CRIMINAL PROCEDURE

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Table of Contents

I. INTRODUCTION

During this *Survey* period, the Michigan Supreme Court and the Michigan Court of Appeals rendered several decisions having great

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impact on Michigan criminal procedure jurisprudence. The Michigan Supreme Court demonstrated its commitment to judicial restraint and legislative intent by issuing opinions this period which overruled years of longstanding precedent. The Michigan Court of Appeals offered opinions on several issues of first impression, but also resolved conflicts between panels.

The decisions of both courts this *Survey* period covered all aspects of criminal procedure, from police investigation through post-conviction relief. The courts limited the areas where criminal defendants could claim they have a reasonable expectation of privacy, thereby restricting their access to relief under the Fourth Amendment.[1] The courts also addressed issues concerning the elicitation of confessions, invocation of the right to silence and waivers of the same. The Michigan Court of Appeals resolved several issues concerning sentencing guideline scoring and post-conviction relief issues. Overall, the cases demonstrate a general trend of restriction of the rights of criminal defendants.

The courts continued to struggle with the proper test to apply in evaluating predicate offenses and lesser included offenses in the context of the constitutional prohibition against double jeopardy.[2] This *Survey* period the Michigan Court of Appeals decided *People v. Bobby Martin*,[3] which adopted the legislative intent test for determining whether multiple punishments were intended for a predicate-based offense (racketeering) and the predicate offenses themselves. That determination may significantly impact the courts' double jeopardy jurisprudence. During this *Survey* period, the Michigan Supreme Court determined that the elements test of *Blockburger v. United States*[4] should be abandoned only to reverse itself in another case decided after the *Survey* period.[5]

Also significant during this reporting period is the courts' conclusion concerning the effect of *Blakely v. Washington*[6] on Michigan's sentencing practices. The Michigan Supreme Court and the Court of

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1. The Fourth Amendment to the United States Constitution provides:

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

U.S. CONST. amend. IV. Michigan's analogous provision reads: "The persons, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures." MICH. CONST. art. I, § 11.

2. The Double Jeopardy Clause from the federal Constitution states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. The analogous Michigan section states that "[n]o person shall be subject for the same offense to be twice put in jeopardy." MICH. CONST. art. I, § 15.

3. 271 Mich. App. 280, 721 N.W.2d 815 (2006).

4. 284 U.S. 299 (1932).

5. *See* People v. Robideau, 419 Mich. 458, 355 N.W.2d 592 (1984), *overruled by* People v. Smith, 478 Mich. 292, 733 N.W.2d 351 (2007).

6. 542 U.S. 296 (2004).

Appeals issued a trilogy of decisions which concluded that *Blakely* had no effect on Michigan's sentencing guidelines, even in the context of intermediate sanctions.[7] These and other decisions significantly impacting Michigan criminal procedure during the *Survey* period are discussed in detail below.

II. SEARCH, SEIZURE AND ARRESTS

Michigan courts decided several search and seizure cases during the *Survey* period wherein the court limited application of the exclusionary rule by restricting the scope of a defendant's expectation of privacy, or declined to find the defendant had standing to challenge the search.

A. Expectation of Privacy

In *People v. Henry*,[8] the Michigan Supreme Court clarified what is meant by abandoned property for Fourth Amendment purposes. In *Henry*, defendant had possession of a bag of illegally copied recordings.[9] When he saw the police approaching in an unmarked police car, he stashed the bag on an electric box attached to a utility pole.[10] The police took the bag from the box and looked inside, yet defendant did not object or claim ownership.[11] The Supreme Court concluded that defendant's actions demonstrated that he "relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy [in it]."[12] The Supreme Court overruled the Court of Appeals which held that abandonment only occurs where "the defendant unquestionably relinquished any reasonable expectation of privacy."[13] This standard, established by the Supreme Court in *People v. Mamon*,[14] is still good law following *Henry*, but the Court made clear in *Henry* that the standard does not require "proof beyond all doubt . . . to show abandonment."[15] As such, defendant's act of stashing the bag on the electric box was sufficient to establish that he abandoned his interest, and thereby relinquished his expectation of privacy in the property.[16]

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7. *See generally* People v. McCuller, 475 Mich. 176, 715 N.W.2d 798 (2006), *aff'd*, 479 Mich. 672, 739 N.W.2d 563 (2007); People v. Drohan, 475 Mich. 140, 715 N.W.2d 778 (2006); People v. Uphaus, 275 Mich. App. 158, 737 N.W.2d 519 (2007).

8. 477 Mich. 1123, 730 N.W.2d 248 (2007).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* (alteration in original) (citing United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973)).

13. People v. Henry, No. 266153, 2006 WL 3733820, at *2 (Mich. Ct. App. Dec. 19, 2006) (quoting People v. Mamon, 435 Mich. 1, 7, 457 N.W.2d 623, 625 (1990)).

14. *Mamon*, 435 Mich. at 7, 457 N.W.2d at 625.

15. *Henry*, 477 Mich. at 1123, 730 N.W.2d at 249.

16. *Id.* at 1123, 730 N.W.2d at 248.

The Court of Appeals considered what expectation of privacy a defendant has in information turned over to third parties in *People v. Gadomski.*[17] As part of its investigation into safe breaking charges, the prosecutor issued investigative subpoenas seeking various records pertaining to defendant.[18] The prosecutor served subpoenas on two pawnshops seeking records of defendant's transactions, to a retailer seeking defendant's purchase history and to a credit agency seeking defendant's credit report.[19] The Court had to determine whether the defendant had standing to challenge the admission of evidence obtained pursuant to these subpoenas, which were served on third parties.[20]

The Court reiterated the rule that the Court will recognize that a criminal defendant has standing to challenge a search if "under the totality of the circumstances, he has a subjective expectation of privacy in the object of the search or seizure and the expectation is one that society is prepared to recognize as reasonable."[21] The Court concluded that defendant did not have a reasonable expectation of privacy in records held by third parties, and thus could not challenge the admissibility of evidence obtained by the search.[22]

B. Other Searches

The Michigan Supreme Court directed the Court of Appeals to address the standing issue in *People v. LaBelle,*[23] but the Appellate Court declined to do so,[24] instead deciding that regardless of defendant's standing, the search in question was not valid as incident to arrest or as the result of consent.[25] In *LaBelle,* the defendant was a passenger in a car stopped by the police because the officer thought the driver passed a stop sign without stopping.[26] During the stop, the officer ordered all of the

17. 274 Mich. App. 174, 731 N.W.2d 466 (2007). The court in *Gadomski* also considered whether the exclusionary rule applies to a violation of the Investigative Subpoena Statute. *See id.* The court ruled that the exclusionary rule is not the appropriate sanction for this statutory violation because this drastic remedy is available for violations of constitutional magnitude. *Id.* at 181-83, 731 N.W.2d at 470-71. Furthermore, the language of the statute itself does not provide this remedy. MICH. COMP. LAWS. ANN. §§ 767A.1-767A.9 (West 2000 & Supp. 2007).

