CRIMINAL LAW

ERIKA BREITFELD[†]

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† Assistant Dean and Associate Professor of Law, Western Michigan University-Cooley Law School. Bachelor of Arts, 2001, Eli Broad College of Business, Michigan State University; Juris Doctor, 2004, Cum Laude, Michigan State University College of Law. Former Assistant Prosecuting Attorney, Macomb County, Michigan. Special thanks to my husband, Brian, for his continued support of my professional endeavors and to my parents for teaching me the importance of education.

I. CRIMINAL PROCEDURE CONCERNS

A. Using LEIN Information as a Basis for Reasonable Suspicion.

The reliability and accuracy of software the police use to form reasonable suspicion was under attack in *People v. Mazzie*.[1] In *Mazzie*, the defendant was a passenger in a vehicle stopped for suspicion of driving without insurance.[2] When police ran the license plate, they received a message coded "EIV=N."[3] The code EIV=N indicates to police that the insurance was not verified, which means—in 90% of cases—the vehicle does not have insurance.[4] The system that provides the police this information is called the Law Enforcement Information Network (LEIN).[5] The LEIN system also tells the officer the license plate number, the vehicle's VIN, the expiration date on the tab, whom the vehicle is registered to, the registrant's address, and whether the vehicle is covered by insurance.[6]

Once the vehicle was stopped, the police noticed a chalky white substance scattered throughout the car.[7] The substance tested positive as cocaine, and the defendant and driver were arrested.[8] The arrests led to a search warrant associated with evidence found on the defendant's phone.[9] The defendant was arrested, again, months later during the execution of the search warrant.[10]

The chain of events began with the vehicle stop for no insurance, so the defendant filed a motion to dismiss the charges from both the insurance stop and the search warrant, alleging that the LEIN network was unreliable and could not provide a basis for probable cause.[11] Further, the defendant argued that the information the Secretary of State

1. People v. Mazzie, 326 Mich. App. 279, 285, 926 N.W.2d 359, 361 (2018).
2. *Id.*
3. *Id.*
4. *Id.* at 285–86, 926 N.W.2d at 362–63.
5. *Id.* at 283, 926 N.W.2d at 361.
6. *Id.* at 285–86, 926 N.W.2d at 362–63.
7. *Id.* at 284, 926 N.W.2d at 362.
8. *Id.*
9. *Id.*
10. *Id.* at 284–85, 326 N.W.2d at 362.
11. *Id.* at 285–86, 326 N.W.2d at 362.

provided and LEIN delivered violated confidentiality principles of Mich. Comp. Laws (MCL) section 257.227(4).[12]

The trial court agreed with the defendant and dismissed the charges.[13] The prosecutor filed a motion for reconsideration, but the trial court denied the motion and reaffirmed its decision, stating that it was concerned with the reliability of the insurance verification codes and whether the exclusionary rule was the proper remedy.[14]

The Michigan Court of Appeals held that it need not reach the question of whether the Secretary of State's provision of insurance information violated any confidentiality.[15] The court held that the merits of that question did not need to be addressed because the remedy the trial court applied—the exclusionary rule—was improper.[16] The court reasoned that the exclusionary rule should only be used when a statute's plain language indicates a legislative intent to apply the rule.[17] The court explained that nothing in the language of the statutes at issue indicated that the exclusionary rule should apply.[18]

The court also opined that the exclusionary rule was designed for police deterrence, and its use should reflect that purpose.[19] Therefore, the court did not think that the exclusionary rule was the appropriate remedy because the violation related to confidentiality, not police conduct or abuse.[20] Hence, the court found the suppression of the evidence drastic and improper.[21]

Additionally, the court found that the regularity of updates provided to the LEIN system was not so improper as to void any reasonable suspicion.[22] First, the court explained that many courts, including federal courts, have held that a state computer database that provides vehicle-related information can provide reasonable suspicion.[23] Second, the court quoted language from a federal, 10th Circuit case where then-Judge Gorsuch provided guidance about the difference between ongoing infractions and infractions that conclude quickly.[24] In that case, the court

12. *Id.*; MICH. COMP. LAWS § 257.227 (2011).
13. *Mazzie*, 326 Mich. App. at 287, 326 N.W.2d at 363.
14. *Id.* at 288, 326 N.W.2d at 364.
15. *Id.* at 289, 326 N.W.2d at 364.
16. *Id.*
17. *Id.* at 290, 326 N.W.2d at 365.
18. *Id.* at 290–91, 326 N.W.2d at 365.
19. *Id.* at 290, 326 N.W.2d at 364.
20. *Id.* at 289, 326 N.W.2d at 364.
21. *Id.* at 290–91, 326 N.W.2d at 364.
22. *Id.* at 294, 326 N.W.2d at 367.
23. *Id; see e.g.*, United States v. Broca-Martinez, 855 F.3d 675 (5th Cir. 2017); United States v. Sandridge, 385 F.3d 1032 (6th Cir. 2004).
24. *Mazzie*, 326 Mich. App. at 295–96, 326 N.W.2d at 367–68.

explained that when criminal infractions continue for days or weeks compared to infractions that quickly resolve, like jaywalking or mugging, the timeliness of the information can vary.[25] It also noted that the timeliness of information is one factor to consider when assessing reasonable suspicion, and that the importance of the timeliness of information will vary depending on the nature of the criminal activity at issue.[26]

Applying the 10th Circuit's language and reasoning, the Michigan Court of Appeals explained that the concern for staleness of information is not as significant when the infraction is ongoing.[27] Likewise, the court reiterated that the standard is reasonable suspicion, not probable cause, so the officers only needed more than a hunch that illegal activity was occurring, which the LEIN database provided.[28] Finally, the court noted that the possible 16-day lapse in updated information was not so late or unreliable that it could not provide the police with reasonable suspicion.[29] Therefore, the Michigan Court of Appeals reversed the suppression order and remanded the case to the trial court.[30]

B. Do You Have an Expectation of Privacy When Sitting in a Parked Vehicle on the Street?

The Michigan Court of Appeals addressed privacy issues and how they relate to parked cars in *People v. Barbee*.[31] In *Barbee*, the defendant was the passenger in a vehicle that was parked on a public street.[32] The vehicle had its engine and headlights on, and the defendant and the driver of the vehicle were talking.[33] Police officers in a marked car shined their flashlights into the vehicle as they pulled alongside it.[34]

The police immediately noticed that "the defendant looked shocked and leaned back in his seat, appearing to pull something from his waist . . . and lean[ed] forward as if he were attempting to place something under his seat."[35] The defendant's movements concerned the officers, so they

25. *Id.* at 295, 326 N.W.2d at 367 (citing United States v. Cortez-Galaviz, 495 F.3d 1203, 1209 (10th Cir. 2007)).
26. *Id.*, 326 N.W.2d at 368.
27. *Id.* at 296, 326 N.W.2d at 368.
28. *Id.* at 296–97, 326 N.W.2d at 368.
29. *Id.* at 297, 326 N.W.2d at 368.
30. *Id.*, 326 N.W.2d at 369.
31. 325 Mich. App. 1, 923 N.W.2d 601 (2018).
32. *Id.* at 3, 923 N.W.2d at 601.
33. *Id.*, 923 N.W.2d at 602.
34. *Id.*
35. *Id.*

exited the police car and approached the defendant.[36] He immediately jumped out of the car, and when police shined a flashlight near where the defendant was seated, they discovered the back of a gun handle under the seat.[37] The defendant was charged with several firearm offenses, including felon in possession of a firearm.[38]

During his bench trial, the defendant argued that the gun should be suppressed because the officers lacked probable cause to approach the vehicle and search it.[39] The trial court refused to consider the argument because, according to the court, the defendant's attorney should have filed a pretrial motion rather than raise the issue during trial.[40] The defendant was convicted.[41] On appeal, the defendant argued ineffective assistance of counsel and claimed there was insufficient evidence to support the numerous weapons convictions.[42]

As to his insufficient evidence claim, the defendant challenged where the police saw him, arguing that the police cannot use the plain view doctrine when they are not somewhere they are lawfully allowed to be.[43] Second, the defendant argued that the police needed some reasonable suspicion of criminal activity to proceed as they did.[44]

The Michigan Court of Appeals held that the plain view doctrine was inapplicable because it applied to seizures, not searches.[45] The court clarified that the plain view and open view doctrines are entirely different.[46] As the court explained, the plain view doctrine is applicable when "an officer's access to the object had some previous justification under the Fourth Amendment."[47] Open view, however, is applicable when an "officer observes incriminating evidence or unlawful activity from a non-intrusive vantage point."[48] Therefore, the question in this case was not whether plain view applied, but whether the defendant's movements inside the car were in open view.

