] The court turned to the plain language of the statute, and noted that, *inter alia*, the statute criminalized "mak[ing]" and "copy[ing]" child pornography. The court held that downloading pornographic images to one's computer constituted "copying" child pornography, thereby falling within the ambit of the statute.[309] "While simply viewing an image on the internet does not amount to 'making' content because the individual has not actually copied the image yet, copying an image that is either stored on a computer hard drive or burned to a CD-ROM or other digital media storage device is considered 'making' content."[310]

C. Financing Child Sexual Conduct is Sufficient to Maintain Conviction Under Production Statute

In *People v. Willis*,[311] the court rejected another attempt to limit the applicability of MCLA § 750.145c. The defendant had attempted to procure sex from an underage boy by offering him money.[312] On appeal, he argued that MCLA § 750.145c was limited in scope to criminalizing only conduct involving the production of child sexually abusive material.[313] The court noted that the defendant omitted a key part of the statutory language, namely the portion which criminalized "a person who

304. *Id.* at 164, 911 N.W.2d at 208.
305. *See* MICH. COMP. LAWS ANN. § 750.145c(2) (West 2019).
306. People v. Seadorf, 322 Mich. App. 105, 112, 910 N.W.2d 703, 706 (2017).
307. *Id.*
308. *Id.* at 108, 910 N.W.2d at 704.
309. *Id.* at 112, 910 N.W.2d at 706.
310. *Id.* at 111, 910 N.W.2d at 706.
311. People v. Willis, 322 Mich. App. 579, 914 N.W.2d 384 (2018).
312. *Id.* at 583, 914 N.W.2d at 386–87.
313. *Id.* at 584, 914 N.W.2d at 387.

attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, *or finance any child sexually abuse activity.*"[314] Given that the evidence showed that defendant had offered money to a sixteen-year old boy to perform various sexual acts, the court affirmed the defendant's conviction.[315]

VIII. CHILD ABUSE

A. Court Rules That "Substantial Physical Harm" is Not Unconstitutionally Vague and That Resulting Sentencings Above the Top of the Guideline Range Were Reasonable

In *People v. Lawhorn,*[316] the Michigan Court of Appeals rejected a "void for vagueness" challenge to the statutory definition of "physical harm."[317] The court concluded that "MCL 750.136b(5) is not so vague that it allows for arbitrary enforcement or gives unstructured and unlimited discretion to the trier of fact to determine whether an offense was committed."[318] In reaching this holding, the court of appeals also noted that the "the provision that allows parents or guardians to use 'reasonable force' when physically disciplining children [MCLA § 750.136b(9)] provides a sufficient standard to prevent the statute from being applied in a subjective standard by law enforcement, judges, or juries."[319]

Evidence introduced at trial showed that the defendant beat the victim (whose age was not cited by the court) with a belt leaving injuries to his buttocks, thigh and calves that were observed to have "bled and scabbed over."[320] Scars from the injuries were observed by a physician nearly a year and a half later.[321] The defendant had also admitted to whipping the victim "too hard" with a belt.[322] The court found that the defendant conduct of "beating her son with a belt and causing scars[] clearly [is] within the conduct prohibited by MCL 750.136b(5)"[323]

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314. MICH. COMP. LAWS ANN. § 750.145c(2); *see also Willis*, 322 Mich. App. at 583–85, 914 N.W.2d at 387–88.
315. *Willis*, 322 Mich. App. at 594, 914 N.W.2d at 392.
316. People v. Lawhorn, 320 Mich. App. 194, 907 N.W.2d 832 (2017).
317. *Id.* at 202, 907 N.W.2d at 840.
318. *Id.*
319. *Id.* at 203, 907 N.W.2d at 840.
320. *Id.* at 203–04, 907 N.W.2d at 840.
321. *Id.* at 204, 907 N.W.2d at 841.
322. *Id.* at 203, 907 N.W.2d at 840.
323. *Id.* at 204, 907 N.W.2d at 841.

Importantly, the defendant's vagueness challenge in *Lawhorn* was limited in scope because the defendant failed to challenge the statute's constitutionality in the trial court; the unpreserved claim of error was subject to a plain error standard of review (rather than *de novo*).[324]

The court explained that grounds to challenge vagueness are as follows:

> [a] statute may be challenged for vagueness on three grounds: (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed."[325]

However, because the defendant did not raise a First Amendment challenge, the court only "address[ed] the issues of fair notice and indefiniteness."[326] The challenge was made solely to the statutory definition of "physical harm" which is "any injury to a child's physical condition."[327] The court recognized that statutes are "presumed to be constitutional" and construed accordingly unless "unconstitutionality is clearly apparent."[328]

The court's decision was not surprising given that the court had previously rejected a similar challenge to the fourth-degree child abuse statute.[329] Noting that "anyone may consult a dictionary," the court reasoned:

> [A] person of ordinary intelligence would clearly understand that the third-degree child abuse statute prohibits a person from knowingly or intentionally causing harm or damage to the state of a child's body or knowingly or intentionally committing an act that poses an unreasonable risk of harm of injury to a child and results in harm or damage to the state of a child's body.[330]

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324. *Id.* at 197, 907 N.W.2d at 837.

325. *Id.* at 199, 907 N.W.2d at 838 (citing People v. Roberts, 250 Mich. App. 492, 497, 808 N.W.2d 290, 295 (2011)).

326. *Lawhorn*, 320 Mich. App. at 199, 907 N.W.2d at 838.

327. *Id.* at 198, 907 N.W.2d at 837.

328. *Id.*

329. People v. Gregg, 206 Mich. App. 208, 210–11, 520 N.W.2d 690, 691–92 (1994).

330. *Lawhorn*, 320 Mich. App. at 201, 907 N.W.2d at 839.

The second issue reviewed by the court was the defendant's challenge to her jail sentence of 365 days, which was one month above the sentencing guideline range.[331]

The court noted that the defendant "[did] not cite any authority to support an argument that the sentence itself was unreasonable."[332] Furthermore, the court found several factors surrounding the crime and the defendant's background supported the sentence:

> (1) that the victim murdered another child after enduring the defendant's abuse;[333]
>
> (2) that the defendant knew her stepfather also beat the victim;[334]
>
> (3) that the defendant knew cocaine was in the home;[335]
>
> (4) the defendant was indifferent to the "deplorable conditions inside the home;"[336]
>
> (5) the defendant's parental rights were previously "terminated by surrender" in New York.[337]

The court found it was "reasonable" for the trial court to rely on these factors, "especially the effects of the defendant's behavior on the victim that culminated in his stabbing another child," as basis for exceeding the guideline range.[338]

IX. EVIDENCE

A. MCR 768.27a — Court Rules That Legislative Rule of Evidence Trumps Michigan Rules of Evidence and That Other Acts Evidence is Admissible in Juvenile Delinquency Trials

The court in *In re Kerr*[339] ruled that the trial court erred in when it concluded that MCLA § 768.27a—which permits other sexual acts

331. *Id.* at 205–06, 907 N.W.2d at 841–42.
332. *Id.* at 210, 907 N.W.2d at 844.
333. *Id.* at 207, 907 N.W.2d at 843.
334. *Id.* at 208, 907 N.W.2d at 843.
335. *Id.* at 208–09, 907 N.W.2d at 843.
336. *Id.* at 209, 907 N.W.2d at 843.
337. *Id.* at 209–10, 907 N.W.2d at 843–44.
338. *Id.* at 210–11, 907 N.W.2d at 844.
339. *In re* Kerr, 323 Mich. App 407, 917 N.W.2d 408 (2018).

against minors into evidence against the defendant "in a criminal case"—did not apply to juvenile-delinquency trials.[340]

The court first noted that MCLA § 768.27a's allowance of other acts evidence to show propensity to commit the same crime in the instant case "irreconcilably conflicts" with MCLA § 404(b), which prohibits other acts evidence to show propensity.[341] But, as the court noted, the Michigan Supreme Court has ruled "that MCL 768.27a prevails over MRE 404(b)."[342] However, evidence admissible under MCLA § 768.27a remains subject to MRE 403, "and may be excluded under MRE 403 if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'"[343] But when applying MRE 403 to evidence admissible under MCLA § 768.27a, "a trial court must weigh the propensity inference in favor of the probative value of the evidence, rather than in favor of its prejudicial effect."[344]

To support its holding that MCLA § 768.27a applies in juvenile delinquency trials, the court first noted that the Michigan Court Rules require that the Michigan Rules of Evidence apply in juvenile delinquency trials.[345] The court then noted that MRE 101 requires that a statutory rule of evidence is effective as long as it does not conflict with the Michigan Rules of Evidence and has not been superseded by a rule or decision of the Michigan Supreme Court.[346] Although MCLA § 768.27a conflicts with MRE 404(b), the Michigan Supreme Court has determined that MCLA § 768.27a supersedes MRE 404(b).[347] Thus, MCLA § 768.27a remains an effective statutory rule of evidence pursuant to the Michigan Rules of Evidence.[348] And because the Michigan Rules of Evidence apply in juvenile-delinquency trials, MCLA § 768.27a — "a statutory rule of evidence that supersedes MRE 404(b) — is applicable in juvenile delinquency trials."[349]

The court also held that the trial court erred in excluding the other acts evidence pursuant to MRE 403.[350] However, the trial court

340. *Id.* at 409, 917 N.W.2d at 409.
341. *Id.* at 412, 917 N.W.2d at 411.
342. *Id.* (citing People v. Watkins, 491 Mich. 450, 455, 818 N.W.2d 296 (2012)).
343. *Id.* (quoting *Watkins*, 491 Mich. at 481, 818 N.W.2d at 313).
344. *Id.* (citing *Watkins*, 491 Mich. at 487, 818 N.W.2d at 316).
345. *Id.* at 413, 917 N.W.2d at 411 (citing MCR 3942(C)).
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.* at 413–14, 917 N.W.2d at 411–12.
350. *Id.* at 415, 917 N.W.2d at 412.