18. *Gadomski*, 274 Mich. App. at 176-77, 731 N.W.2d at 468.

19. *Id.* at 177, 731 N.W.2d at 468.

20. *Id.* at 179, 731 N.W.2d at 469.

21. *Id.* at 178, 731 N.W.2d at 469 (citing People v. Zahn, 234 Mich. App. 438, 446, 594 N.W.2d 120, 123-24 (1999)).

22. *Id.* at 179, 731 N.W.2d at 469.

23. 273 Mich. App. 214, 729 N.W.2d 525 (2006), *rev'd*, 478 Mich. 891, 732 N.W.2d 114 (2007).

24. *Id.* at 217, 729 N.W.2d at 528.

25. *Id.*

26. *Id.* at 216, 729 N.W.2d at 527. This belief was in error, as the officer later admitted that he was "mistaken regarding the presence of a stop sign, stating that there previously had been a stop sign at the intersection." *Id.* at 216, 729 N.W.2d at 528.

occupants out of the vehicle and asked the driver for consent to search the vehicle.[27] The driver consented and the officer searched the car, including defendant's backpack, located at defendant's feet, where he found marijuana.[28] The officer later determined that the driver did not have an operator's license.[29]

The Court of Appeals first evaluated whether the search of defendant's backpack could be supported by a search incident to arrest, where the driver was not actually arrested, but issued a citation instead.[30] The Court of Appeals concluded that while Michigan law makes clear that the search incident to arrest exception to the search warrant requirement will justify a search "whenever there is probable cause to arrest, even if an arrest is not made at the time the search is actually conducted,"[31] the same rule does not apply where the officer issues a traffic citation and does not make an arrest.[32] Based upon the United States Supreme Court decision in *Knowles v. Iowa,*[33] the Court of Appeals concluded that the search of the defendant's backpack could not be justified as a search incident to arrest where there is no actual arrest.[34]

The Court of Appeals next considered whether the driver's consent to search the vehicle could reasonably include the search of a passenger's backpack.[35] A search is reasonable under the Fourth Amendment where it is supported by voluntarily given consent by "the person whose property is being searched or from a third party who possesses common authority over the property."[36] The defendant did not give consent to a search, so the question for the Court was whether it was reasonable for the police to believe that they "obtained consent from a person who had common authority over the premises,"[37] ("premises" meaning the backpack). The Court of Appeals concluded that it was not reasonable for the police to believe that the driver had common authority over a backpack found at the passenger's feet.[38] The Court of Appeals reasoned that a backpack belonging to the driver would more likely be found in the rear seat,[39] and, therefore, a backpack found at the passenger's feet is

27. *Id.* at 216, 729 N.W.2d at 527.
28. *Id.* at 216, 729 N.W.2d at 527.
29. *LaBelle*, 273 Mich. App. 217, 729 N.W.2d at 528.
30. *Id.* at 217-18, 729 N.W.2d at 528.
31. *Id.* at 217, 729 N.W.2d at 528 (citing People v. Solomon (amended opinion), 220 Mich. App. 527, 530, 560 N.W.2d 651, 653 (1996)).
32. *Id.* at 217-18, 729 N.W.2d at 528 (citing Knowles v. Iowa, 525 U.S. 113, 116 (1998)).
33. *Knowles*, 525 U.S. 113.
34. *LaBelle*, 273 Mich. App. at 218, 729 N.W.2d at 529.
35. *Id.* at 220, 729 N.W.2d at 530.
36. *Id.* (citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)).
37. *Id.* at 221, 729 N.W.2d at 530.
38. *Id.* at 222-23, 729 N.W.2d at 531.
39. *Id.* at 224, 729 N.W.2d at 531-32.

more likely the passenger's property.[40] As such, the driver's consent to search the defendant's backpack was not valid to support the search.[41]

The Court of Appeals concluded that the evidence must be suppressed as a result of its findings that the search is invalid, "regardless of whether the traffic stop was valid and whether the defendant has the standing to challenge the validity of the traffic stop . . . ."[42] The Michigan Supreme Court reversed the Court of Appeals' conclusion that the search of the interior of the vehicle was invalid.[43] Instead, the Supreme Court concluded that the initial stop was valid, and following the stop, the driver consented to the search or could have been arrested.[44] The Supreme Court determined that either reason would support the search of the interior of the vehicle, including the defendant's backpack.[45] Furthermore, the Supreme Court held that because the initial stop of the vehicle was lawful,[46] "the defendant, a passenger, lacked standing to challenge the subsequent search of the vehicle."[47]

The Michigan Supreme Court did not address whether the result in *LaBelle*, would be the same if the initial stop of the vehicle was unlawful. The United States Supreme Court, however, recently addressed this issue in *Brendlin v. California.*[48] The defendant in *Brendlin* was also the passenger in a car during a concededly unlawful traffic stop.[49] The Court determined that as such, he was seized for purposes of the Fourth Amendment, and could therefore challenge the constitutionality of the stop.[50] While the Michigan Supreme Court concluded in *LaBelle* that the stop was lawful and that the defendant had no standing to challenge the search, a determination that the search was unlawful should result in a finding that the passenger has standing in light of *Brendlin.*

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40. *LaBelle*, 273 Mich. App. at 224, 729 N.W.2d at 531-32.

41. *Id.* at 223-24, 729 N.W.2d at 531.

42. *Id.* at 226, 729 N.W.2d at 533.

43. *Labelle*, 478 Mich. 891, 732 N.W.2d 114.

44. *Id.* at 892, 732 N.W.2d at 115.

45. *Id.* at 892, 732 N.W.2d at 114.

46. *Id.* at 892, 732 N.W.2d at 115. The court concluded that police could stop the vehicle for failing to come to a full stop before entering the highway. *Id.* at 891, 732 N.W.2d at 114.

47. *Id.* at 892, 732 N.W.2d at 115 (citing Rakas v. Illinios, 439 U.S. 128 (1978); People v. Smith, 420 Mich. 1, 360 N.W.2d 841 (1984); People v. Armendarez, 188 Mich. App. 61, 468 N.W.2d 893 (1991)).

48. 127 S.Ct. 2400 (2007).

49. *Id.* at 2406.

50. *Id.* at 2403.