To determine if the defendant's movements were in open view, the court had to decide if the defendant had a reasonable expectation of

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36. *Id.* at 3–4, 923 N.W.2d at 602.
37. *Id.*
38. *Id.*
39. *Id.* at 4, 923 N.W.2d at 602.
40. *Id.*
41. *Id.* at 3, 923 N.W.2d at 602.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 6, 923 N.W.2d at 603.
46. *Id.*
47. *Id.* at 7, 923 N.W.2d at 604 (citing Texas v. Brown, 460 U.S. 730, 739 (1983)).
48. *Id.* (citing State v. Ramirez, 824 P.2d 894, 896 (Idaho Ct. App. 1991)).

privacy.[49] The court held that the defendant did not have a reasonable expectation of privacy in a vehicle parked on a public street.[50] The court held that anyone from the public could have walked by the vehicle and looked inside to see the contents.[51] Quoting *Texas v. Brown*, the court thus stated, "[T]here is no reason [the officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen."[52]

The court also rejected the defendant's argument that there was insufficient evidence to convict, citing circumstantial evidence of the defendant's location in the vehicle, the defendant's shocked facial expression when the police arrived, and the defendant's suspicious movements consistent with placing an item under the seat.[53] The court viewed that evidence as more than sufficient to justify the trial court's finding that the defendant did possess the weapon; the Michigan Court of Appeals, accordingly, rejected the defendant's claim of ineffective assistance of counsel because the motion would have been frivolous and affirmed the trial court's findings.[54]

C. How Closely Must the Participants in a Lineup Resemble the Suspect?

In *People v. Craft*, the defendant was prosecuted for three counts of assault with intent to murder and two weapons charges.[55] During the investigation and while in custody, the defendant appeared in a six-man lineup.[56] He had counsel present during the lineup, but his counsel did not object.[57] Later, during other pretrial proceedings, the defendant's trial counsel, different than his previous counsel, filed a motion to suppress the lineup, arguing that the lineup was impermissibly suggestive.[58] Specifically, the defendant argued that (1) the defendant was shorter and smaller than the other men; (2) he was lighter skinned than the others; and (3) that only two of the men, including himself, were wearing orange jumpsuits.[59] After hearing evidence from the attorney who was present at the lineup, the court determined that there was nothing impermissibly

49. *Id.* at 8, 923 N.W.2d at 604.
50. *Id.* at 10, 923 N.W.2d at 605.
51. *Id.*
52. *Id.* (quoting *Brown*, 460 U.S. at 739).
53. *Id.* at 12–13, 923 N.W.2d at 607.
54. *Id.*, 923 N.W.2d at 606–07.
55. 325 Mich. App. 598, 601–02, 927 N.W.2d 708, 711–12 (2018), *appeal denied*, 503 Mich. 949, 922 N.W.2d 116 (2019).
56. *Id.*
57. *Id.*
58. *Id.* at 601–02, 927 N.W.2d at 711.
59. *Id.*

suggestive that would lead to a substantial likelihood of misidentification.[60] The defendant proceeded to trial.[61]

At the conclusion of trial, the defense counsel and the prosecutor approved the proposed jury instructions—neither of them recognizing that the instructions for the defendant's two firearm offenses were missing.[62] The jury sent a note to the judge during deliberations asking the court to clarify if the defendant was facing five charges, as the verdict form indicated, or three charges, as the jury instructions in the binder indicated.[63] The court, realizing the error, asked for argument from both the prosecution and the defense about how to proceed and ultimately decided to reinstruct the jury on all five counts.[64] In fact, the court decided to read all charges again, instead of singling out the two charges that were originally missing to avoid any prejudice from "piecemeal consideration."[65]

The defendant was convicted at trial on various counts.[66] He then filed an appeal claiming that the court's reinstruction to the jury was a structural constitutional error and that the prosecutor had waived her rights to supplement the jury instructions when she originally agreed to them.[67] He also appealed the trial court's ruling as to the lineup.[68]

The Michigan Court of Appeals affirmed the trial court's decisions.[69] First, the court clarified that the trial court had the discretion, at any time before the jury's verdict was returned, to supplement its own instructions.[70] In support, the court cited Michigan Court Rule (MCR) 2.512(B)(1), which states that a trial court "may, with or without request, instruct the jury on a point of law if the instruction will materially aid" the jury's understanding.[71] Further, the court reasoned that the rereading of all the instructions—and not just the two instructions that were

60. *Id.*
61. *Id.* at 602, 927 N.W.2d at 712.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 608, 927 N.W.2d at 714.
66. *Id.* at 603–04, 927 N.W.2d at 712. The defendant was convicted of two counts of assault with intent to do great bodily harm less than murder, which is a lesser included charge of assault with intent to murder. *Id.* at 603, 927 N.W.2d at 712. He was also convicted of two firearm offenses. *Id.*
67. *Id.* at 604, 927 N.W.2d at 712.
68. *Id.*
69. *Id.* at 600, 927 N.W.2d at 710.
70. *Id.* at 607, 927 N.W.2d at 714.
71. *Id.*, 927 N.W.2d at 714 (quoting MICH. CT. R. 2.512(B)(1)).

missing—was done to avoid any piecemeal consideration and to protect the defendant, while also avoiding the time and cost of a new trial.[72]

As to the pretrial lineup challenge, the court also disagreed with the defendant's claim that the lineup was impermissibly suggestive.[73] The court noted that the defendant was not entitled to the expanded *Wade* evidentiary hearing because he had never introduced any evidence that indicated that there was a need for an expanded hearing.[74] In fact, the court found the testimony of the lineup counsel to be sufficient to establish that the lineup was not impermissibly suggestive.[75]

The court also held that the physical differences between the men in the lineup were not so dramatic as to affect the lineup's admissibility.[76] The court further reasoned that even if the defendant had met his burden of showing that the lineup was impermissibly suggestive, it would not have undermined the reliability of the jury's verdict.[77] The court pointed to witness testimony indicating that they identified the defendant by his facial features, not his clothing, and that his identification as the shooter was not solely from the lineup.[78] Specifically, a witness had testified to knowing the defendant for three years; moreover, the defendant had announced that he wanted to fight the victim before firing shots, and the defendant was seen in a vehicle matching the description of the getaway vehicle shortly after the incident.[79] Therefore, the court concluded that even if the defendant had met his burden of showing that the lineup was impermissible, the error would have been harmless.[80] The court thus affirmed the trial court's findings.[81]

D. People v. Barritt: Miranda *and What It Means to be in Custody*

In a case rich with procedural history,[82] the Michigan Court of Appeals was tasked with deciding whether a defendant's statements,

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72. *Id.* at 608–09, 927 N.W.2d at 714.
73. *Id.* at 609, 927 N.W.2d at 715.
74. *Id.* at 610, 927 N.W.2d at 715.
75. *Id.*
76. *Id.*, 927 N.W.2d at 716.
77. *Id.* at 612, 927 N.W.2d at 716.
78. *Id.* at 611, 927 N.W.2d at 716.
79. *Id.*
80. *Id.* at 612, 927 N.W.2d at 716.
81. *Id.* at 613, 927 N.W.2d at 717.
82. People v. Barritt, 325 Mich. App. 565, 926 N.W.2d 811 (2018), *leave to appeal denied*, 928 N.W.2d 224 (Mich. 2019). After the Genesee County Circuit Court suppressed the defendant's statements, the state filed an interlocutory appeal. *Id.* at 560, 926 N.W.2d at 813. The Michigan Court of Appeals affirmed the trial court's ruling on different grounds, and the state filed an application for leave to appeal to the Michigan

given without *Miranda* warnings, were made while the defendant was "in custody."[83] The question of whether a defendant is "in custody" for purposes of *Miranda* is a mixed question of fact and law.[84] The reviewing court must independently answer this question after a "review de novo of the record."[85] The trial court's findings of fact are reviewed for clear error, and a factual finding is "clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made."[86]

In this case, both the prosecution and the defense acknowledged that he was not given *Miranda* warnings, but the prosecution asserted that the defendant was not in custody when he made the statements, so his uncoerced and voluntary statements were admissible.[87] The standard for determining if a person is in custody for *Miranda* purposes is "(1) whether a reasonable person would have felt that he was not at liberty to terminate the interrogation and leave; and (2) whether the environment presented the same inherently coercive pressures as the type of station house questioning involved in *Miranda*."[88]

The Michigan Court of Appeals addressed each of these prongs separately. First, the court relied heavily on the instructions provided by the body of caselaw interpreting *Miranda*.[89] The court stated that "in order to determine how a suspect would have 'gauge[d]' his or her 'freedom of movement,' courts must examine 'all of the circumstances surrounding the interrogation.'"[90] Those circumstances include "(1) the location of the questioning;[91] (2) the duration of the questioning;[92] (3) statements made during the interview;[93] (4) the presence or absence of

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Supreme Court. *Id.* The Michigan Supreme Court vacated the court of appeals' holding that the defendant was in custody because the court of appeals should have remanded the case to the trial court for application of the correct standard in the first instance. *Id.* Therefore, the Michigan Supreme Court remanded the case to the circuit court to apply the correct standard for determining when a defendant is "in custody." *Id.* The circuit court granted the defendant's motion to suppress his statements, and the state filed an interlocutory appeal to the Michigan Court of Appeals. *Id.*, 926 N.W.2d at 813–14.