"improperly weighed the propensity inference in favor of the prejudicial effect of the evidence," instead of properly weighing the propensity inference "in favor of the probative value of the evidence. . . ."[351] Therefore, the court vacated the trial court order excluding the other acts evidence and remanded the case back to the trial court to properly consider MRE 403.[352]

B. MCR 768.27b — Court Creates Standard for Admission of Other Acts Evidence Older Than 10 Years in Domestic Violence Cases

In *People v. Rosa*[353], the trial court admitted in defendant's domestic violence trial against his most recent ex-wife other acts of domestic violation against his first wife 16 years earlier.[354] MCLA § 768.27b permits admission of other acts of domestic violence in domestic violence cases unless the other acts occurred "more than [ten] years before the charged offense. . . ."[355] If the other acts occurred more than ten years before the charged offense, then they are inadmissible unless their admission "is in the interest of justice."[356] The statute does not define "interest of justice."[357]

After rejecting the prosecution's proposed definition of when prior acts older than ten years old should be admitted "in the interests of justice," the court announced the new standard:

> We conclude that evidence of prior acts that occurred more than 10 years before the charged offense is admissible under MCL 768.27b only if that evidence is uniquely probative if the jury is likely to be misled without admission of the evidence.[358]

The court held that the other acts of domestic violence against defendant's ex-wife sixteen years earlier was not "uniquely probative" because the victim in the instant case "laid out a detailed and compelling picture of defendant as an abusive and violent husband" consistent with the prior acts against the ex-wife.[359] The court also excluded the other acts evidence under MRE 404(b) because the other acts were admitted to

351. *Id.*
352. *Id.*
353. People v. Rosa, 322 Mich. App. 726, 913 N.W.2d 392 (2018).
354. *Id.* at 732, 913 N.W.2d at 397.
355. *See id.* at 733, 913 N.W.2d at 397–98.
356. *Id.* at 733, 913 N.W.2d at 398.
357. *Id.*
358. *Id.* at 734, 913 N.W.2d at 398.
359. *Id.*

show defendant's propensity in this case to act in conformity with the abusive character shown by the prior acts of violation, which MRE 404(b) does not permit.[360]

The court nonetheless affirmed defendant's conviction, finding that admission of the other acts evidence was harmless error given the other "overwhelming" evidence of defendant's guilt.[361]

C. MCL § 257.625(3) — OWVI Conviction Does Not Require Evidence That Defendant Was Seen Driving Impaired, Only That Defendant's Ability to Drive Was Impaired

In *People v. Mikulen,*[362] the court held that conviction for operating a motor vehicle while visibly impaired (OWVI), MCLA § 257.625(3), does not require evidence showing that the defendant was seen operating his vehicle in an impaired manner.[363] Rather, the prosecution need only present evidence that the *defendant's ability* to operate the vehicle was impaired, not that defendant was seen operating the vehicle in an impaired manner.[364] The court held that the circuit court erred when it vacated defendant's OWVI conviction based on a lack of evidence of defendant being seen operating his vehicle in an impaired manner.[365]

The statute provides in pertinent part:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance, *the person's ability to operate the vehicle is visibly impaired.* If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.[366]

360. *Id.* at 735, 913 N.W.2d at 398–99.
361. *Id.* at 737, 913 N.W.2d at 400.
362. People v. Mikulen, 324 Mich. App. 14, 919 N.W.2d 454 (2018).
363. *Id.* 16–17, 919 N.W.2d at 457–58.
364. *Id.* at 17, 919 N.W.2d at 458.
365. *Id.* at 26, 919 N.W.2d at 462–63.
366. *Id.* at 21, 919 N.W.2d at 460 (quoting MICH. COMP. LAWS ANN. § 257.625(3) (emphasis added)).

In *Mikulen*, the defendant was pulled over because his license plate was obscured.[367] The officer did not witness defendant driving in an erratic or impaired manner.[368] When the officer spoke with the defendant, he noticed the defendant "had glassy, bloodshot eyes and smelled of intoxicants."[369] The officer then conducted various field sobriety tests, which defendant failed.[370] Defendant was arrested and convicted of OWVI in the district court.[371] The circuit court vacated this conviction, interpreting MCLA § 257.625(3) "to require testimony by a witness who actually observed defendant driving in an impaired manner."[372]

In reversing, the *Mikulen* court stated the circuit court improperly read into the statute a requirement that is not supported by either its plain language or the case law interpreting it:

> The plain language of MCL 257.625(3) does not require testimony of a person's impaired driving to satisfy the statutory burden necessitating proof that the person's ability to operate a vehicle was visibly impaired. In this case, the circuit court improperly read into the statute a requirement that the prosecution present evidence showing that defendant was operating his vehicle in an impaired manner. Courts, however, may not read into a statute that which is "not within the manifest intent of the Legislature as derived from the words of the statute itself." Further, Michigan caselaw has not interpreted MCL 257.625(3) as requiring testimony that a defendant's vehicle was being operated in a drunken or impaired manner. *See Lambert*, 395 Mich. at 305, 235 N.W.2d 338 (couching its discussion in terms of a driver's ability). A close reading of the statutory language reflects that it is a "person's ability" to operate a vehicle that must be visibly impaired. MCL 257.625(3). In other words, the focus is on whether the person's capacity to drive was impaired as could be observed by another. Although proof that a vehicle was being operated in an impaired manner, e.g., weaving from side to side, would, of course, greatly strengthen the prosecution's case by indicating that a defendant's ability to

367. *Id.* at 18, 919 N.W.2d at 458.
368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.* at 17–19, 919 N.W.2d at 458–59.
372. *Id.* at 459.

drive was visibly impaired, the statute does not compel such proof to convict a defendant.[373]

D. Trial Courts Must Carefully Separate a Detective's Expert Testimony From His Lay Opinion

In *People v. Dixon-Bey*,[374] the court analyzed the role of a detective witness in providing a mix of lay and expert testimony, and held that courts must be careful to guard against bleed over between legitimate expert testimony and unsupported speculation based on past training and experience.[375] The defendant had admittedly fatally stabbed her boyfriend, but claimed that it was in self-defense.[376] Following her conviction, she appealed her sentence, claiming error in the court's decision to qualify a detective as an expert in interpreting evidence at a crime scene.[377] She argued that the detective was essentially allowed to testify that her claim of self-defense was a "sham" and that he exceeded the bounds of his permissible expert testimony by offering his opinion on "how people engaged in self-defense are expected to act."[378]

The court began by noting that there is a tension between offering a police officer's testimony based upon his "training and experience" versus his lay witness observations of the scene.[379] The court concluded that given the detective's extensive knowledge, skill, training, and experience in homicide investigations, it was not erroneous for the trial court to admit him as an expert in homicide scenes.[380] Where the trial court erred was in its allowance of the detective to offer his opinion on the "certain way" that individuals who have killed in self-defense typically act.[381] This exceeded the detective's expertise in homicide investigations, despite his unquestioned extensive experience.[382] The court reached a similar conclusion with regard to the detective's testimony regarding the amount of force necessary to stab a person in the heart.[383] Nevertheless, despite the trial court's error in admitting the testimony, the court concluded that the detective's testimony was not

373. *Id.* at 14, 919 N.W.2d at 461 (some internal citations omitted).
374. People v. Dixon-Bey, 321 Mich. App. 490, 909 N.W.2d 458 (2017).
375. *Id.* at 505–06, 909 N.W.2d at 467–68.
376. *Id.* at 494, 909 N.W.2d at 461.
377. *Id.* at 495, 909 N.W.2d at 462.
378. *Id.* at 495–96, 909 N.W.2d at 462.
379. *Id.* at 497, 909 N.W.2d at 462–63.
380. *Id.* at 499–500, 909 N.W.2d at 464.
381. *See id.* at 506–09, 909 N.W.2d at 468–69.
382. *Id.* at 505, 909 N.W.2d at 467.
383. *Id.* at 506, 909 N.W.2d at 468.

outcome determinative given the remainder of evidence introduced during the trial.[384]

The defendant also raised an objection regarding the trial court's admission of a previous incident in which she had stabbed the victim.[385] The defendant argued that testimony about that incident, which occurred ten years prior, had no bearing on her intent at the time of the decedent's death.[386] The trial court disagreed, noting that while MRE 404 generally prohibits the admission of character evidence, MRE 404(b)(1) allows evidence to be admitted for the purpose of proving, *inter alia,* "intent."[387] Here, the evidence was only admitted to disprove the defendant's claim that her decision to stab the decedent was "emotional" and made in self-defense.[388] It further disproved her claim that she never threatened the decedent and that she did not intend to harm him.[389]

X. SENTENCING

A. Mitigating Factors in the U.S. Supreme Court Decision of Miller v. Alabama Should be Taken Into Account, But Are Not "Mandated," When Resenting A Juvenile With a Lifetime Without Parole Sentence to a Term of Years

In *People v. Wines,* [390] the court held that the factors set forth in the United States Supreme Court's 2012 decision in *Miller v. Alabama*[391] for re-sentencing defendants sentenced to life without parole when they were juveniles should be considered, even when the prosecution does not seek to re-impose a life without parole sentence under MCLA § 769.25a(4)(b).[392]

In *Miller v. Alabama,*[393] the United States Supreme Court held that mandating a sentence of lifetime incarceration without the possibility of parole for a juvenile "regardless of their age and age-related characteristics and the nature of their crimes" violated the Eighth Amendment's prohibition of cruel and unusual punishment.[394] To

384. *Id.* at 509, 909 N.W.2d at 469.
385. *Id.* at 516, 909 N.W.2d at 473.
386. *Id.*
387. *Id.* at 517, 909 N.W.2d at 473.
388. *Id.* at 518, 909 N.W.2d at 473.
389. *Id.* at 518-19, 909 N.W.2d at 474.
390. People v. Wines, 323 Mich. App. 343, 916 N.W.2d 855 (2018).
391. Miller v. Alabama, 567 U.S. 460 (2012)
392. *Wines*, 323 Mich. App. at 349–50, 916 N.W.2d at 857.
393. *Miller*, 567 U.S. 460 (2012).
394. People v. Wiley, 324 Mich. App. 130, 136, 919 N.W.2d 802, 805 (2018) (quoting *Miller*, 567 U.S. at 489).

remedy the constitutional violation, the Court required that courts resentence affected prisoners and take mitigating factors into consideration before re-sentencing a prisoner to life without parole.[395] The *Miller* Court set forth a list of factors that addressed the "differences between minors and adults relevant to sentencing" a juvenile offender to life without parole:

> *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, they are less deserving of the most severe punishments. Those cases relied on three significant gaps between juveniles and adults. First, children have a lack of maturity and an undeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable ... to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity].[396]

In 2014, the Michigan Legislature enacted MCLA § 769.25, "which set forth the procedure for resentencing criminal defendants who fit *Miller*'s criteria. . . ."[397] Anticipating that either the Michigan or U.S. Supreme Court would retroactively apply *Miller*, the Michigan Legislature enacted MCLA § 769.25a, which would retroactively apply *Miller* to cases that were final.[398] In fact, in 2016, the U.S. Supreme Court determined that "*Miller* was to be afforded retroactive application."[399] MCLA § 769.25a gave the state the option of moving to resentence a defendant to life without parole, or, if the state did not take action, required the court to resentence the defendant to a maximum term of imprisonment of sixty years and a minimum term of not less than twenty-five or more than forty years.[400]

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395. *Id.*

396. People v. Wines, 323 Mich. App. 343, 348, 916 N.W.2d 855, 856–57 (2018) (quoting *Miller*, 567 U.S. at 471).

397. *Wiley*, 324 Mich. App. at 173, 919 N.W.2d at 806.