III. CONFESSIONS AND SELF-INCRIMINATION

A. Invocation of the Right to Silence

The Court of Appeals addressed the prohibition against further interrogation from *Michigan v. Mosely*[51] in a case where the defendant claimed that his refusal to reduce his oral statement to writing operated as an invocation of his right to remain silent. In *People v. Williams*,[52] defendant made an oral statement to police, but refused to reduce the statement to writing.[53] A different investigator later approached him seeking a second interview.[54] The defendant claimed that the second statement must be suppressed because the police did not scrupulously honor his right to silence.[55] To resolve the issue, the Court first had to consider whether his refusal to reduce his first statement to writing operated as an invocation of the right to silence.[56] While the issue was one of first impression for Michigan, the Court relied upon and adopted precedent from other jurisdictions.[57] For example, in *Crosby v. State*[58] the Maryland Court held that a defendant does not invoke his right to silence by merely refusing to reduce his oral statement to writing.[59] Several other jurisdictions follow *Crosby's* example.[60] The Michigan Court held that defendant's refusal was not an indication that he chose "silence over speech" but instead chose "one form of speech over another."[61]

B. Knowing, Intelligent and Voluntary Waiver

One case which may have significant impact on police interrogation practices is the Court of Appeal's decision in *People v. McBride*.[62] Police arrested McBride, a deaf mute, for the murder of her boyfriend.[63] After she was transported to the Roseville Police Department for questioning, the officer in charge learned that she was deaf and mute and called for a sign language interpreter to be present at the interview.[64]

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51. 51 Mich. App. 105, 214 N.W.2d 564 (1974), *vacated*, 423 U.S. 96 (1975).
52. 275 Mich. App. 194, 737 N.W.2d 797 (2007).
53. *Id.* at 199, 737 N.W.2d at 800.
54. *Id.*
55. *Id.* at 198, 737 N.W.2d at 799.
56. *Id.* at 198, 737 N.W.2d at 800.
57. *Id.* at 198-99, 737 N.W.2d at 800.
58. 784 A.2d 1102 (Md. 2001), *cert. denied*, 535 U.S. 941 (2002).
59. *Crosby*, 784 A.2d. at 1108-09.
60. *See, e.g.*, People v. Hendricks, 687 N.E.2d 1328 (N.Y. 1997); State v. Adams, 605 A.2d 1097 (N.J. 1992); State v. Morehead, 811 S.W.2d 425 (Mo. App. 1991).
61. *Williams*, 275 Mich. App. at 198, 737 N.W.2d at 800.
62. 273 Mich. App. 238, 729 N.W.2d 551 (2006).
63. *Id.* at 240, 729 N.W.2d at 554.
64. *Id.*

During the interrogation, the signer would sign and mouth the words to McBride and also interpret McBride's responses for the officers.[65] The officer in charge asked McBride if she'd ever heard of *Miranda*,[66] and McBride responded by shaking her head side to side, which the signer interpreted as a negative response.[67] Later in the discussion, the officer asked McBride if she could read and write and McBride shrugged her shoulders.[68] The interpreter translated this as an affirmative response.[69] The officer then presented McBride with the written form[70] and also orally delivered the rights.[71] However, the officer did not deliver the rights in complete form, combining some rights with others and specifically leaving out McBride's right to counsel.[72] At one point McBride interrupted and signed "either '[n]o, wait, am I supposed to have a lawyer?' or '[do] I need a lawyer?'"[73] The officer responded "'[w]ell you have a right to *have* one.'"[74] No additional comments concerning a lawyer passed between McBride and the officer, and the officer continued reading the form.[75] After reading the rights form, the officer indicated to McBride "I'm gonna ask you to sign that, showing that I read you this and gave you the opportunity . . . ."[76] The officer never completed this sentence, but began questioning McBride, ultimately obtaining a confession.[77]

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65. *Id.*

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

67. *McBride*, 273 Mich. App. at 241, 729 N.W.2d at 554.

68. *Id.* at 241-42, 729 N.W.2d at 554.

69. *Id.* at 242, 729 N.W.2d at 554.

70. Defendant did not claim error with the written form. *Id.* at 238, 729 N.W.2d at 551. The form used was a standard police department form which described the rights as follows:

> You understand that:
>
> 1. You have the right to remain silent and that you do not have to answer any questions put to you or make any statements.
>
> 2. Any statement that you make or anything you say can and will be used against you in a Court of Law.
>
> 3. You have the right to have an attorney (lawyer) present before and during the time you answer any questions or make any statements.
>
> 4. If you cannot afford an attorney (lawyer), one will be appointed for you without cost by the Court prior to questioning.
>
> 5. You can decide at any time to exercise your rights and not answer any questions or make any statement.

Id. at 242-43, 729 N.W.2d at 555.

71. *Id.* at 242, 729 N.W.2d at 555.

72. *Id.* at 243-44, 729 N.W.2d at 555.

73. *McBride*, 273 Mich. App. at 243, 729 N.W.2d at 555.

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

75. *Id.* at 243-44, 729 N.W.2d at 555.

76. *Id.* at 244, 729 N.W.2d at 556.

77. *Id.* at 244-45, 729 N.W.2d at 556.

The Trial Court conducted a *Walker*[78] hearing and determined that the confession should be suppressed because McBride did not "knowingly and intelligently waive her *Miranda* rights."[79] The Court concluded first that no express waiver is necessary to effectively waive the rights, "[r]ather, her mere act of signing the form was sufficient evidence of such waiver."[80]

The issue considered by the Court most likely to impact police practices is its ultimate conclusion that McBride could not have made a knowing and intelligent waiver based upon her understanding of the rights as interpreted to her through the sign language translator.[81] The Court acknowledges that whether the suspect has waived *Miranda* is determined by an evaluation of the totality of the circumstances, considering the "defendant's intelligence and capacity to understand the warnings given."[82] The Court previously ruled in *People v. Brannon*,[83] that a deaf suspect waived *Miranda* rights "when the *Miranda* warnings are explained to the defendant by an interpreter familiar with and competent in the defendant's primary language"[84] such that the defendant "comprehended her *Miranda* rights as conveyed by the interpreter and intelligently waived them."[85]

The Court concluded that there was insufficient evidence that McBride understood her *Miranda* rights for several reasons. First, the sign language interpreter at the interrogation did not sufficiently interpret what was being said, but rather merely signed word for word, so that "all that [McBride was] receiving [was] a bunch of words" instead of an understanding of what those words meant.[86] Furthermore, there was insufficient evidence on the record that anyone inquired about McBride's

78. *Id.* at 245, 729 N.W.2d at 556 (citing People v. Walker, 374 Mich. 331, 132 N.W.2d 87 (1965)).

79. *McBride*, 273 Mich. App. at 259, 729 N.W.2d at 564.

80. *Id.* at 253, 729 N.W.2d. at 560. In reaching its conclusion, the Court relied on *People v. Matthews* which evaluated whether an express statement of waiver is necessary to effectively waive *Miranda* rights, as a matter of first impression. *Id.* at 251-52, 729 N.W.2d at 559 (citing People v. Matthews, 22 Mich. App. 619, 178 N.W.2d 94 (1970)). In *Matthews*, the Court concluded that an express statement of waiver was not necessary. *Matthews*, 22 Mich. App. at 628, 178 N.W.2d at 99. The Court noted that the *Matthews* decision has been followed by subsequent decisions, specifically *People v. Wimbush*, which held that "the act of signing a constitutional rights form after such form was read to and by the defendant was sufficient to 'constitute'" a waiver of *Miranda* rights. *McBride*, 273 Mich. App. at 253, 729 N.W.2d at 560 (citing People v. Wimbush, 45 Mich. App. 42, 44-45, 205 N.W.2d 890, 892 (1973)).