83. *Id.* at 559, 926 N.W.2d at 813.

84. *Id.* at 561, 926 N.W.2d at 814.

85. *Id.*

86. *Id.*

87. *Id.* at 560–61, 926 N.W.2d at 814.

88. *Id.* at 560, 926 N.W.2d at 813 (citing Howes v. Fields, 565 U.S. 449, 509 (2012)), *appeal denied*, 928 N.W.2d 224 (Mich. 2019).

89. *Id.* at 562, 926 N.W.2d at 814.

90. *Id.* (quoting Stansbury v. California, 511 U.S. 318, 322 (1994)).

91. *Id.*, 926 N.W.2d at 815 (citations omitted).

92. *Id.* (citations omitted).

93. *Id.* (citations omitted).

physical restraints during the questioning;[94] and (5) the release of the interviewee at the end of the questioning."[95]

1. Freedom of Movement Analysis

a. Location:

The *Barritt* court held that the small police office where the defendant was questioned leaned toward a finding that the defendant was in custody.[96] The court explained that the custody analysis is an objective, not a subjective inquiry based on the individual views of the officers or the person being questioned.[97] The court noted that the defendant was taken from the front lawn of a residence to the police station in a marked car.[98] The court also emphasized that even though there was a layperson present at the residence, who could have driven the defendant, the police never provided that option to the defendant.[99] Instead, the defendant was transported in the backseat of a marked police vehicle.[100]

Also instructive was the fact that the defendant was placed in a room for questioning with an officer and a police dog.[101] The court further emphasized that the defendant was never alone—he was in the constant presence of armed officers, who became increasingly hostile as the questioning continued.[102] Therefore, the court held that while questioning a defendant in a police station is not dispositive in the custody analysis, the location of the questioning and the totality of the factors affecting the location in this case weighed in favor of finding that the defendant was in custody.[103]

b. Duration:

The duration of the defendant's interview was 90 minutes—a factor that the trial court stated was neutral in its consideration of the freedom of movement analysis.[104] To assess this factor, the court compared the

94. *Id.* (citations omitted).
95. *Id.* (citations omitted).
96. *Id.* at 565, 926 N.W.2d at 816.
97. *Id.* at 568, 926 N.W.2d at 817–18.
98. *Id.* at 566, 926 N.W.2d at 816.
99. *Id.*, 926 N.W.2d at 817.
100. *Id.*
101. *Id.* at 565, 926 N.W.2d at 816.
102. *Id.* at 568, 926 N.W.2d at 817.
103. *Id.* at 568–69, 926 N.W.2d at 817–18.
104. *Id.* at 569, 926 N.W.2d at 818.

defendant's 90-minute interview to the duration of interviews in other cases.[105] The court compared *Yarborough v. Alvarado*,[106] to *Oregon v. Mathiason*,[107] where a 30-minute interview weighed against a finding of custody.[108] The court found that the 90-minute interview weighed neutrally and was therefore not determinative of whether the defendant was in custody.[109]

c. Statements:

As the court noted, *Yarborough* held that "failure to tell a suspect that he or she is free to leave is one factor that can contribute to a finding that a suspect [is] in custody."[110] In *Barritt*, the defendant was taken from a residence to the police station in a marked police car, and the officer who transported him did not recall telling the defendant he was free to leave during the car ride.[111] The officer testified that he told the defendant at the police station that he could finish the interview at any time, but he never told him he was free to leave.[112] In fact, the first time the defendant was told he was free to leave was after he terminated the interview by asking for a lawyer.[113] Only then did the officer indicate that the defendant was not under arrest and was free to leave.[114]

Further, the court emphasized the accusatory nature of the interview.[115] The officers continually questioned the defendant's truthfulness and accused him of lying several times.[116] In fact, the court stressed that the defendant asked the detectives if they "were finished" so he could leave, indicating that he felt like he needed permission to get up from the room and walk out.[117] The court thus found that a reasonable person would not have felt free to leave, which weighed in favor of a custody finding.[118]

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105. *Id.*
106. Yarborough v. Alvarado, 541 U.S. 652 (2004).
107. Oregon v. Mathiason, 429 U.S. 492 (1977).
108. *Barritt*, 325 Mich. App. at 569–70, 926 N.W.2d at 818.
109. *Id.*
110. *Id.* at 570, 926 N.W.2d at 818 (citing *Yarborough*, 541 U.S. at 665).
111. *Id.*, 926 N.W.2d at 819.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 570–71, 926 N.W.2d at 819.
116. *Id.* at 572–73, 926 N.W.2d at 819–20.
117. *Id.*, 926 N.W.2d at 820.
118. *Id.*, 926 N.W.2d at 820–21.

d. Physical Restraints:

The defendant was not handcuffed while he was transported from the residence to the police station, but the court addressed other types of restraints as well.[119] First, the court noted that riding "in the back of a patrol car and being escorted into the police station by armed officers were forms of restraint."[120] The court also held that the defendant's constant supervision by armed officers, as well as the tone of the interview and the presence of a police dog, were forms of restraint that a reasonable person would find restrictive of his liberty.[121] Therefore, the court found that the physical restraints factor weighed in favor of a custody finding.[122]

e. Release:

Finally, the court analyzed whether the defendant was allowed to leave the police station at the end of the interview.[123] The court relied on *Mathiason*, where the defendant was allowed to walk out of a police station at the end of an interview.[124] The court compared that case to this case, where the defendant was handcuffed and placed in a patrol car for transport to another police jurisdiction for questioning.[125] The prosecution conceded that when the defendant concluded the interview at the station, he was not released but instead placed in handcuffs and transported to another jurisdiction—placing him "in custody" for *Miranda* purposes.[126]

The prosecution, however, maintained that any statements made before the handcuffs were placed on the defendant were not made in custody and, therefore, not subject to *Miranda* warnings.[127] The court disagreed and held that the totality of the circumstances supported the trial court's finding that the defendant was in custody during his interrogation.[128]

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119. *Id.* at 575, 926 N.W.2d at 821.
120. *Id.*
121. *Id.*
122. *Id.* at 578, 926 N.W.2d at 822.
123. *Id.*, 926 N.W.2d at 822–23.
124. *Id.* (citing Oregon v. Mathiason, 429 U.S. 492 (1977)).
125. *Id.* at 578, 926 N.W.2d at 823.
126. *Id.* at 579, 926 N.W.2d at 823.
127. *Id.*
128. *Id.*

2. Coercive Environment:

The court then evaluated whether the defendant was presented with the same "inherently coercive pressures" that are present during station house questioning.[129] The court used the decision in *People v. Elliott* to guide its reasoning, per the direction of the Michigan Supreme Court on remand.[130]

The appellate court held that the trial court did not err when it found that the defendant was subjected to the "same inherently coercive pressures as the type of station house questioning at issue in *Miranda*."[131] Specifically, the court noted that the defendant was always accompanied by an armed officer and was unable to travel to the police station in the vehicle that he had traveled to the residence in.[132] The court further emphasized that the defendant did not get to arrange the time, place, or date of the interview—he was at the complete mercy of the police.[133]

Ultimately, the court held that the police limited the defendant's freedom of movement, and the same coercive pressures that *Miranda* was designed to protect against were present.[134] The court therefore affirmed the trial court's suppression of the defendant's statements.[135]

II. CRIMINAL ACTS: PROBABLE CAUSE, DEFINITIONS, AND METHODS OF PROOF

A. Probable Cause and Identity: Mere Suspicion Won't Paint the Picture.

In *People v. Fairey*, the Michigan Court of Appeals revisited one of the most fundamental issues in criminal procedure: probable cause.[136] The defendant, a famous artist most recognized for his red, white, and blue poster of President Barack Obama, was charged with malicious destruction of a building and malicious destruction of property in Wayne

129. *Id.* at 581, 926 N.W.2d at 824 (quoting Howes v. Fields, 565 U.S. 499, 509 (2012)).