398. *Id.*

399. *Id.* (citing Montgomery v. Louisiana, 136 S. Ct. 718 (2016)).

400. MICH. COMP. LAWS ANN. § 769.25a(4)(b)–(c) (West 2019).

In *Wines*, the prosecutor did not file a motion to resentence defendant to life without parole, forcing the court to resentence defendant to a term of years pursuant to MCLA § 769.25a.[401] The question in *Wines* was whether a trial court that resentences a defendant for a term of years under MCLA § 769.25a must consider the *Miller* standards.[402] The court agreed with the prosecution that *Miller* "applied only in life-without-parole decisions and does not constitutionally compel a sentencing judge to consider only the factors defined in *Miller* when the sentence of life imprisonment without parole is not sought by the prosecution per MCL 769.25a."[403] But, the court held, this does not mean that *Miller* has "*no* application" to these sentencing decisions.[404] The court pointed out that the attributes of youth, like those described in *Miller*, have historically been applied by Michigan courts when imposing criminal sentences—so much so that the court held that "a failure to consider the distinctive attributes of youth, such as those discussed in *Miller*, when sentencing a minor to a term of years pursuant to MCL 769.25a so undermines a sentencing judge's exercise of his or her discretion as to constitute reversible error."[405] Further, the court stated:

> In sum, we conclude that there is no *constitutional* mandate requiring the trial court to specifically make findings as to the *Miller* factors except in the context of a decision whether to impose a sentence of life without parole. We further conclude that when sentencing a minor convicted of first-degree murder, when the sentence of life imprisonment without parole is not at issue, the court should be guided by a balancing of the *Snow* objectives and in that context is required to take into account the attributes of youth, such as those described in *Miller*.[406]

401. *Wines*, 323 Mich. App. at 349, 916 N.W.2d at 857.
402. *Id.*
403. *Id.* at 350, 916 N.W.2d at 857.
404. *Id.*
405. *Id.* at 351–52, 916 N.W.2d at 858 (citing People v. Snow, 386 Mich. 586, 592, 194 N.W.2d 314 (1972)).
406. *Id.* at 352, 916 N.W.2d at 859.

B. Justice Versus Mercy — When Does a Tough-Sentencing Judge Cross The Line Between Mercy for Plea Deals and Punishment for Going to Trial?

In *People v. Pennington*,[407] defendant appealed his conviction after a bench trial of second degree murder on the following grounds: (1) the trial court improperly considered testimony from his preliminary examination transcript in violation of the Confrontation Clause; (2) ineffective assistance of counsel; (3) failing to consider a lesser included offense of manslaughter; and (4) that the trial judge inappropriately sentenced defendant at the top of the guidelines as punishment for defendant exercising his right to a criminal trial.[408]

The court denied defendant's appeal as to all grounds except for the last one, finding that the trial judge did indeed have a policy of imposing the maximum sentence recommended under the guidelines when a defendant is convicted after going to trial.[409] The court held that the trial judge's policy deprived defendant of his right to an individualized sentence and his due process rights not to be punished for exercising his constitutional right to a criminal trial.[410] The court noted that it had previously admonished the trial judge in an unpublished opinion about "her practice of sentencing defendants who proceed to trial at the top of the guidelines range."[411] Having determined from the record that the trial judge did the same thing in the instant case, the court remanded for resentencing before a different judge.[412]

The court articulated the difficulty sometimes attendant to determining the line between appropriately rewarding a defending for pleading guilty and punishing him or her for exercising their constitutional right to a trial:

> Courts, including the United States Supreme Court, have sometimes struggled to articulate the precise line between rewarding a defendant for pleading guilty, which is routine in plea bargains, and punishing a defendant for asserting his constitutional right to trial.

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407. People v. Pennington, 323 Mich. App. 452, 917 N.W.2d 720 (2018).
408. *Id.*
409. *Id.*
410. *See id.* at 466–69, 917 N.W.2d at 728–29.
411. *Id.* at 466, 917 N.W.2d at 728 (citing People v. Smith, No. 328477, 2016 WL 6905889 (Mich. Ct. App. Nov. 22, 2016)).
412. *Id.* at 469, 917 N.W.2d at 729–30.

> In this case, however, we need not resolve any tension between these principles. Here, the judge's sentencing policy was to impose the maximum recommended guidelines sentence when a defendant was convicted after going to trial. This does not demonstrate a process by which a court determines what an individualized sentence should be and then reduces it as an inducement or reward for a plea. Rather, it is the automatic imposition of the maximum guidelines sentence—a policy that ignores the requirement of individualized sentencing and promises not a degree of mercy as reward for a plea, but instead a harsh sentence as punishment for seeking a trial. Thus, while an admission of guilt may be considered indicative of remorse and may be grounds to reduce the punishment that would otherwise be imposed, there is no doubt that sentencing defendants to the top of the guidelines because they went to trial, or increasing their sentence in any way for doing so, is a violation of both due process and our law governing sentencing.[413]

Because the trial judge only followed along reading the portion of the preliminary exam transcript that was used to impeach a witness at trial, and it was properly admitted for that purpose under MRE 613, the trial court did not improperly consider testimony not admitted at trial, so there was no Confrontation Clause violation.[414] The court also dismissed the ineffective assistance of counsel on the facts and held that the trial court properly considered and rejected the lesser included offense of manslaughter because the evidence failed to show "adequate provocation" of passion required for the offense.[415]

C. New Standard Imposed When Judge Reviewing Defendant's Sentence on a Crosby Remand is not the Original Sentencing Judge

In *People v. Howard*,[416] the court set a new standard of review when the judge reviewing a defendant's sentence on a "*Crosby*" remand is not the original sentencing judge.[417] The court also considered whether the trial judge at issue complied with the *Crosby* remand requirements.[418]

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413. *Id.* at 468–69, 917 N.W.2d at 729–30.

414. *Id.* at 459, 917 N.W.2d at 725.

415. *Id.* at 464–65, 917 N.W.2d at 727–28.

416. People v. Howard, 323 Mich. App. 239, 916 N.W.2d 654 (2018).

417. A "*Crosby*" remand is taken from United States v. Crosby, 397 F.3d 103 (2d. Cir. 2005), and so named by the Michigan Supreme Court in People v. Lockridge, 498 Mich. 358, 870 N.W.2d 502 (2015), wherein the court found that Michigan's sentencing

In *People v. Lockridge*,[419] the Michigan Supreme Court provided the following instructions to trial courts conducting a *Crosby* remand:

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant.[420]

The court held that the trial judge failed to comply with these requirements because he failed to appoint counsel for defendant and to obtain defense counsel's views on resentencing.[421] The court then had to address the first impression issue of how to handle a situation in which the original sentencing judge was unavailable to conduct the *Crosby* remand; in this case, the sentencing judge had since retired and passed away.[422]The court reviewed varying positions by various federal circuits and adopted the procedure used in the Second Circuit:

> We find the Second Circuit's rationale in *Garcia* to be persuasive and its solution reasonable. When a newly assigned judge handles a *Crosby* remand without ever encountering the defendant, both the personal nature of sentencing, and perceptions of the fairness, integrity, and public reputation of the judicial proceeding are called into question. We conclude that when the original sentencing judge is unavailable, in addition to following the other *Crosby* remand requirements, the assigned judge must allow the defendant an opportunity to appear before the court and be heard before the judge can decide whether he or she would resentence the defendant. Because that opportunity was not given to defendant in this matter, and because he was

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guidelines violated a defendant's Sixth Amendment right to a jury trial, and required adoption of a remand procedure patterned after *Crosby* to remedy the violation. *See Howard*, 323 Mich. App. at 242, 242 n. 2, 916 N.W.2d at 655–56, 656 n. 2.

418. *Id.* at 245–47, 916 N.W.2d at 657–58.

419. People v. Lockridge, 498 Mich. 358, 870 N.W.2d 502 (2015).

420. *Howard*, 323 Mich. App. at 245, 916 N.W.2d at 657 (quoting *Lockridge*, 498 Mich. at 398, 870 N.W.2d at 524).

421. *See id.* at 246, 916 N.W.2d at 658.

422. *Howard*, 323 Mich. App. at 244, 916 N.W.2d at 657.

> deprived of counsel and the input of counsel at the time of the *Crosby* remand, we vacate the trial court's order and remand for further proceedings.[423]

D. Court Resolves First Impression Issue by Finding That a "Pattern of Continuing Criminal Conduct" Under Offense Variable 13 Cannot be Satisfied With a Single Felonious Act

People v. Carll[424] resolved a first impression issue as to whether a court can score a defendant's offense variable (OV) 13 at 25 points for a "pattern of continuing criminal conduct" when the defendant had no prior record and the multiple convictions used to calculate the score 25 arose from a single act.[425] Answering in the negative, the court ruled that "a single felonious act cannot constitute a pattern and that the trial court erred by concluding otherwise."[426]

In *Carll*, defendant was convicted of and sentenced on one count of reckless driving causing death and three counts of reckless driving causing serious impairment of a bodily function.[427] Defendant was driving a pick-up truck with passengers in the truck cab and bed through a stop sign at 30 to 40 miles per hour "and struck a car that was entering the intersection with the right of way."[428] The passenger in the other vehicle was killed and several passengers in defendant's truck were seriously injured.[429]

The court held that the sentencing statute for OV 13 "contemplates that there must be more than one felonious event" for a score of 25, and that here defendant committed a single felonious event of reckless driving.[430] The court distinguished other cases in which defendant's had been scored 25 on OV 13 when the conviction occurred out of a single incident but that involved separate acts against separate victims on "separate occasions."[431]

"Defendant's reckless driving constitutes a single act, and although there were multiple victims, nothing was presented to show that he