81. *McBride*, 273 Mich. App. at 257, 729 N.W.2d at 562.

82. *Id.* at 253, 729 N.W.2d at 253 (citing People v. Howard, 226 Mich. App. 528, 538, 575 N.W.2d 16, 23 (1997)).

83. 194 Mich. App. 121, 486 N.W.2d 83 (1992).

84. *McBride*, 273 Mich. App. at 254, 729 N.W.2d at 561 (quoting *Brannon*, 194 Mich. App. at 130-31, 486 N.W.2d at 88 (citing State v. Mason, 633 P.2d 820, 821-22 n.3 (Or. Ct. App. 1981))).

85. *Id.* at 256, 729 N.W.2d at 562.

86. *Id.* at 246, 729 N.W.2d at 557.

level of education, or whether she in fact was able to read or write.[87] The Court of Appeals concluded that because there was insufficient evidence that McBride actually comprehended the rights as described to her through the sign language interpreter, it could not conclude that she made a knowing, intelligent and voluntary waiver of those rights.[88]

The Michigan Supreme Court has since granted leave to appeal[89] specifically on the issue of "whether, under all the circumstances, the defendant made a knowing, intelligent and voluntary waiver of her Fifth Amendment rights."[90] If the Supreme Court agrees with the Court of Appeals, it will impose a higher burden on police officers taking *Miranda* waivers when the suspect is communicating through an interpreter. The police would have to determine whether the interpreter adequately conveyed the rights in such a manner that the defendant could comprehend them.

In *Brannon*[91] the Court ultimately concluded that the defendant made knowing, intelligent and voluntary waiver where an interpreter delivered the rights and the officers presented Brannon with a written advice of rights form to review.[92] Also, in *People v. Truong*,[93] the suspect spoke through an interpreter because his primary language was Vietnamese.[94] The Court concluded that the defendant knowingly and intelligently waived his rights, specifically pointing out that "[t]here is no greater obligation on the part of the police to ascertain comprehension of *Miranda* rights with respect to a person using a translator than with respect to a person fluent in English."[95] It is doubtful that the Supreme Court will be willing to impose this additional burden on the police.

IV. DUE PROCESS

A. Discovery

The Court of Appeals reaffirmed its refusal to engage in legislative decision making when it reversed the District Court's suppression of evidence in response to the prosecutor's failure to comply with a district court discovery order in *People v. Greenfield*.[96] The Court of Appeals addressed two issues under Michigan's criminal discovery rule, M.C.R.

87. *Id.* at 256, 729 N.W.2d at 562.
88. *Id.*
89. People v. McBride, 475 Mich. 902, 716 N.W.2d 586 (2006).
90. People v. McBride, 478 Mich. 875, 731 N.W.2d 767 (2007).
91. *Brannon*, 194 Mich. App. 121, 486 N.W.2d 83.
92. *Id.* at 132, 486 N.W.2d at 88.
93. 218 Mich. App. 325, 553 N.W.2d 692 (1996), *appeal denied*, 455 Mich. 870 (1997) (after remand).
94. *Id.* at 333-34, 553 N.W.2d at 697.
95. *Id.* at 335, 553 N.W.2d at 698.
96. 271 Mich. App. 442, 722 N.W.2d 254 (2006), *appeal denied*, 477 Mich. 953, 723 N.W.2d 897 (2006).

6.201.[97] First, the Court had to determine whether the evidence sought was that contemplated as mandatory under the discovery rule, and if not, could the District Court order discovery of the material in the absence of good cause?[98]

Greenfield was arrested by an Oakland County sheriff's deputy for operating a motor vehicle while under the influence of intoxicating liquor ("OUIL").[99] The deputy then transported defendant to the Rochester Police Department for purposes of administering a DataMaster breath test.[100] The test revealed that his blood alcohol content was above the legal limit, and he was subsequently charged with OUIL, third offense, a felony.[101] What the deputy did not realize was that the booking room at the Rochester Police Department was equipped with a motion activated video recording system.[102] Defense counsel filed a request for discovery seeking numerous items, "including '[a]ny videotapes or audio recordings made of the stop, investigation, arrest and post-arrest activity including the booking procedure, advice of rights, and chemical testing.'"[103] It is clear from the record that the sheriff's department and the prosecutor did not learn of the existence of the booking room video until defendant's preliminary examination, and by that time the recording of defendant's chemical test had been recorded over.[104] The District Court issued a discovery order after defendant's preliminary examination

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97. MICH. CT. R. 6.201, in effect at the time of defendant's case, provided in relevant part:

> (A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, MSA 28.1023(194a), a party upon request must provide all other parties:
> (1) the names and addresses of all lay and expert witnesses whom the party intends to call at trial;
> (2) any written or recorded statement by a lay witness whom the party intends to call at trial, except that a defendant is not obliged to provide the defendant's own statement;
> (3) any report of any kind produced by or for an expert witness whom the party intends to call at trial;
> (4) any criminal record that the party intends to use at trial to impeach a witness;
> (5) any document, photograph, or other paper that the party intends to introduce at trial; and
> (6) a description of and an opportunity to inspect any tangible physical evidence that the party intends to produce at trial. *On good cause shown*, the court may order that a party be given the opportunity to test without destruction such tangible physical evidence.

MICH. CT. R. 6.201(A) (emphasis added).

98. *Greenfield*, 271 Mich. App. at 444, 722 N.W.2d at 256.
99. *Id.* at 444-45, 722 N.W.2d at 256.
100. *Id.* at 445, 722 N.W.2d at 256.
101. *Id.*
102. *Id.*
103. *Id.* at 446, 722 N.W.2d at 256.
104. *Greenfield*, 271 Mich. App. at 446, 722 N.W.2d at 256.

which included the disputed tapes.[105] Based upon the prosecutor's failure to produce them, the District Court suppressed the results of defendant's DataMaster test.[106]

The Court of Appeals discussed the scope of criminal discovery in Michigan, noting that M.C.R. 6.201 governs discovery in criminal cases,[107] and that "[t]here is no general constitutional right to discovery in a criminal case."[108] The Michigan Supreme Court made clear in *People v. Phillips*[109] that courts may only order discovery in criminal cases when "the subject of the discovery [is] set forth in the rule or the party seeking discovery [shows] good cause why the [T]rial [C]ourt should order the requested discovery."[110] The Court of Appeals in *Greenfield* made clear that the booking room video was not a subject set forth in the discovery rule[111] and is therefore not subject to mandatory disclosure.[112]

Because the booking room video was not subject to mandatory disclosure, the Court was left to determine whether there was good cause supporting the discovery order.[113] The Court noted from *Phillips* that "the failure to produce evidence that does not fall within any category of discoverable evidence does not constitute good cause to support a discovery order.[114] The Court concluded that the District Court order suppressing the DataMaster results was an abuse of discretion, and reversed the Circuit Court's order affirming the District Court's suppression.[115]

In rendering its decision, the Court of Appeals commented that they would not engage in legislative activity by mandating the discovery of these types of videos.[116] They implied an invitation to the Supreme Court to do just that when it included the following in a footnote:

> We do not decide in this opinion whether such videotapes *should* be subject to mandatory discovery. Videotapes of chemical test procedures may be helpful in defending drunken driving cases.