130. *Id.* at 581–82, 926 N.W.2d at 823–24; *see also* People v. Elliott, 494 Mich. 292, 833 N.W.2d 284 (2013).

131. *Barritt*, 325 Mich. App. at 582, 926 N.W.2d at 825 (quoting *Howes*, 565 U.S. at 509).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. People v. Fairey, 325 Mich. App. 645, 646–47, 928 N.W.2d 705, 706 (2018).

County.[137] Before addressing the context of the defendant's charges, a review of his signature artistry is important.

The defendant is internationally recognized as a question-authority-type graffiti artist.[138] His signature image, which identifies his artwork, is a cartoonish depiction of a face called "Obey Giant."[139] This image is stuck to stickers, posters, and building walls, usually without the owners' permission.[140] This fits the defendant's image of being an artist who champions dissent and questions authority.[141]

In 2015, Bedrock Properties hired the defendant to "design and create three large murals" on its downtown buildings in Detroit.[142] The defendant's presence in the city was highly anticipated, with local media coverage and interviews.[143] In fact, during an interview with a local news station, the defendant was asked if he was going to be "leaving anything behind uncommissioned."[144] The defendant responded, "[Y]ou'll just have to keep your eyes peeled."[145] Further, a newspaper quoted the defendant as stating, "I still do stuff on the street without permission. I'll be doing stuff on the street when I'm in Detroit."[146]

A Detroit Police Sergeant was watching these interviews and began to research the defendant.[147] She watched YouTube videos about how to "tag" (i.e., place stickers and art in unauthorized places) and began to search the city for illegal art containing the defendant's signature—the "Obey Giant."[148] During her search, she found 14 different places around the city where the defendant's artistry was placed—mostly abandoned buildings, bridges, and railroads.[149]

The detective admitted that she did not see anyone place the posters or graffiti, nor could she determine when the images were created or placed.[150] She believed, however, that the defendant's proclamation that he would be doing stuff on the street without permission was a strong indicator that it was him, and a magistrate agreed, binding the defendant

137. *Id.* at 646–47, 928 N.W.2d at 706.
138. *Id.* at 647, 928 N.W.2d at 706.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*, 928 N.W.2d at 707.
145. *Id.*
146. *Id.*
147. *Id.* at 647–48, 928 N.W.2d at 707.
148. *Id.* at 648, 928 N.W.2d at 707.
149. *Id.*
150. *Id.*

over for trial in Wayne County Circuit Court on the felony charges.[151] The defendant filed a motion in the circuit court to quash the bind over, and the court agreed.[152] The prosecution appealed.[153]

In an artistically infused opinion, full of references to art and art supplies, Judge Gleicher and the Michigan Court of Appeals held that the prosecution had failed to demonstrate any evidence that the defendant placed the posters or graffiti on the buildings in question.[154] The court observed that probable cause is not a suspicion of guilt, but rather a reasonable belief that the defendant committed the crime.[155] And here, the court opined, the prosecution only showed that the defendant teased the audience about wanting to put up posters—not that he did.[156] The court also emphasized that mere suspicion that someone did something is not the same as probable cause.[157] As such, the court affirmed the circuit court's dismissal of the charges.[158]

B. What is the Definition of a Felony? It Depends.

Felony firearm is a prosecutor's favorite type of charge because it requires minimal proof: only that the defendant was in possession of firearm when committing or attempting to commit a felony. At issue in *People v. Washington* is what qualifies as a felony.[159] The defendant was convicted of keeping or maintaining a drug house, felony firearm, possession of marijuana, and receiving and concealing a stolen firearm.[160] Keeping and maintaining a drug house was the charge used as the predicate felony for the felony firearm conviction.[161] The defendant appealed his conviction, arguing that keeping or maintaining a drug house was a misdemeanor under the Michigan Public Health Code and could not be used as the predicate charge for the felony firearm charge.[162]

The Michigan Court of Appeals relied on *People v. Smith*, which held that "offenses labeled as misdemeanors are misdemeanors for

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 650–51, 928 N.W.2d at 708–09.
155. *Id.* at 651, 928 N.W.2d at 708–09.
156. *Id.*
157. *Id.* at 651–52, 928 N.W.2d at 708–09.
158. *Id.*
159. 501 Mich. 342, 916 N.W.2d 477 (2018).
160. *Id.* at 348, 916 N.W.2d at 477.
161. *Id.*, 916 N.W.2d at 479.
162. *Id.*

purposes of the Penal Code."[163] According to the court, the Michigan Public Health Code had clear and unequivocal language that keeping or maintaining a drug house was intended to be a misdemeanor.[164] Therefore, the misdemeanor of keeping or maintaining a drug house could not become the predicate felony for a felony firearm charge brought under the Michigan Penal Code.[165] The Michigan Court of Appeals, therefore, granted the defendant's appeal, and the prosecutor filed a leave to appeal.[166]

On appeal, the Michigan Supreme Court first determined that the word "felony" under the Michigan Penal Code meant an "offense that is punishable by imprisonment in state prison."[167] To be sent to prison, the defendant must be sentenced to an offense that carries more than one-year's imprisonment.[168] Hence, if a defendant is convicted of felony firearm, the prosecutor must prove that the defendant was committing a crime punishable by more than one year while in possession of a firearm.[169]

This analysis—and arguably the case—would have ended here except for the conflict between Michigan's Penal Code and Michigan's Heath Code.[170] The crime of keeping or maintaining a drug house is not defined in the Michigan Penal Code but rather in the Michigan Public Health Code.[171] And in the Public Health Code, maintaining a drug house is a misdemeanor that is "punishable for not more than two years."[172] Here lies the conflict: the Michigan Penal Code calls any offense where a person is subject to more than one-year of confinement a felony, but the Michigan Public Health code defines some offenses with a potential prison sentence as misdemeanors.

The Michigan Supreme Court addressed the conflict between the two statutory codes and decided that definitions and labels in one code apply only to that code; they are not to be transferred and applied to other

163. *Id.* at 349, 916 N.W.2d at 479 (citing People v. Smith, 423 Mich. 427, 378 N.W.2d 384 (1985)). *Smith* addressed a conflict between the Michigan Penal Code and the Michigan Code of Criminal Procedure. *Smith*, 423 Mich. at 437, 378 N.W.2d at 389. Like *Washington*, the issue in *Smith* was whether two-year misdemeanors should be counted as felonies for the habitual offender and consecutive-sentencing provisions of the Michigan Code of Criminal Procedure. *Id.* at 433, 378 N.W.2d at 387.

164. *Id.* at 349–50, 916 N.W.2d at 480.

165. *Id.*

166. *Id.* at 351, 916 N.W.2d at 481.

167. *Id.* at 353, 916 N.W.2d at 481.

168. *Id.* at 354, 916 N.W.2d at 482.

169. *Id.*

170. *Id.* at 354–55, 916 N.W.2d at 482–83.

171. *Id.*

172. *Id.*

codes.[173] The Court also relied on its precedent in *People v. Smith* to establish that because the crime of keeping or maintaining a drug house carries a prison sentence (more than one year), it qualifies as a felony under the Michigan Penal Code, which is the statutory scheme that addresses the felony firearm statute.[174] Hence, the Michigan Supreme Court applied the definition from the Penal Code to this case.[175]

C. The Struggle to Read a Person's Mind: What Does It Mean to Be Deliberate and Premeditated?

In *People v. Oros*, a jury convicted the defendant of first-degree, premeditated murder.[176] On appeal, he argued that there was insufficient evidence to prove that he premeditated or deliberated the killing.[177] The circumstances surrounding the murder are as follows: the defendant made up a story indicating that his girlfriend had left him without access to his vehicle, debit card, or cellphone.[178] He walked door-to-door in an apartment complex asking each resident if he could use their phone to call his girlfriend.[179] If a resident let him in, he would call his own phone number and then ask for money after the unsuccessful call.[180] Testimony from the residents indicated that the defendant would request money in a passive manner at first but would become more aggressive as time progressed; one resident indicated that it seemed as if the defendant was casing his apartment when he let him inside.[181]

The defendant went to the victim's apartment and used this scheme to gain entry.[182] The victim was murdered during the entry.[183] The defendant, during the police investigation, admitted that he was able to persuade the victim to let him use her phone, but he said that the victim struck him over the head with a coffee mug without reason.[184] The defendant claimed that the victim then climbed on top of him with a huge knife in her hand and that it was only after he gained control of the knife that he stabbed her 29 times.[185]