423. *Id.* at 252–53, 916 N.W.2d at 661–62.
424. People v. Carll, 322 Mich. App. 690, 915 N.W.2d 387 (2018).
425. *Id.* at 704, 915 N.W.2d at 396.
426. *Id.*
427. *Id.* at 693, 915 N.W.2d at 391.
428. *Id.* at 693–94, 915 N.W.2d at 391.
429. *Id.* at 694, 915 N.W.2d at 391.
430. *Id.* at 705–06, 915 N.W.2d at 397.
431. *Id.* at 705, 919 N.W.2d at 397 (distinguishing People v. Gibbs, 299 Mich. App. 473, 487, 830 N.W.2d 821 (2013) and People v. Harmon, 248 Mich. App. 522, 532, 760 N.W.2d 314 (2001)).

committed separate acts against each individual victim in the course of the reckless driving. Accordingly, we conclude that the trial court improperly scored OV 13 at 25 points. It should have been scored at zero."[432]

E. Strict Adherence to Statutory Offense Enhancement Language is Required

The Michigan Court of Appeals maintained its dedication to strict adherence to statutory language regarding the use of prior offenses to enhance or otherwise increase punishment for individual defendants. In *People v. Pointer-Bey*, the defendant pleaded guilty to armed robbery, conspiracy to commit armed robbery, bank robbery, conspiracy to commit bank robbery, two counts of assault with a dangerous weapon, possession of a firearm during the commission of a felony (second offense), and being a felon in possession of a firearm.[433] The prosecutor explained on the record that in exchange for the plea, the prosecutor had agreed not to charge the defendant with another bank robbery committed on a separate date.[434] The prosecutor further agreed that he would reduce the defendant's habitual-offender status from a fourth offense (a 25-year mandatory minimum) to a third offense.[435] The court ultimately sentenced the defendant as a third-offense habitual offender to fifteen to forty-five years' imprisonment for the robbery charges, four to eight years for each felonious assault conviction, five to ten years for the felon-in-possession conviction, and five years' imprisonment, to be served consecutively for the felony-firearm conviction.[436] The defendant moved to withdraw his plea, which the trial court denied.[437]

On appeal, the defendant first argued that his plea proceedings were defective because he was not informed of the sentencing consequences related to his convictions of felonious assault and felon-in-possession.[438] The court of appeals agreed, noting that the prosecution had failed to state the maximum sentences for felonious assault and felon-in-possession, which rendered the plea proceedings defective and entitled the defendant to withdraw his plea in its entirety.[439]

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432. *Id.* at 705–06, 919 N.W.2d at 397.
433. People v. Pointer-Bey, 321 Mich. App. 609, 909 N.W.2d 523 (2017).
434. *Id.* at 613–14, 909 N.W.2d at 526.
435. *Id.* at 614, 909 N.W.2d at 526.
436. *Id.*
437. *Id.*
438. *Id.* at 614–15, 909 N.W.2d at 526–527.
439. *Id.* at 617, 909 N.W.2d at 528.

The defendant further argued that he had not provided an adequate factual bases for his felony-firearm conviction because, even though it was his second felony-firearm offense, he did not have a prior conviction under MCLA § 750.227b.[440] The court strictly applied the plain language of the statute which required "a second conviction *under this subsection*" and agreed that the defendant was entitled to relief, as the defendant did not have a prior conviction under MCLA § 750.227b.[441] Instead, the defendant had a conviction for a federal firearms offense[442] arising out of the United States District Court for the Eastern District of Wisconsin.[443] Because this previous firearms conviction was not a conviction specifically under MCLA § 750.227b(1), the court held that it could not be used to enhance the defendant's sentence and that the defendant had therefore been given misinformation regarding the mandatory minimum sentence he faced for his plea to felony-firearm.[444]

The defendant also challenged the benefit of his plea bargain, arguing that it was an illusory bargain because, contrary to the prosecutor's representations, he was not subject to a twenty-five-year minimum as a fourth-offense habitual offender.[445] Despite the merit to the defendant's assertion that he was not actually subject to a 25-year minimum sentence, the court rejected his arguments because it concluded that the plea bargain was not illusory as he had received numerous benefits under the plea.[446] The court noted that the habitual offender statute requires:

> (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction for the subsequent felony . . . as follows:
>
> (a) If the subsequent felony is a serious crime or a conspiracy to commit a serious crime, *and 1 or more of the prior felony*

440. *Id.* at 615, 909 N.W.2d at 526–27.
441. *Id.* at 619, 909 N.W.2d at 529.
442. 18 U.S.C. 924(c)(1)(A) (2019).
443. *Pointer-Bey*, 321 Mich. App. at 620, 909 N.W.2d at 529.
444. *Id.* at 620, 909 N.W.2d at 529.
445. *Id.* at 621, 909 N.W.2d at 529.
446. *Id.* at 623–24, 909 N.W.2d at 531.

> *convictions are listed prior felonies*, the court shall sentence the person to imprisonment for not less than 25 years.[447]

The court again strictly applied the language of the statute: because the defendant's prior convictions were not "listed prior felonies" under Michigan law, the statute did not encompass the defendant's convictions arising under federal statutes or the statutes of other states.[448] This is despite MCLA § 769.12(1)'s more general instruction that the convictions could be "for felonies or attempts to commit felonies in this state if obtained in this state."[449] The court reasoned that for the purposes of the twenty-five-year minimum, the Michigan Legislature had clearly limited this more general instruction to only those felonies which are "listed prior felonies."[450] In short, the more specific limitation controlled the general section, in accordance with traditional principles of statutory interpretation.[451] Therefore, the prosecutor's offer to take the 25-year minimum term of imprisonment "off the table" was indeed a misunderstanding of the law; but the court stopped short of concluding that the defendant's plea bargain was illusory, noting that the prosecutor had still reduced his habitual offender status from a fourth offender to a third offender, and had further agreed not to charge the defendant in an earlier bank robbery.[452]

In other words, the court found no illusory bargain where the defendant may not have received as many benefits as he had hoped for, but still received many benefits for the plea.[453] Still, given the other plea errors the court found, it remanded the matter to the trial court to allow the defendant the opportunity to withdraw his plea.[454]

F. Habitual Offender Enhancement Applies to Repeat Domestic Abusers

In *People v. Stricklin*,[455] the defendant argued that his sentence for third-offense domestic violence could only be enhanced under the recidivism adjustment in the statute, and not by reference to the habitual offender statute.[456] Under the domestic violence statute, a first or second

447. MICH. COMP. LAWS ANN. § 769.12(1)(a) (West 2019) (emphasis added).
448. *Pointer-Bey*, 321 Mich. App. at 622, 909 N.W.2d at 530.
449. *Id.*
450. *Id.*
451. *Id.*
452. *Id.* at 623, 909 N.W.2d at 531.
453. *Id.*
454. *Id.* at 618, 909 N.W.2d at 528.
455. People v. Stricklin, 322 Mich. App. 533, 912 N.W.2d 601 (2018).
456. *Id.* at 536, 912 N.W.2d at 603.

assault or assault and battery of a spouse/former spouse/co-parent/resident of the same household/or and individual with whom the defendant has a dating relationship is punishable by up to ninety-three days' imprisonment.[457] If, however, the defendant has "two or more previous convictions" for domestic violence, then the offense is punishable by up to five years' imprisonment.[458] MCLA § 750.81b(b) requires that a defendant's prior domestic-violence convictions be established at the time of sentencing.[459] The *Stricklin* defendant had two prior domestic-violence convictions, making his instant offense a felony eligible for the enhanced sentence.[460] Further, he had been convicted for felony witness-intimidation, giving him at least four total felonies on his record at the time of his sentence.[461]

At sentencing, he argued that because the domestic-violence statute already contained a mechanism for enhancing his sentence, his sentence should not have also been enhanced by the habitual-offender statute which provides:[462]

> If a person has been convicted of any combination of 3 or more felonies ... and that person commits a subsequent felony ... the person shall be punished upon conviction of the subsequent felony and sentencing . . . as follows:
>
> (b) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court . . . may sentence the person to imprisonment for life or for a lesser term.
>
> (c) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is less than 5 years, the court . . . may sentence the person to imprisonment for a maximum term of not more than 15 years.[463]

The defendant argued that his "first conviction" for the purposes of the habitual-offender enhancement should be taken to mean a conviction for

457. MICH. COMP. LAWS ANN. § 750.81(2) (West 2019).
458. *Id.* § 750.81(4).
459. *Id.* § 750.81b(b).
460. *Stricklin*, 322 Mich. App. at 536, 912 N.W.2d at 603.
461. *Id.*
462. *Id.*
463. MICH. COMP. LAWS ANN. § 769.12 (West 2019).

a first offense of domestic violence, which is a misdemeanor not otherwise subject to enhancement under the habitual offender statute.[464]

The court rejected the defendant's arguments, holding that "nothing in the habitual offender statute or the domestic-violence statute indicates an intent by the legislature to exclude third-offense domestic violence from the enhancement provision of MCLA § 769.12."[465] The court reasoned that when a legislative scheme elevates the offense based upon underlying offenses, rather than only the punishment, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions are permitted.[466] Because the domestic-violence statutory scheme did not merely enhance punishment based on recidivism, but instead created a separate substantive crime, felony domestic violence, based on recidivism, the habitual offender enhancement still applied.[467]

G. Michigan's Sentencing Guidelines are Fully Advisory: All Sentences, Including Those Which Depart From The Guidelines, Must Reflect Fundamental Principles of Proportionality

1. Steanhouse Holds that Michigan's Sentencing Guidelines are Fully Advisory, and that All Sentences Must Reflect Fundamental Principles of Proportionality

Following the U.S. Supreme Court's decisions in *Alleyne v. United States*,[468] the Michigan Supreme Court held that Michigan's mandatory sentencing guidelines violated the Sixth Amendment because they required judicial fact-finding beyond facts admitted by the defendant or found by the jury.[469] The Michigan Supreme Court clarified the ramifications of this decision in *People v. Steanhouse*,[470] namely whether any portion of Michigan's mandatory guidelines sentencing survived *Lockridge*'s holding.