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105. *Id.* at 446, 722 N.W.2d at 256-57.

106. *Id.* at 446-47, 722 N.W.2d at 257.

107. *Id.* at 447, 722 N.W.2d at 257 (citing People v. Phillips, 468 Mich. 583, 588-89, 663 N.W.2d 463, 466 (2003)).

108. *Id.* at 447 n.4, 722 N.W.2d at 257 n.4 (citing People v. Elston, 462 Mich. 751, 765, 614 N.W.2d 595, 602 (2000)).

109. *Phillips*, 468 Mich. 583, 663 N.W.2d 463.

110. *Greenfield*, 271 Mich. App. at 448, 722 N.W.2d at 257.

111. *Id.* at 450-51, 722 N.W.2d at 258-59 (discussing MICH. CT. R. 6.201).

112. *Id.* at 450-51, 722 N.W.2d at 258-59. The court clarified that MICH. CT. R. 6.201 applies to cases in the district and circuit courts in Michigan, but that it does not apply to misdemeanor cases. *Id.* at 450 n.6, 722 N.W.2d at 259 n.6.

113. *Id.* at 451, 722 N.W.2d at 259.

114. *Id.* (citing *Phillips*, 468 Mich. at 592-93, 663 N.W.2d at 468).

115. *Id.* at 452-53, 722 N.W.2d at 260.

116. *Greenfield*, 271 Mich. App. at 453 n.8, 722 N.W.2d at 260 n.8.

> However, the authority to define the scope of the procedural rules in this state rests exclusively with our Supreme Court, and we will not expand the scope of *MCR 6.201* here.[117]

What remains to be seen is whether the rules committee will answer the invitation and amend the rules to mandate discovery of this type of evidence.

B. Right to Present a Defense

In a sweeping opinion which cleared years of appellate precedent, the Supreme Court held that dismissal or suppression are not appropriate remedies for a police officer's failure to provide a reasonable opportunity for a defendant in a drunk driving case to obtain an independent chemical test.[118] In *Anstey*, the Court determined that the denial of a defendant's right to an independent test was not of constitutional magnitude, so application of the exclusionary rule was inappropriate, and dismissal was not warranted.[119] The Court demonstrated its continued desire to operate within the bounds of judicial restraint by refusing to read a remedy into the statute which does not appear in the statute's language.

Anstey was arrested for operating a vehicle while intoxicated or with an unlawful blood alcohol content.[120] After his chemical breath test at the police station reflected a body alcohol level of 0.21 grams per 210 liters of breath, defendant asked the arresting officer to transport him to a hospital in Indiana to obtain an independent chemical test.[121] The officer

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117. *Id.*

118. People v. Anstey, 476 Mich. 436, 719 N.W.2d 579 (2006), *cert. denied*, ___U.S.___, 127 S.Ct. 976 (2007). The right to an independent chemical test comes from the statutory language found at MCL section 257.625A(6)(d) which reads:

> A chemical test described in this subsection shall be administered at the request of a peace officer having reasonable grounds to believe that person has committed a crime described in section 625.c(1). *A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a reasonable time after his or her detention.* The test results are admissible and shall be considered with other admissible evidence in determining the defendant's innocence or guilt. If the person charged is administered a chemical test by a person of his or her own choosing, the person charged is responsible for obtaining chemical analysis of the test sample.

MICH. COMP. LAWS ANN. § 257.625A(6)(d) (West 2006) (emphasis added).

119. *Anstey*, 476 Mich. at 436, 719 N.W.2d at 579.

120. *Id.* at 440, 719 N.W.2d at 583. Specifically, defendant was charged with a violation of MCL section 257.625(1)(a) or (b). *Id.* at 441, 719 N.W.2d. at 583.

121. *Id.* at 440, 719 N.W.2d at 583. At the time of defendant's arrest, the statutory intoxication limit was 0.10 grams per 210 liters of breath. MICH. COMP. LAWS ANN. § 257.625(1) (West 2006). The level has been lowered to 0.08 grams per 210 liters of breath. *Anstey*, 476 Mich. at 440, 719 N.W.2d at 583.

refused this request.[122] The officer also refused defendant's next request to transport him to Watervliet Community Hospital, a 15-20 minute drive from the jail.[123] The officer did offer to transport defendant to Lakeland Hospital/St. Joseph Medical Center where police routinely took suspects for independent chemical tests, but the defendant refused.[124] The District Court in response granted the defense motion to suppress the chemical test results, and dismiss the case.[125] The Supreme Court did not challenge the District Court's ruling that the officer's refusal to transport the defendant to a hospital of his choice was an unreasonable denial of his rights under the statute,[126] but focused instead on the appropriate remedy for that denial assuming it occurred.[127]

The Court began its analysis by evaluating the plain language of the statute, and the impact existing case law has had on a remedy for its violation.[128] The legislature did not include a remedy for violation of section 6(d).[129] The Court notes by contrast that a later section of the same statute[130] mandates suppression of state-administered chemical test results as the remedy for failure to make those results available to the defense.[131] Rules of statutory construction dictate that if the legislature wished to enforce the drastic remedy of suppression in subsection (6)(d), it would have done so by including the necessary language, especially when the sanction is included in the same statute in a later section.[132]

Despite the absence of statutory language supporting the exclusion of the chemical test results, the lower courts relied on a previous case to find that suppression of the evidence and dismissal of the case must be the remedy.[133] In *Koval*, the Supreme Court ruled that a denial of the defendant's statutory right to an independent chemical test required

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122. *Anstey*, 476 Mich. at 440-41, 719 N.W.2d at 583.

123. *Id.* at 440, 719 N.W.2d at 583.

124. *Id.* at 440-41, 719 N.W.2d at 583.

125. *Id.* at 441, 719 N.W.2d at 583.

126. MICH. COMP. LAWS ANN. § 257.625a(6)(d) (West 2006).

127. *See Anstey*, 476 Mich. at 442 n.3, 719 N.W.2d at 584 n.3. The court concluded that "because the prosecution does not challenge the district court's ruling [that defendant was denied the reasonable opportunity for an independent chemical test], we assume for purposes of this section of the opinion that the statute was violated." *Id.*

128. *See id.* at 442, 719 N.W.2d at 584.

129. *See id.* at 443-44, 719 N.W.2d at 584-85.

130. MICH. COMP. LAWS ANN. § 257.625a(8) (West 2006).

131. *See Anstey*, 476 Mich. at 444, 710 N.W.2d at 585. MCL section 257.625a(8) reads in relevant part:

> If a chemical test described in subsection (6) is administered, the test results shall be made available to the person charged or the person's attorney upon written request to the prosecution . . . . *Failure to fully comply with the request bars the admission of the results into evidence by the prosecution.*

MICH. COMP. LAWS ANN. § 257.625a(8) (West 2006) (emphasis added).