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173. *Id.* at 357, 916 N.W.2d at 484.
174. *Id.* at 362–63, 916 N.W.2d at 487.
175. *Id.*
176. 502 Mich. 229, 234, 917 N.W.2d 559, 561 (2018).
177. *Id.*
178. *Id.* at 235, 917 N.W.2d at 562.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*

The defendant was charged with open murder, so the jury was presented with jury instructions for first-degree murder, second-degree murder, and voluntary manslaughter.[186] As to the element of premeditation, the court instructed the jury that "the intent to kill was premeditated, that is thought out beforehand."[187] The jury was also told that "there must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill."[188] For the deliberation definition, the court instructed the jury that "the killing was deliberate which means that the [d]efendant considered the pros and cons of the killing and thought about and chose his actions before he did it."[189]

The jury convicted the defendant of first-degree murder, which required the jury to find that the victim died as a result of the stabbing, the defendant intended to kill the victim, the killing was deliberate, and the killing was premeditated.[190] The defendant admitted that he intended to kill the victim, but he claimed on appeal that the evidence was insufficient to convict him on the deliberation and premeditation elements.[191]

The Michigan Court of Appeals agreed and reduced his first-degree murder conviction to second-degree murder.[192] The court reasoned that previous precedent precluded the court from finding that premeditation could be formed between successive stab wounds.[193] The prosecutor sought leave to appeal in the Michigan Supreme Court, and the court scheduled oral arguments to determine if the appellate court viewed the trial record for premeditation and deliberation in the light most favorable to the prosecution.[194]

To determine if the trial court evidence was sufficient, the appellate court must consider the "evidence in the light most favorable to the prosecution, and consider[] whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable

186. *Id.* at 236, 917 N.W.2d at 562.
187. *Id.*, 917 N.W.2d at 562–63.
188. *Id.*
189. *Id.*
190. *Id.* at 237, 917 N.W.2d at 563.
191. *Id.*
192. *Id.*
193. *Id.* at 238, 917 N.W.2d at 564 (relying on People v. Hoffmeister, 394 Mich. 155, 229 N.W.2d 305 (1975)).
194. *Id.*

doubt."[195] The court emphasized in its opinion that it is for the trier of fact, *not* the appellate court, to determine what inferences are fair.[196]

The Michigan Supreme Court reversed the court of appeals' decision and held that the jury could have concluded that the defendant acted with premeditation and deliberation.[197] As to the deliberation element, the court stated that the defendant's conflicting stories to the police about what happened, as well as evidence that the victim was struck with a coffee mug—not the defendant as he had claimed—could lead a jury to conclude that the defendant was not acting under provocation but instead with a cool state of mind.[198] The court further reasoned that an inference could have been drawn that the defendant wanted to kill the victim based on how the circumstances progressed—assaultive conduct that went from striking the victim in the head, to gaining control of a kitchen knife, to stabbing the victim 29 times.[199]

Further, the court reasoned that it was also possible for the jury to conclude that the defendant thought about the killing beforehand.[200] The court indicated that the defendant had an opportunity for a second look when the defendant flipped the victim's body over, climbed on top of her, and continued to stab her.[201] The court also explained that premeditation could be found in the depth of each stab wound—that the force needed to deliver the numerous stab wounds in such a deep fashion indicated that it would have been reasonable for the jury to infer that the defendant had time to take a second look at his actions.[202]

In conclusion, the court stressed that insufficiency of evidence arguments require a case-by-case analysis of the facts and circumstances.[203] The court ultimately concluded that the jury could have applied the facts and made inferences that would have supported each element of first-degree premeditated murder.[204]

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195. *Id.* at 239, 917 N.W.2d at 564 (quoting People v. Harris, 495 Mich. 120, 126, 845 N.W.2d 477, 481–82 (2014)).

196. *Id.*

197. *Id.* at 244, 917 N.W.2d at 567.

198. *Id.* at 246, 917 N.W.2d at 568.

199. *Id.* at 246–47, 917 N.W.2d at 568.

200. *Id.* at 247, 917 N.W.2d at 568.

201. *Id.* at 248, 917 N.W.2d at 569.

202. *Id.* at 249, 917 N.W.2d at 569.

203. *Id.*, 917 N.W.2d at 570.

204. *Id.* at 250, 917 N.W.2d at 570. Justice McCormack wrote a blistering dissent arguing that deliberation and premeditation were not proved beyond a reasonable doubt and that the inferences offered from the prosecution were insufficient. *Id.* at 250–64, 917 N.W.2d at 570–77. She also suggested that the holding was inconsistent with precedent, namely *Hoffmeister*. *Id.* at 257, 917 N.W.2d at 573–74.

D. Pregnancy, Abortion, and Michigan's Rape-Shield Statute

In *People v. Sharpe,* the defendant was charged with numerous counts of criminal sexual conduct, two of which were first-degree.[205] The alleged victim was the 14-year-old daughter of the defendant's girlfriend, whom he fathered two children with but was not married to.[206] The defendant did not live in the same household as his girlfriend and the children.[207] The victim's mother was hospitalized, and, during that time, the defendant stayed at the victim's home to care for her and her two siblings.[208] During that time, the defendant had sexual intercourse with the 14-year-old girl.[209] A pregnancy occurred, and the victim refused to tell her mother with who she had sexual intercourse.[210]

The victim had an abortion, and several months later, the defendant and the victim's mother ended their relationship.[211] Upon the defendant's breakup with the victim's mother, the victim told her mother that the defendant had impregnated her.[212] The prosecutor filed pretrial motions to admit evidence of the victim's pregnancy, abortion, and lack of other sexual partners.[213] The trial court held that the only evidence that was admissible was the pregnancy and excluded all other evidence as impermissible character evidence.[214] The prosecutor filed an interlocutory appeal, and the defendant filed a cross-appeal, asserting that the rape-shield statute precluded all the proffered evidence.[215]

The Michigan Court of Appeals held that all evidence was admissible.[216] The court reasoned that the pregnancy and abortion evidence was admissible under an exception to the rape-shield statute that allowed evidence of the victim's past sexual conduct with the actor.[217] The court also reasoned that the evidence of the lack of other sexual partners was admissible because it did not fall under the demonstrated protections of the rape-shield statute, which is intended to bar evidence of specific instances of sexual conduct.[218] Further, the court

205. 502 Mich. 313, 320, 918 N.W.2d 504, 507 (2018).
206. *Id.* at 320, 918 N.W.2d at 507–08.
207. *Id.*
208. *Id.*, 918 N.W.2d at 508.
209. *Id.* at 321, 918 N.W.2d at 508.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 321–22, 918 N.W.2d at 508.
216. *Id.*
217. *Id.* at 322, 918 N.W.2d at 509.
218. *Id.*

stated that even if the lack of sexual conduct could be construed as a specific instance of sexual conduct, it would fall under the rape-shield's exception for showing the origin of pregnancy.[219]

The defendant sought leave to appeal to the Michigan Supreme Court, and the court granted leave to consider the following issues: (1) whether evidence related to the complainant's pregnancy, abortion, and lack of other sexual partners is excluded under the rape-shield statute; (2) whether any of the rape-shield law exceptions applied; and (3) if the evidence was admissible under Michigan Rules of Evidence (MRE) 402 or 403.[220]

The Michigan Supreme Court held that all evidence was admissible because it was not excluded under the rape-shield statute.[221] The court addressed each piece of evidence under the purview of the rape-shield statute.[222] As to the pregnancy and the abortion, the court held that the pregnancy was not an example of a specific instance of sexual conduct, which would be precluded under the statute.[223] Rather, the court held that the pregnancy was evidence that a sexual encounter occurred—but not evidence of a particular occurrence.[224] The court supported its conclusion by addressing the specific language of the rape-shield statute that allows for "the origin of semen, pregnancy, or disease."[225]

The Court also held that the lack of sexual partner evidence is not precluded under the rape-shield statute.[226] The court held that "excluding evidence of a lack of sexual partners under the rape-shield statute would render the phrase 'specific instances' meaningless."[227] The court explained that the purpose of the rape-shield law is to protect a complainant's privacy and to protect the complainant from having to expose her sexual history.[228]

After the court determined that the evidence was not precluded under the rape-shield statute, the court evaluated whether the evidence was relevant and could pass the balancing test in MRE 403.[229] The court held that the evidence was relevant because it was probative of whether the