The Court began by "reaffirm[ing] *Lockridge*'s remedial holding rendering the guidelines advisory in all applications."[471] In doing so, it rejected the prosecution's argument that the guidelines had been rendered advisory only in cases that involved judicial fact-finding which

464. *Stricklin*, 322 Mich. App. at 538, 912 N.W.2d at 604.
465. *Id.* at 539–40, 912 N.W.2d at 604–05.
466. *Id.* at 540, 912 N.W.2d at 604.
467. *Id.*
468. Alleyne v. United States, 570 U.S. 99 (2013).
469. People v. Lockridge, 498 Mich. 358, 870 N.W.2d 502 (2015).
470. People v. Steanhouse, 500 Mich. 453, 902 N.W.2d 327 (2017).
471. *Id.* at 459, 902 N.W.2d at 329.

increased the applicable guidelines range.[472] The court reasoned that even if a bifurcated mandatory/advisory guidelines regime might technically avoid constitutional defect, it would be practically unworkable because the distinction between "judge-found" facts and facts "sufficiently admitted by the defendant" would prove unclear in practice.[473] This, combined with other lingering questions, such as how would these issues be resolved or what standard would be applied on review, led the court to find that a "mixed" sentencing regime would result in "endless litigation and perpetual uncertainty."[474] The court instead reemphasized that although the guidelines are advisory, sentencing courts must still consult the applicable guidelines range, take it into account when imposing a sentence, and justify the sentence imposed in order to facilitate appellate review.[475]

The court next turned to the proper standard to be used in determining whether a departure sentence is so unreasonable as to constitute an abuse of the trial court's discretion.[476] Although the court found that review of sentencing decisions would be for abuse of discretion, the court had yet to decide between two competing sets of sentencing standards: proportionality, and reference to the federal statutory factor codified in 18 USC § 3553(a).[477] The court ultimately chose to embrace traditional notions of proportionality found throughout the court's jurisprudence over reference to the federal factors.[478] The court explained that although the Supreme Court had noted the constitutional flaw present in many states' sentencing systems,[479] nothing in its holdings required Michigan to abandon its longstanding practices applicable to sentencing, so long as it was not treating its sentencing guidelines as mandatory.[480]

The court distinguished its holding in this regard from the United States Supreme Court's holding in *Gall v. United States*,[481] which rejected a federal circuit court's determination that the court must justify all deviations from the federal guidelines in proportion to the extent of the deviation.[482] The Michigan Supreme Court noted that Michigan's

472. *Id.* at 465–66, 902 N.W.2d at 332–33.
473. *Id.* at 468, 902 N.W.2d at 334.
474. *Id.* at 468–69, 902 N.W.2d at 334.
475. *Id.* at 470, 902 N.W.2d at 335.
476. *Id.*
477. *Id.* at 471, 902 N.W.2d at 335–36.
478. *Id.* at 477, 902 N.W.2d at 338.
479. *See* United States v. Booker, 543 U.S. 220 (2005).
480. *Steanhouse*, 500 Mich. at 473, 902 N.W.2d at 336.
481. Gall v. United States, 552 U.S. 38 (2007).
482. *Id.* at 47.

principles of proportionality did not create the same presumption of unreasonableness struck down by *Gall*.[483] Instead, Michigan's proportionality system simply required that all sentences be proportionate to the seriousness of the circumstances surrounding the offense and the offender.[484] The court further explained that the guidelines would remain "highly relevant" to sentencing determinations, but that they would no longer be mandatory in any sense.[485] The "key test" would be whether a sentence was proportionate to the seriousness of the matter not whether it departed from or adhered to the guidelines.[486] The supreme court remanded the matter to the court of appeals for appellate review of the departure sentence at issue in the case.[487]

2. Chief Justice Markman's Dissent

Chief Justice Markman authored a vigorous dissent to the majority's holding in *Steanhouse*.[488] Chief Justice Markman argued that the majority overstepped its institutional bounds, by holding that the whole of the sentencing guidelines were never mandatory.[489] Instead, Chief Justice Markman would have held that the guidelines remained mandatory to the extent that such mandatory application did not run afoul of a defendant's Sixth Amendment right to a jury trial.[490]

Chief Justice Markman began his dissent by noting that although the Michigan Supreme Court has the power to strike down laws which are unconstitutional, it followed that its power of judicial review would authorize it only to strike down those portions of the law which were unconstitutional.[491] In other words, if a statutory scheme, such as Michigan's guidelines, could be saved, Chief Justice Markman would have held that the court was duty-bound to uphold all portions of the law that could be saved from unconstitutionality, thereby deferring to the legislature's decision.[492]

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483. *Steanhouse*, 500 Mich at 474, 902 N.W.2d at 337.

484. *Id.*

485. *Id.*

486. *Id.* at 475, 902 N.W.2d at 337.

487. *Id.* at 477, 902 N.W.2d at 338.

488. *Id.* at 484, 902 N.W.2d at 342 (Markman, C.J., concurring in part, dissenting in part).

489. *Id.* at 485, 902 N.W.2d at 343 (Markman, C.J., concurring in part, dissenting in part).

490. *Id.*

491. *Id.* at 486, 902 N.W.2d at 343–44 (Markman, C.J., concurring in part, dissenting in part).

492. *Id.*

Chief Justice Markman noted that in imposing Michigan's sentencing guidelines, the legislature had indicated its decision to constrain judicial decision-making at sentencing to avoid unwarranted disparities in the minimum and maximum sentences which could be imposed.[493] Although the United States Supreme Court found that the Sixth Amendment of the Constitution barred the use of the mandatory judicial fact-finding to increase the floor of the minimum guidelines range, Chief Justice Markman noted that the appropriate remedy was not to simply throw out the entire sentencing regime mandated by the Michigan Legislature.[494] Instead, Chief Justice Markman suggested a variety of alternatives.[495]

First, Chief Justice Markman suggested that the guidelines could be made to have an advisory floor and a mandatory ceiling; such a remedy would avoid increasing a minimum sentence through the use of judicial fact-finding, but would still pay proper deference to the legislature's decision to bind judicial decision-making to a maximum guidelines range.[496] Next, Chief Justice Markman proposed making the floor and ceiling of guidelines mandatory, but eliminating all judicial fact-finding.[497] This would avoid running afoul of the Supreme Court precedent which held that the Sixth Amendment barred judicial fact-finding when it increased the minimum sentence of a defendant.[498] Another solution proposed was to make the guidelines advisory if a judge engaged in fact-finding, but mandatory if the judge did not.[499] By eliminating judicial fact-finding from the mandatory application of the guidelines, Chief Justice Markman reasoned that the majority of the guidelines could be saved.[500] Finally, Chief Justice Markman proposed that judicial fact-finding could be eliminated altogether or that juries

493. *Id.* at 487, 902 N.W.2d at 344 (Markman, C.J., concurring in part, dissenting in part).

494. *Id.* at 494–95, 902 N.W.2d at 348 (Markman, C.J., concurring in part, dissenting in part).

495. *Id.* at 496–511, 902 N.W.2d at 348–56 (2017) (Markman, C.J., concurring in part, dissenting in part).

496. *Id.* at 497–502, 902 N.W.2d at 349–52 (Markman, C.J., concurring in part, dissenting in part).

497. *Id.* at 503–05, 902 N.W.2d at 353 (Markman, C.J., concurring in part, dissenting in part).

498. *Id.*

499. *Id.* at 505–09, 902 N.W.2d at 353–55 (Markman, C.J., concurring in part, dissenting in part).

500. *Id.* at 510, 902 N.W.2d at 356 (2017) (Markman, C.J., concurring in part, dissenting in part).

could be required to find all relevant factors for application of the Guidelines.[501]

Chief Justice Markman concluded by noting that *any* of these above remedies would avoid the Sixth Amendment problems at issue in United States Supreme Court precedent, while simultaneously preserving the maximum amount of the legislature's original sentencing scheme.[502] Given his divergent views on the proper deference to pay to the legislature's "preferred system of sentencing," Chief Justice Markman dissented from the Majority's holding.[503]

3. Steanhouse Applied

As discussed above, the Michigan Supreme Court remanded consideration of the defendant's sentence in *Steanhouse* to the Michigan Court of Appeals for application of its decision.[504] On remand, the court of appeals applied the proportionality test announced by the Supreme Court to the departure imposed by the trial court.[505]

At the outset, the court noted that a trial court abuses its sentencing discretion if it fails to provide adequate reasons for the extent of its departure sentence.[506] The first step to the appellate court's review would be to consider whether the trial court adequately articulated whether the guidelines took into account the conduct alleged to support the particular departure imposed.[507] In the instant case, the trial court departed upwards from the guidelines based upon the "horrendous, brutal" assault of the victim as well as the fact that the victim was incapacitated by drug use at the time of the assault.[508] The court of appeals held that neither reason was a proper consideration for departing from the advisory guidelines because such factors were accounted for in the guidelines themselves.[509]

For example, the guidelines already required the trial court to score OV 7 at 50 points if the offender treated the victim with "excessive

501. *Id.* at 509–11, 902 N.W.2d at 356 (Markman, C.J., concurring in part, dissenting in part).

502. *Id.* at 519, 902 N.W.2d at 361 (Markman, C.J., concurring in part, dissenting in part).

503. *Id.* at 512, 902 N.W.2d at 357 (Markman, C.J., concurring in part, dissenting in part).

504. *Id.* at 477, 902 N.W.2d at 338.

505. People v. Steanhouse, 322 Mich. App. 233, 238, 911 N.W.2d 253, 256 (2017).

506. *Id.*

507. *Id.* at 239–40, 911 N.W.2d at 257.

508. *Id.* at 240, 911 N.W.2d at 257–58.

509. *Id.* at 241, 911 N.W.2d at 258.

brutality."[510] In this way, the guidelines allowed the trial court to consider the brutal nature of the incident before it. Yet the trial court in *Steanhouse* declined to score the guidelines with the "excessive brutality" calculation because it concluded that the brutality at issue was not beyond that necessary for assault with intent to murder, the offense of conviction.[511] The Michigan Court of Appeals found that, having rejected application of the calculation allowed under the guidelines, the trial court could not later use the same conduct as a reason for departing outside of the guidelines.[512] For a similar reason, the court of appeals also rejected the trial court's decision to enhance the defendant's sentence because the victim was incapacitated by drug use at the time of the offense; the guidelines already allowed an enhanced calculation for "exploitation of a vulnerable victim."[513] Having not scored it as part of the defendant's sentencing calculation, the trial court was not permitted to later use the same factor to depart upwards from the sentence.[514] The court therefore remanded the matter for resentencing.[515]

The Michigan Court of Appeals reached a similar determination in *People v. Dixon-Bey*.[516] There, the trial court departed upwards from the guidelines based on its conclusion that the defendant was a "recidivist criminal" deserving of "greater punishment" than contemplated by the guidelines.[517] Yet, under the guideline calculation, the defendant's prior record variable score was zero, leaving the record devoid of any indication why the trial court concluded that the defendant was a "recidivist criminal."[518] Moreover, the trial court emphasized that the defendant stabbed the victim twice in the chest, but did not explain how the guideline enhancements for aggravated use of a weapon and lethal possession of a weapon had not accounted for this.[519] Similarly, the trial court made reference to the "impact of the victim's death on his family," but did not explain why the guidelines' enhancement for "psychological injury to a member of a victim's family" did not adequately account for that impact.[520]

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510. *Id.* at 240, 911 N.W.2d at 258; *see also* MICH. COMP. LAWS ANN. § 777.37(1)(a) (West 2019).
511. *Id.*
512. *Id.*
513. *Id.* at 241, 911 N.W.2d at 258.
514. *Id.*
515. *Id.* at 243, 911 N.W.2d at 259.
516. People v. Dixon-Bey, 321 Mich. App. 490, 909 N.W.2d 458 (2017).
517. *Id.* at 525, 909 N.W.2d at 478.
518. *Id.*
519. *Id.* at 526–27, 909 N.W.2d at 478.
520. *Id.* at 527, 909 N.W.2d at 478.