132. *See Anstey*, 476 Mich. at 444, 710 N.W.2d at 585 (citing People v. Monaco, 474 Mich. 48, 710 N.W.2d 46 (2006)).

133. *See* People v. Koval, 371 Mich. 453, 124 N.W.2d 274 (1963), *rev'd*, People v. Anstey, 476 Mich. 436, 719 N.W.2d (2006).

dismissal of the charges against the defendant.[134] The *Koval* Court determined that the statute "was enacted for the protection and benefit of a defendant charged with operating a motor vehicle while under the influence of intoxicating liquor."[135] As a result, the *Koval* Court reasoned that a violation of the statute mandates dismissal of the case.[136]

The *Anstey* Court embarked on a reevaluation of the validity of this conclusion by not only considering the plain language of subsection 6(d), but also current Michigan law concerning the boundaries of the exclusionary rule.[137] The Court concluded that current Michigan law does not support application of the exclusionary rule in this context because the rule "is a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of *constitutional* rights . . . ."[138] Because failure to provide a reasonable opportunity for an independent chemical test is not an error of "constitutional dimensions"[139] and because the language of the statute itself does not suggest exclusion as a remedy for violation, application of the exclusionary rule in these circumstances was inappropriate.[140] The same reasoning applied to suggest that the more drastic remedy of dismissal was not available unless included in the statute.[141] The Court concluded that the legislature could not have intended either of these results, and therefore overruled *Koval* and its progeny.[142]

The Court assumed, for purposes of rendering its decision, that the defendant was denied his statutory right to an independent chemical test.[143] When an officer denies a reasonable request, the Court acknowledged that "the officer prevents the defendant from exercising a statutory right to discover potentially favorable evidence in his or her

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134. *Anstey*, 476 Mich. at 459, 124 N.W.2d at 277. Although the court in *Koval* relied on a previous version of the statute, that statute also failed to provide a statutory remedy for its violation. *See id.* at 455-56, 124 N.W.2d at 275.

135. *Id.* at 458, 124 N.W.2d at 276.

136. *Id.* at 459, 124 N.W.2d at 277.

137. *Id.* at 447, 719 N.W.2d at 587.

138. *Id.* at 447-48, 719 N.W.2d at 587 (citing People v. Hawkins, 468 Mich. 488, 512-13, 668 N.W.2d 602, 616 (2003)) (emphasis in original).

139. *Id.* at 447-48, 719 N.W.2d at 587 (citing *Hawkins*, 468 Mich. at 507, 668 N.W.2d at 612).

140. *See Anstey*, 476 Mich. at 449, 719 N.W.2d at 587.

141. *Id.*

142. *See id.* at 449, 719 N.W.2d at 587-88. The Court noted that besides *Koval*, it was overruling the following cases as well: People v. Green, 260 Mich. App. 392, 677 N.W.2d 363 (2004); People v. Prelesnik, 219 Mich. App. 173, 555 N.W.2d 505 (1996); People v. Hurn, 205 Mich. App. 618, 518 N.W.2d 502 (1994); People v. Dicks, 190 Mich. App. 694, 476 N.W.2d 500 (1991); Peop' v. Willis, 180 Mich. App. 31, 446 N.W.2d 562 (1989); People v. Underwood, 153 M. App. 598, 396 N.W.2d 443 (1986); and People v. Burton, 13 Mich. App. 203, 163 N.W.2d 823 (1968). *Anstey*, 476 Mich. at 446 n.9, 719 N.W.2d at 586-87 n.9.

143. *See Anstey*, 476 Mich. at 442, 719 N.W.2d at 584.

defense."[144] Therefore, the Court outlined the remedy for such violations.[145] The Court indicated that where a defendant claims he made a reasonable request for an independent chemical test, and his request was denied, the Trial Court must determine whether he was in fact deprived of the right.[146] If the Court determines that such a violation occurred, the Court may, upon request of defense counsel, inform and instruct the jury on this violation.[147] The Court indicated that its authority to make instruction to the jury comes from the Court's constitutional authority to prescribe rules for conduct in the courtroom[148] and its statutory authority to instruct the jury on the law.[149] Justice Corrigan, writing for the majority concluded that such an instruction will deter police from violating the statute, knowing that the jury will be informed.[150]

The Court also rejected defendant's claim that the denial of the independent test prevented him from preparing a defense and thereby violated his right to due process.[151] While the Court acknowledged that a criminal defendant has a constitutional right to present a defense as a "fundamental element of due process,"[152] the Court distinguished between the government's duty to preserve exculpatory evidence and a duty to develop such evidence.[153] The Court found that there was no duty to develop potentially exculpatory evidence for the defendant, and therefore his due process claim failed as well.[154]

It is not surprising that the current Michigan Supreme Court would rule in this way. We should expect to see several more opinions from this

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144. *Id.* at 450, 719 N.W.2d at 588.

145. *See id.*

146. *Id.* (indicating that this may require an evidentiary hearing).

147. *Id.* at 450, 719 N.W. at 588. The Court also authored proposed jury instructions:

> Our law provides that a person who takes a chemical test administered at a peace officer's request must be given a reasonable opportunity to have a person of his or her own choosing administer an independent chemical test. The defendant was denied such a reasonable opportunity for an independent chemical test. You may determine what significance to attach to this fact in deciding the case. For example, you might consider the denial of the defendant's right to a reasonable opportunity for an independent chemical test in deciding whether, in light of the nonchemical test evidence, such an independent chemical test might have produced results different from the police-administered test.

Id. at 450-51, 719 N.W.2d at 588-89.

148. *Id.* at 451, 719 N.W.2d at 589 (citing MICH. CONST. art. VI, § 5).

149. *Anstey*, 476 Mich. at 452, 719 N.W.2d at 589 (citing MICH. COMP. LAWS ANN. § 768.29 (West 2000)).

150. *Id.* at 457 n.22, 719 N.W.2d at 592 n.22.

151. *Id.* at 459-60, 719 N.W.2d at 593-94. *See* U.S. CONST. amend. VI; U.S. CONST. amend. XIV; MICH. CONST. art. 1 §§ 13, 17 & 20.

152. *Anstey*, 476 Mich. at 460, 719 N.W.2d at 593 (citing People v. Hayes, 421 Mich. 271, 279, 364 N.W.2d 635, 639 (1984)).

153. *Id.* at 460, 719 N.W.2d at 594.