219. *Id.* at 323, 918 N.W.2d at 509.
220. *Id.*
221. *Id.* at 331, 918 N.W.2d at 513.
222. *Id.* at 328–31, 918 N.W.2d at 512–13.
223. *Id.* at 328–29, 918 N.W.2d at 512.
224. *Id.*
225. *Id.* at 329, 918 N.W.2d at 512.
226. *Id.*
227. *Id.* at 330, 918 N.W.2d at 513.
228. *Id.*
229. *Id.* at 331–32, 918 N.W.2d at 513–14.

victim was sexually assaulted.[230] Further, the abortion, the court reasoned, was relevant to explain why the prosecution was not able to provide DNA evidence about the identity of who impregnated the victim.[231] Finally, the court held that the lack of sexual partner evidence was being offered by the victim to eliminate any other suspect.[232]

The court also opined that all evidence carries some prejudicial value, but that the evidence in this case was not more unfairly prejudicial than probative.[233] Therefore, the Michigan Supreme Court affirmed the holding of the Court of Appeals—on different grounds—and remanded the case to the trial court for further proceedings.[234]

III. PLEA AGREEMENTS AND TRIALS

A. A Prosecutor, Judge, and Defendant Explore the Boundaries

Though the media covered this highly public case, the public is probably unaware of the complications surrounding the defendant's plea in *People v. Smith*.[235] The defendant was Virgil Smith, a state senator.[236] In May 2015 and while a state senator, he fired a rifle at his ex-wife's car, causing damage to the vehicle and also fired the same gun into the air in her presence.[237] As a result, he was arrested and charged with four criminal charges: felonious assault, domestic violence, malicious destruction of personal property, and felony firearm.[238]

The Wayne County Prosecutor's Office offered the defendant a plea bargain whereby he would plead guilty to malicious destruction of property and, as a condition of the plea, resign as state senator and agree not to run for political office (a "bar-to-office" provision) during his five-year probation.[239]

The defendant accepted the plea and plead guilty.[240] At sentencing, however, the trial court, sua sponte, refused to enforce the resignation and bar-to-office provisions of the plea agreement.[241] The judge indicated that he thought the plea agreement conditions were "an unconstitutional

230. *Id.* at 332, 918 N.W.2d at 514.
231. *Id.*
232. *Id.* at 332–33, 918 N.W.2d at 514.
233. *Id.* at 333, 918 N.W.2d at 514.
234. *Id.* at 334–35, 918 N.W.2d at 515.
235. 502 Mich. 624, 628, 918 N.W.2d 718, 720 (2018).
236. *Id.*
237. *Id.* at 628, 918 N.W.2d at 720–21.
238. *Id.*
239. *Id.* at 628–29, 918 N.W.2d at 721.
240. *Id.* at 629, 918 N.W.2d at 721.
241. *Id.*

interference . . . with the legislative branch . . . and [] the rights of the defendant's constituents."[242] The prosecutor asked to withdraw the plea, indicating that, with the judge's alterations, it was no longer what the prosecutor had bargained for.[243] The judge refused and indicated that allowing the prosecutor to withdraw the plea would not serve the interests of justice; he sentenced the defendant, and the prosecution appealed.[244]

Approximately one month later, in April 2016, the defendant resigned from his position as state senator.[245] In April 2017, the Michigan Court of Appeals dismissed the prosecution's appeal as moot because the defendant had voluntarily resigned his position and did not indicate an interest in running for another political office.[246] That same day—only hours after the court issued its opinion—the defendant filed a petition to run for Detroit City Council.[247] The prosecutor sought leave to appeal to the Michigan Supreme Court under an election-related emergency.[248] The Michigan Supreme Court remanded to the Michigan Court of Appeals.[249]

The court of appeals affirmed the trial court's findings and held that the resignation and bar-to-office provision were unconstitutional violations of the separation of powers doctrine and that the plea agreement "invaded the right of the defendant's constituents to decide upon his moral and other qualifications" because the defendant's crime did not specifically disqualify him under constitutional provisions.[250] The court also found that the trial judge had not abused his discretion when he denied the prosecution's motion to withdraw the plea.[251]

The prosecutor again appealed, and the Michigan Supreme Court asked both parties to prepare oral argument as to the following issues: (1) whether a plea agreement that prohibits a defendant from holding public office violates separation of powers; (2) whether the provision requiring the defendant to resign was properly before the Michigan Court of Appeals because the trial court had struck that provision anyway; and (3)

242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* At this time, the appeal was pending in the Michigan Court of Appeals. *Id.*
246. *Id.*
247. *Id.* at 629–30, 918 N.W.2d at 721.
248. *Id.* at 630, 918 N.W.2d at 721.
249. *Id.*
250. *Id.*
251. *Id.*

if the trial court abused its discretion when it amended the plea agreement without allowing the prosecutor to withdraw the plea.[252]

The Michigan Supreme Court held that the issue of the resignation provision was moot when the court of appeals heard it; therefore, the issue should not have been decided.[253] The court also held that the bar-to-office provision could be resolved on public policy rather than constitutional grounds.[254] According to the court, the proper test to analyze whether a bar-to-office provision violates public policy is found in *Town of Newton v. Rumery*.[255]

In *Rumery*, the United States Supreme Court explained that "the 'well established' balancing test under which 'a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.'"[256] The *Smith* court, after establishing that the *Rumery* test was the proper test, then explained why the test advised against enforcement.[257] The court explained that political power, especially voting, is a fundamental right that can be regulated but not impaired.[258] It also held that public offices should not be treated like private property, but rather "delegations of portions of the sovereign power for the welfare of the public."[259] Therefore, public office cannot be commoditized for the personal benefit of the officeholder.[260]

Naturally, then, an agreement to have a candidate resign from office or to prohibit the pursuit of public office is void against public policy.[261] And while the court did acknowledge the argument that public lawmakers should be treated like other members of the public (specifically, defendants who surrender the practice of their professions), the court noted that doctors, lawyers, and other professionals are not holding a public office that should never be commoditized.[262]

The court also held that there must be a nexus between the charged crime and the bar-to office-provision, meaning that there must be a "legitimate reason" for the waiver of the plaintiff's right to run for

252. *Id.* at 631, 918 N.W.2d at 722.
253. *Id.* at 631–32, 918 N.W.2d at 722–23.
254. *Id.* at 632–33, 918 N.W.2d at 723.
255. *Id.* (citing Town of Newton v. Rumery, 480 U.S. 386 (1987)).
256. *Id.* at 633, 918 N.W.2d at 723 (citing *Town of Newton*, 480 U.S. 386).
257. *Id.* at 634, 918 N.W.2d at 724.
258. *Id.*
259. *Id.* (quoting Att'y Gen. v. Jochim, 99 Mich. 358, 367, 58 N.W. 611, 613 (1894)).
260. *Id.*
261. *Id.* at 640, 918 N.W.2d at 727.
262. *Id.* at 641–42, 918 N.W.2d at 728.

office.[263] The court found that the nexus was not fulfilled.[264] The court reasoned that the defendant's criminal misconduct was unrelated to his public office.[265] Rather, the bar-to-office provision seemed to reflect the prosecutor's personal belief that the defendant should not be in office—not a reason that was legitimately related to the defendant's service to the public or responsibilities while in office.[266]

The court also held that the trial court judge should have allowed the prosecuting attorney to withdraw the plea agreement once the judge indicated he would not accept the resignation and bar-to-office provisions.[267] The court relied on precedent established in *People v. Siebert* that "a prosecutor . . . is entitled to learn that the judge does not intend to impose the agreed-upon sentence . . . and [be] given an opportunity to withdraw from the plea agreement."[268] The court further reasoned that a prosecutor has an interest in being entrusted with how to charge defendants and that the trial court cannot substitute its own plea offer for the one in which the prosecutor agreed.[269] Therefore, the trial court abused its discretion.[270]

B. What Does a Defendant Have to Do to be Appointed a DNA Expert at Public Expense?

In a case of first impression, the Michigan Supreme Court explained what a defendant must successfully show to secure the appointment of a DNA expert at public expense.[271] In 1993, Tanya Harris was murdered in Detroit.[272] At the time, DNA swabs were taken from her body, including her fingernails, vagina, and rectum.[273] A suspect was never pursued, and, for nearly two decades, the case was cold.[274] In 2011, the DNA swabs were tested and matched the defendant, Johnny Ray Kennedy.[275] He was in prison serving a sentence for strangling another woman under similar circumstances.[276]