The Michigan Court of Appeals rejected the trial court's reference to the "cold-blooded" nature of the crime.[521] It noted that by using this language, the trial court may have indicated its belief that the killing had been premediated.[522] Yet, the jury only convicted the defendant of second degree murder, indicating that the jury decided that the murder was not premediated.[523] Because the trial court was bound to score the guidelines in accordance with the jury's determination, the court of appeals concluded that this reference to premeditation was in error.[524]

H. Trial Courts are Required to Consider the Defendant's Prior Offenses as "Felonies" for Guideline Purposes and Must Accord Parity With the Scoring of the Co-Defendant's Offense Variables

In *People v. Jackson*,[525] the defendant pled guilty to unarmed robbery and a habitual offender second offense sentence enhancement after being acquitted by a jury of felony firearm charges because the jury deadlocked on the principal charge of armed robbery.[526] He pled to the lesser charge prior to a second trial.[527] On appeal, he argued that the trial court incorrectly scored offense variables (OV) 1, 2 and 13.[528] The court affirmed the trial court's scoring of these variables.[529]

The Michigan Court of Appeals addressed the scoring of OV 1, aggravated use of a weapon, and OV 2, lethality of weapon used, together.[530] The defendant argued that his acquittal on felony firearm charges barred the assessment of offense variable points related to a weapon.[531] The court of appeals disagreed, relying on the plain language of MCLA § 777.31(2)(b), which states that in multiple offender cases, if one offender is assessed points under the variable, "all offenders shall be assessed the same number of points" and the trial court has "no scoring discretion in multiple offender cases."[532]

Jackson's case involved multiple offenders—one co-defendant pleaded guilty to armed robbery and scored points under both OV 1 and

521. *Id.* at 527, 909 N.W.2d at 479.
522. People v. Dixon-Bey, 321 Mich. App. 490, 527, 909 N.W.2d 458, 479 (2017).
523. *Id.* at 528, 909 N.W.2d at 479.
524. *Id.*
525. People v. Jackson, 320 Mich. App. 514, 907 N.W.2d 865 (2017).
526. *Id.* at 518, 901 N.W.2d at 867.
527. *Id.*
528. *Id.* at 518–27, 901 N.W.2d at 867–72.
529. *Id.* at 516, 901 N.W.2d at 866.
530. *Id.* at 523, 901 N.W.2d at 870.
531. *Id.* at 523, 907 N.W.2d at 870.
532. *Id.* at 524, 901 N.W.2d at 870.

2.[533] Relying upon *People v. Morson*,[534] the court of appeals held that Jackson must be assessed the same OV points as his co-defendant.[535] "Although the trial court did not state on the record that it calculated [Jackson's] scores for OV1 and OV2 based on his codefendant's OV1 and OV2 scores, our Supreme Court's holding in Morson required it to do so; therefore it cannot be held to have erred for so doing."[536] The court further stated that, even if the trial court were not bound by the co-defendant's scoring, the record from the trial produced adequate support the trial court's scoring decisions.[537]

One issue not addressed by the court of appeals is that the *Morson* opinion involved multiple offenders who were all convicted of the same offense.[538] The *Jackson* co-defendants pled to different crimes altogether.[539] The court of appeals did not reach the ultimate question of whether OV1 and OV2 points must be scored similarly for all co-defendants regardless of their respective crimes of conviction. The dissenting opinions in *Morson* suggest that there are legitimate bases for not equally scoring co-defendants when they are convicted of different offenses.[540]

The second challenge involved OV 13, which addresses a continuing pattern of criminal conduct.[541] The variable scoring is based on the number and type of a defendant's prior felony convictions within a five year period prior to the sentencing offense.[542] Twenty-five points are scored if "...the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person."[543] The defendant argued that the court improperly used his two prior convictions for attempted resisting or obstructing a police officer to assess the OV 13 scoring.[544] He argued they should not be considered because the maximum penalty for the crime of resisting or obstructing a police

533. *Id.* at 525, 901 N.W.2d at 871.
534. 471 Mich. 248, 260, 685 N.W.2d 203, 209 (2004).
535. *Id.* at 525–26, 901 N.W.2d at 871.
536. *Id.* at 526, 901 N.W.2d at 871.
537. People v. Jackson, 320 Mich. App. 514, 526, 907 N.W.2d 865, 871–72 (2017).
538. *Morson*, 471 Mich. 248, 251, 685 N.W.2d 203, 204 (2004).
539. *Jackson*, 320 Mich. App. at 518, 525, 907 N.W.2d at 867, 871.
540. *See Morson*, 471 Mich. at 271, 685 N.W.2d at 215 (Markman, J., concurring in part and dissenting in part); *Id.* at 277, 685 N.W.2d at 218 (Young, J., concurring in part and dissenting in part).
541. *Jackson*, 320 Mich. App. at 519, 907 N.W.2d at 868.
542. MICH. COMP. LAWS ANN. § 777.43 (West 2019).
543. *Id.*
544. People v. Jackson, 320 Mich. App. 514, 519, 907 N.W.2d 865, 868 (2017).

officer is two years and the penalty for attempt is one year, which is a misdemeanor penalty under Michigan law.[545]

The court of appeals disagreed, finding that the Michigan Sentencing Guidelines "...specifically describe how trial courts must treat attempt offenses for scoring purposes."[546] Resisting or obstructing a police officer[547] is considered a "Class G" felony.[548] According to the Michigan Court of Appeals, under MCLA § 777.19(3)(b), ". . . because resisting or obstructing a police officer is a Class G felony, the trial court was required to consider defendant's attempted resisting or obstructing as Class H felonies for purposes of scoring the sentencing guidelines."[549]

Nonetheless, the court of appeals' use of MCLA § 777.19 in its analysis is subject to question in this regard. MCLA § 777.19 is contained in part two of the Michigan Sentencing Guidelines Act.[550] The act expresses that "[t]he offense descriptions in part 2 of this chapter are for assistance only and the statutes listed govern application of the sentencing guidelines."[551] The act also states that "[i]f the offender is being sentenced for an attempted felony described in [MCL 777.19], determine the offense variable level and prior record variable level based on the underlying attempted offense.[552] As such, in dividing crimes into classes and categories, part two of the act, particularly MCLA § 777.19, is meant to address the offense of conviction not the treatment of prior offenses.[553]

In determining whether a defendant's offense of conviction was part of a pattern of felonious criminal activity involving three or more crimes against a person (as the statute requires), the trial court should not rely on the prior offense's alphabetical guideline classification under Part Two (which addresses the crime of conviction), but whether that prior offense is "felonious" under Michigan's Code of Criminal Procedure. Under MCLA § 761.1, "'[f]elony' means a violation of a penal law of this state for which the offender upon conviction may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony."[554] Under the same statute, "'[m]isdemeanor means a

545. *Id.*
546. *Id.* at 521, 901 N.W.2d at 869; *see also* MICH. COMP. LAWS ANN. § 777.19 (West 2019).
547. *See* MICH. COMP. LAWS ANN. §§ 750.81d(1), .479(2) (West 2019).
548. *Id.*
549. *Jackson*, 320 Mich. App. at 522, 907 N.W.2d at 869.
550. MICH. COMP. LAWS ANN. § 777.19.
551. *Id.* at § 777.6 (West 2019).
552. *Id.* at § 777.21(5) (West 2019).
553. *See, e.g.*, MICH. COMP. LAWS ANN. § 777.19.
554. MICH. COMP. LAWS ANN. § 761.1 (West 2019).

violation of a penal law of this state this is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine."[555] As such, the court of appeals may have erred in allowing crimes whose maximum penalties were not "more than [one] year" to be considered felonious.

I. Courts Can Rely on Various Evidence in Offense Variable Scoring for Psychological Injury

In *People v. Wellman*,[556] the defendant was convicted of assault with intent to commit sexual penetration and was sentenced as an habitual fourth offender.[557] On appeal, he "did not dispute the conviction, but allege[d] there to be an error in the scoring of offense variable 4 (OV) 4 [sic] resulting in an incorrect sentence."[558] The defendant argued the trial court used "inaccurate information" and scored the variable in violation of the defendant's "state and federal due process rights."[559] Essentially, the defendant argued that the prosecution could not prove the serious psychological injury from his attack or one requiring professional treatment.[560]

The victim did not supply an impact statement to the trial court prior to sentencing and did not testify that she had sought psychological treatment.[561] The court of appeals found that "[w]hether the victim had undergone psychological treatment is not determinative."[562] Citing prior cases for the proposition that "statements about feeling angry, hurt, violated and frightened" supported points under OV 4, the Michigan Court of Appeals also relied on the recent Michigan Supreme Court decision, *People v. Calloway*.[563] *Calloway* examined a similar challenge raised to OV 5—psychological injury to victim's family.[564]

The *Calloway* court found points scored under OV 5 were appropriate given the statements from the victim's family that demonstrated the serious psychological issues they were suffering that could require future professional treatment.[565] The Michigan Supreme

555. *Id.*
556. People v. Wellman, 320 Mich. App. 603, 605, 910 N.W.2d 304, 305 (2017).
557. *Id.* at 606, 910 N.W.2d at 306.
558. *Id.*
559. *Id.*
560. *Id.*
561. *Id.* at 606–07, 910 N.W.2d at 306.
562. *Id.* at 608, 910 N.W.2d at 306–07.
563. *Id.* at 609, 910 N.W.2d at 307 (citing People v. Calloway, 500 Mich. 180, 895 N.W.2d 165 (2017)).
564. *See generally* People v. Calloway, 500 Mich. 180, 895 N.W.2d 165 (2017).
565. People v. Wellman, 320 Mich. App. 603, 609, 910 N.W.2d 307 (2017).