154. *See id.* at 460-61, 719 N.W.2d at 594.

bench exercising judicial restraint, and perhaps overruling other precedents which read remedies or interpretations into statutory language which is not there by the plain language of the statute. In *Anstey*, only one justice dissented from the decision to overrule *Koval*.[155] In other words, only Justice Cavanaugh would hold that such drastic remedies as suppression or dismissal should result from the government's failure to help develop exculpatory evidence, where there is no statutory language in support.[156] The Court has also established new procedure for addressing denials of independent chemical test: an evidentiary hearing followed by instructions to the jury upon request.[157] It is important to note, however, that the Court limited application of this instruction to violation of section 6(d).[158]

V. DOUBLE JEOPARDY

During this *Survey* period, and immediately following, Michigan courts decided cases which questioned the appropriate test to evaluate double jeopardy concerns in Michigan. The most significant discussion was found in cases evaluating whether jury instructions were appropriate, but the courts' decisions significantly impact Michigan's double jeopardy jurisprudence.

In June of 2006, the Michigan Court of Appeals decided *People v. Martin*.[159] At that time, the controlling precedent on the double jeopardy issue was *People v. Robideau*,[160] where the Michigan Supreme Court abandoned the elements test from *Blockburger v. United States*[161] as the way to evaluate whether the legislature intended multiple punishments for certain offenses.[162] Especially, noted the *Robideau* Court, where the question concerns compound offenses, in other words offenses where one offense requires proof of an underlying offense,[163] the proper inquiry is whether the legislature intended to impose multiple punishments, not an evaluation of the elements of the offenses.[164]

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155. *Id.* at 468, 719 N.W.2d at 598 (Cavanaugh, J., dissenting).

156. *See id.*

157. *Id.* at 450, 719 N.W.2d at 588.

158. *Anstey*, 476 Mich. at 459, 719 N.W.2d at 593.

159. 271 Mich. App. 280, 721 N.W.2d 815 (2006).

160. 419 Mich. 458, 355 N.W.2d 592, *overruled by Smith*, 478 Mich. 292, 733 N.W.2d 351.

161. *Blockburger*, 284 U.S. 299.

162. *See Robideau*, 419 Mich. at 486, 355 N.W.2d at 603.

163. Felony murder is an example of a compound offense, because it necessarily requires proof of an underlying felony. MICH. COMP. LAWS ANN. § 750.316(2) (West 2004). In *Martin*, defendant was charged with racketeering which necessarily requires proof of the criminal activity establishing a criminal pattern. *Martin*, 271 Mich. App. at 286, 721 N.W.2d at 824; MICH. COMP. LAWS ANN. §§ 750.159f, 750.159i (West 2004).

164. *See Robideau*, 419 Mich. at 486, 355 N.W.2d at 603.

The Court in *Martin* was asked to determine the effect of the legislative intent analysis in the context of instructions for necessarily lesser included offenses.[165] The defendants in *Martin*[166] were charged with racketeering,[167] and with the supporting predicate offense of keeping a house of prostitution.[168] The defendants were not charged separately with the second charge.[169] The defendants argued on appeal that the Trial Court erred when it instructed the jury that it could convict them of keeping a house of prostitution because it was a necessarily lesser included offense of racketeering.[170]

Embarking on its discussion of the issue, the Court noted first that while it is clear that a defendant may not be convicted of an offense for which he was not charged,[171] a defendant is put on notice that he may be found guilty of a lesser included offense.[172] Furthermore, the Court noted that MCL section 768.32(1) states that a jury or a judge may convict a defendant for an "inferior" offense when charged with an offense consisting of different degrees.[173] The Court in *Cornell*[174] further determined that this statute covered all cases where "different grades of offenses or degrees of enormity had been recognized."[175] What this means, according to the Court in *Cornell,* is that a defendant is subject to conviction for an offense which is a necessarily lesser included offense, regardless of whether described by degrees.[176] "[N]ecessarily lesser

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165. *See Martin*, 271 Mich. App. at 292, 721 N.W.2d at 828.

166. This case involved three consolidated appeals with multiple defendants. *Id.* at 285, 721 N.W.2d at 824. Because the issues and holdings in the separate cases either follow that decided in Martin, or uphold existing Michigan precedent, they are not separately addressed for purposes of this *Survey* article. Instead, this *Survey* discusses only those significant issues in docket nos. 25461, 256463 and 256464, concerning defendants Bobby Martin, Roger Thompson and Roger Brown.

167. *Id.* at 286, 721 N.W.2d at 824; MICH. COMP. LAWS ANN § 750.159i (West 2004).

168. *Martin*, 271 Mich. App. at 285-86, 721 N.W.2d at 824-85; MICH. COMP. LAWS ANN § 750.452 (West 2004).

169. *Martin*, 271 Mich. App. at 285-86, 721 N.W.2d at 824-87.

170. *Id.* at 286, 721 N.W.2d at 824.

171. *Id.* at 287, 721 N.W.2d at 825 (citing Schmuck v. United States, 489 U.S. 705 (1989)).

172. *Id.* at 287, 721 N.W.2d at 825 (citing People v. Cornell, 466 Mich. 335, 646 N.W.2d 127 (2002)).

173. *Id.* at 288, 721 N.W.2d at 826. The statutory subsection reads as follows:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

MICH. COMP. LAWS ANN. § 768.32(1) (West 2000).

174. *Cornell*, 466 Mich. 335, 646 N.W.2d 127.

175. *Martin*, 271 Mich. App. at 288, 721 N.W.2d at 826 (citing *Cornell*, 466 Mich. at 353-54, 646 N.W.2d at 127).

176. *See Cornell*, 466 Mich. at 353-54, 646 N.W.2d at 138.

included offenses," by the analysis in *Cornell*, are those offenses where "(1) it is impossible to commit the greater offense without first committing the lesser offense and (2) conviction of the greater offense requires the jury to find a disputed factual element that is not part of the lesser offense."[177]

Turning its attention to defendants' racketeering charge in *Martin*, the Court noted that the racketeering charge requires the prosecutor to establish that the defendant engaged in a pattern of some criminal activity.[178] The prosecution's theory here was that the underlying criminal activity was keeping a house of prostitution.[179] The question becomes, in a predicate-based offense like racketeering, will the underlying predicate offense always be a necessarily lesser included offense? The answer to this question by the *Martin* Court impacts jury instructions and double jeopardy concerns in other multiple punishment contexts.

The *Martin* Court admitted that "under a rote application of *Cornell*, predicate offenses would invariably be necessarily included lesser offenses of the predicate-based offense."[180] The Court noted that this undesirable result could not have been the legislature's intent, and relied upon a case from the double jeopardy context to support its contention.[181] In *People v. Wilder*,[182] the Court concluded that a conviction for felony murder and the underlying predicate felony of armed robbery violated double jeopardy.[183] The majority in *Wilder* reasoned that a felony murder cannot be committed without first committing the underlying felony.[184] However, in *Martin* the Court found Justice Ryan's reasoning in his *Wilder* concurrence more instructive.[185] He pointed out that the concept of lesser included offenses "reflects a continuum of culpability" while "predicate-based offenses and their predicates are tied together by the Legislature."[186] Therefore, it would not violate double jeopardy to convict of both the supporting predicate and the predicate-based offense, where the Court determines that the legislature intended to impose multiple punishments.[187]

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177. *Martin*, 271 Mich. App. at 289, 721 N.W.2d at 826 (citing *Cornell*, 466 Mich. at 353-54, 646 N.W.2d at 138).