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263. *Id.* at 643, 918 N.W.2d at 729.
264. *Id.* at 644, 918 N.W.2d at 729.
265. *Id.*, 918 N.W.2d at 729–30.
266. *Id.* at 644–45, 918 N.W.2d at 730.
267. *Id.* at 646, 918 N.W.2d at 730.
268. *Id.* (quoting People v. Siebert, 450 Mich. 500, 504, 537 N.W.2d 891, 893 (1995)).
269. *Id.* at 647, 918 N.W.2d at 731.
270. *Id.*
271. People v. Kennedy, 502 Mich. 206, 211, 917 N.W.2d 355, 358 (2018).
272. *Id.*, 917 N.W.2d at 357.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*

When the defendant was charged with the victim's murder, he requested, through counsel, public funds to hire a DNA expert.[277] The expert was not expected to testify, but rather to help the defendant understand the evidence and become educated on the intricacies of DNA extraction, collection, and preservation.[278] The trial court denied the request, and the defendant was convicted of first-degree murder.[279]

On appeal, the defendant alleged that the trial court's denial of his motion for an expert violated his constitutional right to present a defense.[280] The Michigan Court of Appeals held that the defendant had not presented enough evidence to show that the expert would have helped the defense.[281] The defendant appealed, and the Michigan Supreme Court granted oral argument and requested briefing on whether the defendant's constitutional rights were violated when he was denied the witness and whether the trial court abused its discretion in failing to appoint a DNA expert.[282]

The Michigan Supreme Court began its analysis by deciding that the United States Supreme Court case *Ake v. Oklahoma* was controlling.[283] The Michigan Supreme Court found that the due process analysis the United States Supreme Court engaged in to determine if the *Ake* defendant was entitled to a psychiatric expert was analogous to the present case.[284] In fact, the Michigan Supreme Court acknowledged that, until that day, it had been using a Michigan statute, MCL 775.15, to govern the appointment of expert witnesses, even though upon closer review, that statute did not expressly address the appointment of expert witnesses.[285]

Further, the Michigan Supreme Court held that precedent cases *People v. Jacobsen*[286] and *People v. Tanner*[287] had incorrectly applied MCL 775.15.[288] To the extent that those cases indicated that the statute was the controlling authority on the appointment of an expert, the court overruled them.[289] As such, the court decided that DNA expert requests should receive a due process analysis, as indicated in *Ake v.*

277. *Id.*
278. *Id.*, 917 N.W.2d at 357–58.
279. *Id.* at 211–12, 917 N.W.2d at 358.
280. *Id.* at 212, 917 N.W.2d at 358.
281. *Id.*
282. *Id.*
283. *Id.* at 210, N.W.2d at 357 (citing Ake v. Oklahoma, 470 U.S. 68 (1985)).
284. *Id.* at 219–20, 917 N.W.2d at 362.
285. *Id.* at 220–22, 917 N.W.2d at 362–64.
286. 448 Mich. 639, 532 N.W.2d 838 (1995).
287. 469 Mich. 437, 671 N.W.2d 728 (2003).
288. *Kennedy*, 502 Mich. at 221–22, 917 N.W.2d at 363–64.
289. *Id.* at 225, 917 N.W.2d at 365–66.

Oklahoma.[290] The court further held that the proper standard to analyze an appointment of an expert is the reasonable probability standard.[291]

Under the reasonable probability standard, as discussed in *Moore v. Kemp*, the defendant must show that "there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial."[292] The *Moore* court further explained that this standard required the defendant to make a showing that would "include a specific description of the expert or experts desired" and "inform the court why the particular expert is necessary."[293] The Michigan Supreme Court adopted the *Moore* reasonable probability test because it felt that it struck the right balance between "requiring too much or too little" of a defendant.[294]

In sum, the Michigan Supreme Court held that "a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial."[295] In doing so, it overruled the holdings of *People v. Tanner* and *People v. Jacobsen* that relied on MCL 775.15 as the controlling authority for the appointment of an expert witness.[296]

C. Using Prior Weapons Convictions as Other-Acts Evidence

In *People v. Wilder*, the defendant was tried for felony firearm, felon in possession, and carrying a concealed weapon.[297] During the trial, the defense called the defendant's wife to testify that she did not see the defendant with a gun on the day in question; she did not know her husband owned a gun; and she did not have any weapons in the house.[298] Because the defendant had previous weapons convictions, the prosecutor asked the wife on cross-examination if she knew the defendant to carry guns.[299] The wife replied no to all questions intimating that she was unaware of the defendant's possession and ownership of guns.[300]

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290. *Id.*
291. *Id.* at 227–28, 917 N.W.2d at 367 (citing Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987)).
292. *Moore*, 809 F.2d at 712.
293. *Id.*
294. *Kennedy*, 502 Mich. at 227–28, 917 N.W.2d at 367.
295. *Id.* at 227, 917 N.W.2d at 366 (quoting *Moore*, 809 F.2d at 712).
296. *Id.* at 222, 917 N.W.2d at 364.
297. People v. Wilder, 502 Mich. 57, 60, 917 N.W.2d 276, 278 (2018).
298. *Id.*
299. *Id.* at 61, 917 N.W.2d at 278.
300. *Id.*

Then, in the vein of impeaching the witness by contradiction, the prosecutor asked the witness about the defendant's prior weapons convictions over strenuous objections from the defense attorney.[301] At the close of the trial, the defendant was convicted of the felon in possession and felony firearm charges.[302] The defendant appealed to the Michigan Court of Appeals, which affirmed the trial court's rulings on the use of prior convictions for impeachment.[303] The defendant sought leave to appeal to the Michigan Supreme Court, and the court granted leave as to whether the prosecutor's impeachment was proper.[304]

The Michigan Supreme Court held that the prosecution's questioning was improper.[305] Under MRE 609, a witness can be impeached with evidence that he committed a crime.[306] The court ruled that MRE 609 did not apply to the prosecutor's tactics.[307] The court then evaluated MRE 608, which addresses opinion or reputation evidence about a witness's character for truthfulness, excluding specific instances of conduct of the witness.[308] The court held that MRE 608 was also inapplicable because the witness never testified as to opinion or reputation.[309]

The court concluded, therefore, that the only applicable evidence rule that could govern the prosecutor's method of cross examination was MRE 404.[310] MRE 404(b) provides, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes . . . ."[311]

The court rejected the prosecutor's method of using other bad acts as impeachment evidence.[312] The court reasoned that the prosecutor's questions about the defendant carrying guns were not relevant to any purpose under MRE 404.[313] Specifically, the questions were irrelevant to the direct questioning about whether the defendant owned or possessed a gun on the date in question.[314] Instead, the court opined that the prosecutor's first use of improper questions—an apparent attempt to

301. *Id.*
302. *Id.* at 61–62, 917 N.W.2d at 278.
303. *Id.*
304. *Id.*
305. *Id.* at 63, 917 N.W.2d at 279.
306. *Id.* at 62–63, 917 N.W.2d at 279.
307. *Id.* at 63, 917 N.W.2d at 279.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.* (quoting MICH. R. EVID. 404).
312. *Id.* at 66, 917 N.W.2d at 281.
313. *Id.* at 65, 917 N.W.2d at 280.
314. *Id.*

elicit propensity evidence—led to further improper questioning in the form of misusing prior convictions as impeachment evidence.[315]

The court explained that the prosecutor would have only been allowed to bring up the prior convictions under MRE 404 if the defense had opened the door by testifying about the defendant's good character.[316] But because the defense never offered any character evidence, the prosecutor's attempt to elicit character evidence through cross-examination was wrong and inadmissible under MRE 404.[317] The court, therefore, reversed the court of appeals' finding that the cross-examination was valid and remanded the case to the court of appeals to consider whether the error was harmless.[318]

IV. SENTENCING

A. Sentencing Guidelines Under Lockridge and Retroactive Applications

The primary issue in *People v. Barnes* was whether a Michigan Supreme Court decision about sentencing guidelines was retroactive.[319] The defendant was convicted of second-degree murder in 2002, which the Michigan Court of Appeals affirmed on direct appeal, and from which the Michigan Supreme Court denied leave to appeal.[320] Then, in 2008, the defendant filed a motion in the trial court for relief from judgment.[321] The trial court denied the motion, and the Michigan Court of Appeals and Michigan Supreme Court denied leave to appeal.[322]

The defendant filed another motion for relief from judgment based on the Michigan Supreme Court's holding in *People v. Lockridge*.[323] The defendant claimed that because the *Lockridge* decision made sentencing guidelines advisory and not mandatory, the defendant should be resentenced.[324] The trial court denied the defendant's motion, citing MCR 6.502(G)(1), which allows only one motion for relief from judgment to be filed per conviction.[325]

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315. *Id.* at 66, 917 N.W.2d at 281.
316. *Id.*
317. *Id.* at 66–68, 917 N.W.2d at 281–82.
318. *Id.* at 69–70, 917 N.W.2d at 283.
319. People v. Barnes, 502 Mich. 265, 268, 917 N.W.2d 577, 580 (2018), *cert. denied sub nom.* Barnes v. Michigan, 139 S. Ct. 1556 (2019).
320. *Id.* at 267, 917 N.W.2d at 580.
321. *Id.*
322. *Id.*
323. *Id.* (following People v. Lockridge, 498 Mich. 358, 870 N.W.2d 502 (2015)).
324. *Id.*
325. *Id.* at 267–68, 917 N.W.2d at 580.