Court did not require the family member(s) to be, at present, seeking or receiving professional treatment.[566] Comparing the statements made by the family in *Calloway* with those of the victim in the case before it at the preliminary examination, the court of appeals found "no great departure."[567] During her testimony, the victim explained that the assault was traumatic and "her 'everyday life was harder now."[568] She also mentioned suffered continuing memory loss.[569]

Following both *Calloway* and *Wellman*, trial courts will look to the victim's testimony, impact statements and presentation to determine whether to score psychological injury points under OV 4, and OV5. Given the traumatic nature of most criminal encounters, this is likely a natural conclusion to be reached by courts. These opinions will make it difficult to challenge the scoring of points in these variables.

XI. APPEALS

A. What Appeal Rights Under the Michigan Medical Marihuana Act are Waived by an Unconditional Guilty Plea?

The court in *People v. Cook*[570] had to consider various questions on remand from the Michigan Supreme Court, the dispositive one being whether the defendant's unconditional guilty plea to operating a vehicle with the presence of a controlled substance (marihuana) in her body waived her right to appeal the trial court's denial of an evidentiary hearing to establish various affirmative defenses under § 8 of the Michigan Medical Marihuana Act, MCLA § 333.26421 *et seq.* (MMMA).[571]

The court held that the unconditional guilty plea by the defendant waived her right to appeal the trial court's denial of an evidentiary hearing under section 8 of the MMMA because the rights under section 8 did not implicate the very authority of the state to bring charges, which is not waivable, but rather related only to the state's ability to prove defendants factual guilt at trial, which is a waivable right.[572]

In determining what rights were waivable by an unconditional guilty plea, the court relied on the concurring and dissenting opinion of Justice

566. *Id.* at 610, 910 N.W.2d at 308 (citing *Calloway*, 500 Mich. at 186, 895 N.W.2d at 168–69).
567. *Id.* at 611, 910 N.W.2d at 308.
568. *Id.*
569. *Id.*
570. People v. Cook, 323 Mich. App. 435, 918 N.W.2d 536 (2018).
571. *Id.* at 437, 918 N.W.2d at 537.
572. *Id.* at 447, 918 N.W.2d at 543.

Moody in the 1981 Michigan Supreme Court decision in *People v. White*.[573] The court declined to follow certain language in a 1986 Michigan Supreme Court opinion styled *People v. New*, which arguably could have affected the *Cook* court's ultimate holding, calling it a "misreading" of the federal cases the *New* Court analyzed and also non-binding "obiter dictum" because it was not necessary to the decision of the *New* case.[574] In other words, the court of appeals in *Cook* relied on the rationale of a concurring and dissenting opinion in a 1981 Supreme Court case to interpret, and reject parts of, the majority opinion in a 1986 Supreme Court case.

Indeed, after quoting the rationale from Justice Moody's concurring and dissenting opinion in *White*, the court offered its decision about its interpretation of the holding of the *New* Court:

> To summarize, the *New* Court held that "a criminal defendant may appeal from an unconditional guilty plea or a plea of nolo contendere only where the claim on appeal implicates the very authority of the state to bring the defendant to trial, that is, where the right of the government to prosecute the defendant is challenged," but "[w]here the claim sought to be appealed involves only the capacity of the state to prove defendant's factual guilt, it is waived by a plea of guilty or nolo contendere." "Another phrasing of this principle . . . is that 'jurisdictional' defenses are not waived by a plea of guilty."[575]

In finding that section 8 of the MMMA did not implicate the authority of the state to bring defendant to trial, and was thus waivable, the court compared it to section 4 of the MMMA, which the court held would have implicated the authority of the state to bring the defendant to trial, and was thus not waivable.[576] Section 4 provides "broad immunity" from criminal prosecution to "qualifying patients" possessing a registration card for medical marihuana.[577] So if a defendant can prove the elements of § 4, the state would have no authority to bring charges against a defendant "for the medical use of marihuana in accordance with" the

573. *Id.* at 444–45, 918 N.W.2d at 541–42 (citing People v. White, 411 Mich. 366, 308 N.W.2d 128 (1981)).

574. *Id.* at 443–44, 918 N.W.2d at 540–41 (rejecting in part the holding in People v. New, 427 Mich. 482, 398 N.W.2d 358 (1986)).

575. *Id.* (internal citations omitted).

576. *Id.* at 448–51, 918 N.W.2d at 543–45.

577. *Id.* at 448–49, 918 N.W.2d at 543–44 (citing MICH. COMP. LAWS ANN. § 333.26424 (corresponding to Section 4 of the MMMA)).

MMMA.[578] Thus, § 4 immunity "implicates the very authority of the state to bring the defendant to trial," and is therefore "not the type of defense that is waived by an unconditional guilty plea."[579]

Section 8, on the other hand, is available to "unregistered patients," contains only affirmative defenses, and is a "different creature" that is "separate and distinct" from immunity under § 4.[580] This is because § 8 relates to affirmative defenses that defendant must prove at trial in a case that the prosecution has the right to bring.[581] Thus, a § 8 defense is waivable under *New* because it "does not implicate the right of a prosecutor to bring a defendant to trial in the first instance, as the defense specifically contemplates the matter potentially proceeding to trial, where the defense will be weighed by the jury."[582]

XII. POST-JUDGMENT RELIEF

A. A Jurisdictional Challenge is not Barred by MCR 6.502's Limitation of One Motion for Relief From Judgment

In *People v. Washington,*[583] the jury convicted the defendant of murder, assault and firearms offenses in 2004.[584] He appealed as of right "challeng[ing] the propriety of the trial court's upward departure from the sentencing guidelines."[585] The Court of Appeals affirmed the convictions in an opinion on June 13, 2006 but remanded the case for resentencing.[586] The defendant filed an application for leave to appeal in the Michigan Supreme Court on August 8, 2006.[587] On October 4, 2006, while the case was pending in the Michigan Supreme Court, the trial court resentenced the defendant.[588] On December 4, 2006, the defendant filed a delayed application for leave to appeal the resentencing order, again on the issue of an upward departure.[589] The Michigan Supreme

578. *Id.* at 450, 918 N.W.2d at 544–45.

579. *Id.* at 446, 918 N.W.2d at 542 (quoting *New*, 427 Mich at 495, 398 N.W.2d at 364) (internal quotation marks omitted).

580. People v. Cook, 323 Mich. App. 435, 450, 918 N.W.2d 536, 545 (2018) (citing People v. Kolanek, 491 Mich. 382, 401, 817 N.W. 2d 528 (2012)).

581. *Id.*

582. *Id.* at 451, 918 N.W.2d at 545.

583. People v. Washington, 321 Mich. App. 276, 908 N.W.2d 924 (2017).

584. *Id.* at 278–79, 908 N.W.2d at 925.

585. *Id.* at 279, 908 N.W.2d at 925–26.

586. *Id.* at 279–80, 908 N.W.2d at 926.

587. *Id.* at 280, 908 N.W.2d at 926.

588. *Id.*

589. *Id.* at 280, 908 N.W.2d at 926.

Court denied the delayed application on December 28, 2006.[590] The Michigan Court of Appeals denied the appeal of the resentencing order on May 4, 2007 and the Michigan Supreme Court later denied application for leave to appeal.[591]

The defendant filed a motion for relief from judgment in the trial court on March 25, 2008.[592] The trial court denied the motion on July 9, 2008.[593] The defendant appealed, the court of appeals denied the application on October 19, 2009, and later denied an application for leave to appeal in 2010.[594] Thereafter, the defendant "exhaust[ed] all available postconviction relief."[595]

On June 22, 2016, the defendant filed a second motion for relief from judgment on the grounds that the trial court lacked jurisdiction to resentence in October 2006 due to the pending application in the Michigan Supreme Court.[596] The prosecution argued that the motion was barred by MCR 6.502(G), which prohibits successive motions for relief from judgment unless there has been a retroactive change in the law or new evidence has been discovered.[597] While the trial court agreed with the prosecution with respect to successive motions for relief from judgment, the trial court concluded that it had lacked jurisdiction to resentence, nonetheless.[598]

The Michigan Court of Appeals found that "a motion for relief from judgment under MCR 6.502 is merely a procedural vehicle and [the court's] determination that relief under MCR 6.502 was unavailable to defendant did not end [its] inquiry."[599] While "brought pursuant to an inapplicable court rule," the court of appeals held that the defendant's motion raised an issue that "nevertheless constitutes an important and reviewable claim of error."[600] Citing *People v. Swafford*[601] for the proposition that filing a timely application for leave to appeal from the court of appeals stays the proceedings on remand, the court held that the issue raised by defendant was in fact one of jurisdiction.[602] The

590. *Id.*
591. *Id.*
592. *Id.* at 281, 908 N.W.2d at 926.
593. *Id.*
594. *Id.*
595. *Id.*, 908 N.W.2d at 927.
596. *Id.*
597. *Id.*
598. *Id.* at 281–82, 908 N.W.2d at 927.
599. *Id.* at 283, 908 N.W.2d at 928.
600. *Id.*
601. 483 Mich. 1, 762 N.W.2d 902 (2009).
602. People v. Washington, 321 Mich. App. 276, 285, 908 N.W.2d 924, 928–29 (2017).

defendant's motion was proper because "[j]urisdictional defects may be raised at any time."[603]

The Michigan Court of Appeals found any conflict with MCR 6.502 to be "illusory" because the trial court exercised its "inherent power to 'recognize its lack of jurisdictional or any pertinent boundaries on its proper exercise.'"[604] While likely a case confined by its own unique facts and history, *Washington*, nonetheless, identifies that MCR 6.502's bar to successive motions for relief from judgment is not a bar to all post-judgment motions, even when all post-conviction relief has been exhausted.[605]

B. A Series of Evidentiary Rulings Were Affirmed in Reviewing the Effectiveness of Defense Counsel's Performance

In *People v. Urban*,[606] the defendant was convicted of several felonies related to the confinement and battering of his girlfriend.[607] On appeal, he challenged the effectiveness of his trial counsel for failing to object to DNA evidence, testimony regarding his illegal possession of a sawed off shotgun, testimony about the Islamic religion, testimony about the state of defendant's home, and an instruction to the jury.[608] The defendant also challenged the scoring of two offense variables under the sentencing guidelines.[609] The court did not find that the trial counsel was ineffective or the guidelines were improperly scored.[610]

1. Ineffectiveness of Counsel

The court addressed the effectiveness of the trial counsel's performance pursuant to the accepted standards of review.[611] The "effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise."[612] To demonstrate ineffective assistance of counsel, a defendant must show that: (1) "trial counsel's performance was deficient" and (2) "that counsel's deficient performance

603. *Id.* at 285–86, 908 N.W.2d at 929.
604. *Id.* at 286, 908 N.W.2d at 929.
605. *Id.*
606. People v. Urban, 321 Mich. App. 198, 908 N.W.2d 564 (2017).
607. *Id.* at 201–02, 908 N.W.2d at 564 (2017).
608. *Id.* at 207–12, 908 N.W.2d at 571–75.
609. *Id.* at 212, 908 N.W.2d at 574.
610. *Id.* at 206, 214, 908 N.W.2d at 571, 575.
611. *Id.* at 206, 908 N.W.2d at 571.
612. *Id.* at 206–07, 908 N.W.2d at 571 (2017) (citing People v. Rodgers, 248 Mich. App. 702, 714, 645 N.W.2d 294, 301 (2001)).

prejudiced the defense."[613] An attorney's performance is deficient if it falls "below an objective standard of professional reasonableness," and such performance prejudices the defense if "it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different."[614]

Trial counsel did not object to the admission of the DNA evidence, which was admitted with little evidence of accompanying evidence of interpretive evidence regarding the likelihood of the potential match. The court of appeals first examined whether the admission of the evidence was error under a plain error standard (due to counsel's failure to object). The court found no error. While the forensic scientist did not provide any testimony regarding the statistical parameters of the DNA, her report (which contained the testing methodology and data interpretation) was also admitted as an exhibit. The court also noted that even if there was error, the admission of the evidence did not affect the defendant's substantial rights, citing the testimony of the victim and evidence photographed and seized by the police.

Turning to whether the defense attorney was ineffective for failing to object to the admission of the DNA evidence, the court found that it was unlikely that the attorney thought it necessary to object.[615] The defense theory at trial did not deny that an altercation had occurred but instead characterized the incident as a brawl in which both sustained injuries.[616] "The presence of their respective DNA on items found in the home would therefore be unsurprising, and challenging the DNA would seem to be of questionable purpose."[617] The inconclusive result of a test on a handgun allowed the defendant to argue that the DNA evidence contradicted the victim's testimony.[618] Finally, the court found "no reasonable probability" that the trial outcome would have been different had the DNA evidence been excluded.[619]

The court likewise found no ineffectiveness when the defense counsel elicited testimony from the victim "about defendant's possession of an illegal sawed-off shotgun."[620] However, the shotgun was referenced in text messages and video footage played for the jury. The court suggested that referencing the "illegality" of the shotgun could have been

613. *Id.* at 206, 908 N.W.2d at 571 (citing People v. Taylor, 275 Mich. App. 177, 186, 737 N.W.2d 790, 796 (2007)).
614. *Id.* at 206–07, 908 N.W.2d at 571.
615. *Id.*, 908 N.W.2d at 571–72.
616. *Id.* at 202, 908 N.W.2d at 569.
617. *Id.* at 207, 908 N.W.2d at 572.
618. *Id.* at 205, 908 N.W.2d at 570–71.
619. *Id.* at 208, 908 N.W.2d at 572.
620. *Id.*

a strategic decision meant to show the victim wanted to get the defendant in as much trouble as possible by fabricating a story. Alternatively, counsel could have been trying to "'get ahead' of the issue." The court seemed partially satisfied by the fact that the jury had acquitted the defendant of one of the two charges of felonious assault, which suggested the jury did not believe the victim with respect to the presence of the shotgun at the time of the incident.

The Michigan Court of Appeals also did not find ineffective assistance for counsel's failure to object to questions about the defendant's Islamic faith both on relevance and prosecutorial misconduct.[621] Specifically, testimony revealed that the defendant "said Islamic prayers and 'Muslim things' in Arabic," and ". . . [Muslims had] made him this way."[622] The court found this evidence was relevant to demonstrate the defendant's state of mind.[623] The prosecution theorized that the motive for the crimes were recent losses in the defendant's life, and the testimony reflected his emotional turmoil.[624] The court found the evidence not substantially prejudicial because the evidence that defendant engaged in prayer and religious practices while emotionally distressed did not ". . . go[] beyond the merits of the case to inject issues broader than the defendant's guilt or innocence..."[625]

The court did not find any prosecutorial misconduct to which defense counsel should have objected in the first place.[626] The court did not believe the record supported the argument that ". . . the prosecution sought to insert religion into the case in order to arouse public prejudice in the jury" and that any such objection would have been futile.[627] The court found the evidence "reflected factual descriptions of [the victim]'s continued confinement."[628] By finding the religious evidence relevant, the court essentially rejected ineffectiveness arguments related to religion.[629]

Defense counsel requested and received a demonstration outside the presence of the jury with respect to whether the victim was strong

621. *Id.* at 209–10, 908 N.W.2d at 573.

622. *Id.*

623. *Id.* at 210, 908 N.W.2d at 573. The court also rejected any ineffectiveness with respect to evidence regarding the state of the defendant's home which was described as a "mess" and having "a really bad odor." *Id.* at 214, 908 N.W.2d at 575. This evidence also was offered to show the defendant's deteriorating mental condition. *Id.* at 213–214, 908 N.W.2d at 575.

624. *Id.*, 908 N.W.2d 564, 573.

625. *Id.* at 210–11, 908 N.W.2d at 573.

626. *Id.* at 211–12, 908 N.W.2d at 574.

627. *Id.* at 212, 908 N.W.2d at 574.

628. *Id.*

629. *See generally id.*

enough to load the pistol.[630] After loading the magazine into the pistol backward and having to have the process explained to her during the hearing, the court then instructed the jury that the victim "had the physical strength to load the ammunition..." and that "she was able to put rounds in the magazine."[631] On appeal, the defendant argued that his trial counsel should have request the court include a statement that the victim needed assistance to load the magazine.[632] The Michigan Court of Appeals disagreed, finding that the demonstration was requested with respect to her strength and that a "brief verbal prompt while attempting to load the magazine... was not dispositive of whether she had previously loaded the magazine."[633] The court again found that any such request would likely have been futile.[634]

2. Sentencing Guidelines

The defendant also raised two issues with respect to the sentencing guidelines, arguing that offense variable ("OV") 4, serious psychological injury to victim, and OV 7, aggravated physical abuse, were improperly scored.[635] With respect to OV 4, the court relied upon the trial record and victim's sentencing impact statement, which showed that the victim had been seeing a therapist after believing that she would be killed during the incident and the abuse she endured.[636] She also suffered from "nightmares..., flashbacks... and a daily struggle with emotional stability as a result of the trauma."[637] With respect to OV 7, the court found "...substantial evidence supporting the conclusion that defendant's prolonged behavior was egregious and sadistic."[638] There was "ample evidence" to support the variable scoring.[639]

C. Defendant Could not Withdraw Plea Without Showing Prejudice

In *People v. Winters,*[640] the defendant pled *nolo contendre* to second-degree arson, attempted arson, and being an habitual offender.[641] During

630. *Id.* at 202, 908 N.W.2d at 569.
631. *Id.* at 212, 908 N.W.2d at 574.
632. *Id.* at 213, 908 N.W.2d at 574.
633. *Id.*, 908 N.W.2d at 575.
634. *Id.*
635. *Id.* at 214, 908 N.W.2d at 575.
636. *Id.* at 215, 908 N.W.2d at 576.
637. *Id.* at 215–16, 908 N.W.2d at 576.
638. *Id.* at 217, 908 N.W.2d at 577.
639. *Id.* at 218, 908 N.W.2d at 577.
640. People v. Winters, 320 Mich. App. 506, 904 N.W.2d 899 (2017), *aff'd in part vacated in part*, No. 156388, 2018 WL 3910815 (Mich. May, 18, 2018).

the plea proceeding, the court told Winters that the maximum penalty for the attempt charge was twenty years when, in fact, it was only ten years.[642] The defendant argued that he should be allowed to withdraw his plea because the trial court did not comply with MCR 6.302(B)(2).[643] However, the Michigan Court of Appeals found that "a misstatement of the maximum possible sentence does not require reversal if no prejudice is shown... Because defendant was not told that he was facing a shorter sentence than he actually was, he cannot show he was prejudiced."[644] The defendant also argued that the "advice of rights" form bearing his signature was "faulty" because of his "limited ability to read."[645] The court rejected this argument finding that the form was read to the defendant and the trial court asked the defendant if he understood his rights.[646] Defendant's corresponding claim of ineffective assistance of counsel was also rejected because he could not show that the outcome would have been different had his trial attorney objected to the misstatement with respect to the maximum possible penalty.[647]

D. Trial Court's Advising the Jury That it had Ruled Confession Admissible was Harmless Error

The defendant in *People v. Pierson*[648] appealed the denial of a post-conviction motion for relief from judgment.[649] The basis of the motion was that the trial court deprived him of a fair trial by commenting that the court had ruled on the admissibility of a statement made to the arresting officer and precluding questions about the circumstances surrounding the statement.[650] Finding the trial judge's comments to "clearly intemperate and unwise," declining to create a "bright-line rule" regarding reversal and limiting its ruling to the facts of the case, the

641. *Id.* at 508–509, 904 N.W.2d at 901.
642. *Id.* at 509, 904 N.W.2d at 901.
643. *Id.* at 508–509, 904 N.W.2d at 901.
644. *Id.* at 511, 904 N.W.2d at 902.
645. *Id.* at 512, 904 N.W.2d at 903.
646. *Id.* at 512–13, 904 N.W.2d at 903 (2017). The court reasoned that the rule does not specify a reader, and, therefore, the defendant's statement that his rights had been read to him and that he understood them was sufficient. *Id.* Although not mentioned by the court explicitly, the fact that this was the defendant's third felony plea proceeding (given the habitual third sentencing enhancement) may have influenced the rejection of this argument.
647. *Id.* at 513, 904 N.W.2d at 903.
648. People v. Pierson, 321 Mich. App. 288, 909 N.W.2d 274 (2017)
649. *Id.* at 290, 909 N.W.2d at 275.
650. *Id.*