The defendant appealed to the Michigan Supreme Court, and the Michigan Supreme Court held that the defendant's conviction did not "qualify for extraordinary remedy of retroactive application to cases on collateral review."[326] The court acknowledged that judicial decisions that express new rules are generally not applied retroactively because society has an interest in having cases closed and final.[327] The court did, however, indicate that there are exceptions to the general rule and that both state and federal rules govern the analysis.[328]

The rules for retroactivity are clear. First, "court[s] must give retroactive effect to new substantive rules of constitutional law."[329] Second, a court must "give retroactive effect to new watershed rules of criminal procedure."[330] The Michigan Supreme Court determined that the *Lockridge* case did articulate a new rule of law, but it did not fit either exception.[331] First, the *Lockridge* rule did not affect substantive rules of constitutional law.[332] Instead, *Lockridge* affected the sentencing process after conviction.[333] Further, the *Lockridge* case did not relate to the accuracy of convictions, so it did not meet the second exception.[334]

The court then had to analyze the retroactive application issue from a state law perspective.[335] The court noted that the applicable state law test to determine retroactivity originated in *People v. Hampton*.[336] The *Hampton* test considers "(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice."[337] The court found that there was heavy reliance on the mandatory sentencing guidelines from the bench and bar.[338] The court

326. *Id.* at 274, 917 N.W.2d at 584.

327. *Id.* at 268, 917 N.W.2d at 580.

328. *Id.* at 268–69, 917 N.W.2d at 580–81.

329. *Id.* at 269, 917 N.W.2d at 581 (quoting Montgomery v. Louisiana, 138 S. Ct. 718, 728 (2016)). Constitutional law is defined as "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* (quoting *Montgomery*, 138 S. Ct. at 728).

330. *Id.* at 270–72, 917 N.W.2d at 581–82. To be a watershed rule of criminal procedure, the new rule "must be necessary to prevent an impermissibly large risk of an inaccurate conviction . . . ." *Id.* at 271, 917 N.W.2d at 582 (internal citation omitted).

331. *Id.* at 270–72, 917 N.W.2d at 581–82.

332. *Id.* (referencing *Lockridge*, 498 Mich. 358, 870 N.W.2d 502 (2015)).

333. *Id.* at 271, 917 N.W.2d at 582 (referencing People v. Lockridge, 498 Mich. 358, 870 N.W.2d 502 (2015)).

334. *Id.* at 272, 917 N.W.2d at 582 (referencing *Lockridge*, 498 Mich. 358, 870 N.W.2d 502).

335. *Id.* at 273, 917 N.W.2d at 583.

336. *Id.* (citing People v. Hampton, 384 Mich. 669, 187 N.W.2d 404 (1971)).

337. *Id.* (quoting *Hampton*, 384 Mich. 669, 187 N.W.2d 404).

338. *Id.* at 274, 917 N.W.2d at 583–84.

held that because of that heavy reliance on the sentencing guideline schemes, the effect on the administration to justice if *Lockridge* was retroactively applied would be incalculable.[339] Therefore, the court concluded that *Lockridge* would only be applied prospectively.[340]

B. Can Probation Extend Beyond Its Original Termination Date?

In *People v. Vanderpool*, the defendant was convicted of assaulting a police officer and placed on probation.[341] As conditions of his probation, the defendant was prohibited from possessing controlled substances and probation agents were permitted "to conduct compliance checks and to search his property."[342] The defendant's probation was set to expire in July 2015, but the trial court did not enter an order discharging him.[343] Three months later, in September 2015, the defendant's probation officer filed a petition with the trial court to extend the probation for one year.[344] The court extended the defendant's probation for one year, until June 2016.[345] During the extended probationary time, the defendant was found in possession of heroin, which led to a criminal conviction and probation revocation.[346]

On appeal, the defendant argued that the trial court did not have jurisdiction to extend his probationary term because his probation had expired in June 2015.[347] The court disagreed, holding that trial courts retain jurisdiction to modify a probation term as long as it falls within the five-year statutory maximum period.[348] The court reasoned that the one-year extension of probation was within the five-year maximum, so it was valid.[349]

Further, the court also placed importance on the lack of discharge order, meaning that the defendant was still under the original probationary conditions and that the compliance check that lead to the

339. *Id.*, 917 N.W.2d at 584.
340. *Id.*
341. People v. Vanderpool, 325 Mich. App. 493, 496, 925 N.W.2d 914, 915 (2018).
342. *Id.*
343. *Id.*
344. *Id.* at 496, 925 N.W.2d at 915–16.
345. *Id.*, 917 N.W.2d at 916.
346. *Id.*
347. *Id.* at 497, 917 N.W.2d at 916.
348. *Id.* at 497–98, 917 N.W.2d at 916 (citing People v. Marks, 340 Mich. 495, 501, 65 N.W.2d 698, 702 (1954)); *see also* MICH. COMP. LAWS § 771.2(5) (2017) (stating that the court shall "[f]ix and determine the period and conditions of probation" and "[t]he court may amend the order in form or substance at any time").
349. *Vanderpool*, 325 Mich. App. at 499, 925 N.W.2d at 917.

discovery of heroin and his conviction was legal.[350] Therefore, the court held that the probation extension was valid.[351]

C. The Parameters of Resentencing Under Miller v. Alabama

In a 1987 case, *People v. Williams*, the defendant, then a juvenile, was convicted and sentenced for murder (first-degree and second-degree) and felony firearm.[352] On the first-degree murder charge, the defendant was sentenced to mandatory life without parole.[353] On his second-degree murder charge, the defendant was sentenced to life with the possibility of parole and a consecutive two-year term for felony firearm.[354]

The defendant was resentenced under *Miller v. Alabama*, which invalidated all juvenile mandatory life sentences without parole.[355] At his resentencing on the first-degree murder charge, the defendant was sentenced to 25 to 60 years imprisonment, but the other sentences remained intact.[356] The defendant then filed a motion claiming that his second-degree murder sentence was also invalidated by *Miller v. Alabama*, and the trial court agreed.[357] The prosecutor appealed.[358]

The Michigan Court of Appeals held that *Miller v. Alabama* did not invalidate the defendant's sentence for second-degree murder.[359] The court reasoned that the state was required under *Miller* to provide a "meaningful opportunity" for release, and that the holding only applied to "life-without-parole decisions."[360] The court held that because the defendant had the opportunity for parole under the second-degree sentence, the sentence was not invalid under *Miller*.[361]

The defendant also argued on appeal that his sentence was invalid because the sentencing judge relied on inaccurate information and a misconception of the law, but the defendant never provided any facts to support this argument.[362] The court, in fact, found that the sentencing judge understood that he was offering the defendant a meaningful

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350. *Id.*
351. *Id.*
352. People v. Williams, 326 Mich. App. 514, 517, 928 N.W.2d 319, 320 (2018).
353. *Id.*
354. *Id.*
355. *Id.* (citing Miller v. Alabama, 567 U.S. 460 (2012)).
356. *Id.*
357. *Id.*, 928 N.W.2d at 321.
358. *Id.*
359. *Id.*
360. *Id.* at 521, 928 N.W.2d at 322 (quoting People v. Wines, 323 Mich. App. 343, 350, 916 N.W.2d 855, 857 (2018)).
361. *Id.* at 523, 928 N.W.2d at 323–24.
362. *Id.* at 522, 928 N.W.2d at 323.

opportunity for release because he told the defendant, "You will be eligible for parole if you can get that first one off your back," referring to the first sentence on the first-degree murder conviction.[363]

Finally, the court reasoned that the trial court did not have the authority to resentence the defendant on all his convictions because none of the other convictions were premised on the first-degree conviction.[364] Accordingly, all of the sentences and convictions were separate and only the first-degree murder conviction was entitled to resentencing.[365]

363. *Id.* at 523, 928 N.W.2d at 323.
364. *Id.* at 525, 928 N.W.2d at 325.
365. *Id.*, 928 N.W.2d at 324.