178. *Id.* at 289, 721 N.W.2d at 826.

179. *Id.* at 287, 721 N.W.2d at 825.

180. *Id.* at 291-92, 721 N.W.2d at 827-28. And, as a result, prosecution for both would violate double jeopardy. *See id.*

181. *Id.*

182. 411 Mich. 328, 308 N.W.2d 112 (1981).

183. *Id.* at 352, 308 N.W.2d at 121.

184. *Id.* at 346, 308 N.W.2d at 118.

185. *Martin*, 271 Mich. App. at 291, 721 N.W.2d at 827 (citing *Wilder*, 411 Mich. at 353, 308 N.W.2d at 122 (Ryan, J., concurring)).

186. *Wilder*, 411 Mich. at 360, 308 N.W.2d at 125 (Ryan, J., concurring).

187. While Justice Ryan concurred with the result of the majority in *Wilder*, he did so not by applying the same elements test from *Blockburger*, but by noting that the

Relying on Justice Ryan's reasoning from *Wilder* and the test as described in *Cornell*, the *Martin* Court concluded that "the Legislature did not intend the predicate offenses supporting a racketeering charge to be considered lesser included offenses of that charge."[188] Therefore, it was error for the Trial Court to instruct the jury that they could find defendant guilty of the underlying predicate offense as a necessarily lesser included offense where it was not charged separately in the indictment.[189]

The issue in *Martin* was whether the predicate offense in that case was a lesser included offense for purposes of evaluating the jury instructions.[190] However, the reasoning of the Court in *Martin* directly impacts cases in the double jeopardy context as well. If the underlying predicate offense is not a lesser included offense of the predicate-based offense, prosecution for both offenses is not barred by double jeopardy. This is true even though application of the same elements test from *Blockburger*[191] might bar prosecution for both offenses as a violation of double jeopardy. This distinction is important to understand, because very shortly after the Court of Appeals decided *Martin*, the Michigan Supreme Court decided *People v. Smith*.[192] *Smith* was a double jeopardy case, and the Supreme Court determined that the legislative intent analysis of *Robideau* was not the way to evaluate a double jeopardy claim in Michigan.[193] Instead, the Court held that the appropriate analysis is the *Blockburger* same elements test, and thus overruled *Robideau*.[194] The effect this decision will have on the Court's holding in *Martin* and other cases involving multiple punishments in the context of jury instructions remains to be seen.

VI. RIGHT TO A SPEEDY TRIAL

The 180-day rule in Michigan provides in relevant part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a

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legislature did not intend to impose multiple punishments for a felony murder and its underlying felony. *Id.* at 364, 308 N.W.2d at 125 ("[A] clear legislative intent is required to overcome what is in effect the rebuttable presumption against multiple punishment contained in the Double Jeopardy Clause . . . .").

188. *Martin*, 271 Mich. App. at 295, 721 N.W.2d at 829.

189. *See id.* at 295, 721 N.W.2d at 830.

190. *See id.*

191. *Blockburger*, 284 U.S. 299.

192. *Smith*, 478 Mich. 292, 733 N.W.2d 351.

193. *See id.* at 315, 733 N.W.2d at 363.

194. *See id.* It is important to note that in *Smith*, the Court indicated that the proper point of analysis was the "proof of facts adduced at trial rather than the theoretical elements of the offense alone." *Id.* at 311, 733 N.W.2d at 361.

> correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.[195]

A subsequent section of the same statute provides for dismissal of the case with prejudice if there is a violation of the rule.[196] In *People v. Williams*,[197] defendant claimed that his rights under the 180-rule were violated, and therefore he was entitled to dismissal of the pending charges.[198] Defendant was on parole for another offense when he was arrested for an armed robbery allegedly occurring on May 7, 2000.[199] After his arrest, he was returned to the Michigan Department of Corrections for violation of his parole.[200] He was not arraigned on the new charge until June 18, 2001.[201] His preliminary hearing was June 28, 2001, and he was "bound over for trial on the armed robbery charge."[202] The Department of Corrections sent notice of defendant's incarceration to the prosecutor on July 12, 2001, which they received on July 16, 2001.[203] The information was issued on July 19, 2001,[204] and the defendant first appeared for trial on January 9, 2002.[205] The Trial Court granted defendant's motion for dismissal based upon violation of the 180-day rule.[206] However, the Court of Appeals, relying on existing case law, determined that the charges should not have been dismissed because the rule did not apply to defendants subject to mandatory consecutive sentencing on the pending charge.[207] Because defendant was on parole at the time he committed the offense, he was subject to mandatory consecutive sentencing, and therefore was not entitled to relief under the 180-day rule.[208]

The task for the Michigan Supreme Court was to determine whether the 180-day rule applies to defendants subject to mandatory consecutive

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195. MICH. COMP. LAWS ANN. § 780.131(1) (West 1998).
196. MICH. COMP. LAWS ANN. § 780.133 (West 1998).
197. 475 Mich. 245, 716 N.W.2d 208 (2006).
198. *Id.* at 249, 716 N.W.2d at 211.
199. *Id.* at 248, 716 N.W.2d at 211. Defendant was arrested on May 23, 2000. *Id.*
200. *Id.*
201. *Id.* at 248-49, 716 N.W.2d at 211.
202. *Id.* at 249, 716 N.W.2d at 211.
203. *Williams*, 475 Mich. at 249, 716 N.W.2d at 211.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *See id.*

sentencing on the pending charge.[209] Historically, the courts in Michigan have been inconsistent in determining the applicability of the 180-day rule in this context. In 1991, the Michigan Supreme Court resolved any conflicts in the lower courts by deciding in *People v. Smith*,[210] that the 180 day rule does not apply where the defendant is subject to mandatory consecutive sentencing.[211] In *Williams*, the current Michigan Supreme Court bench overruled *Smith* and its progeny, demonstrating, again, its insistence on maintaining the plain language of Michigan's statutory language.[212] Because an exception to the 180-day rule for cases involving mandatory consecutive sentencing does not appear in the plain language of the statute, the Court concluded that the exception does not exist.[213]

Even though the 180-day rule applied to the defendant's case in *Williams*, the Court still ruled he was not entitled to relief.[214] The Court clarified a discrepancy between the statute and the applicable court rule,[215] which dictated that the case must be dismissed if the prosecutor fails to make a good faith effort to bring a state prisoner to trial within 180 days.[216] Therefore, under the court rule existing at the time, a defendant could seek dismissal based upon a violation of the 180-rule if the prosecutor did not made a good faith effort to bring him to trial, even

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209. It is important to note that the court could have decided this case on other issues discussed later. Specifically, a determination of when the prosecutor received actual notice of defendant's incarceration, and whether the constitutional right to a speedy trial was violated here. However, the court indicated that it specifically addressed the applicability of MCL section 780.131 to ensure that its holding on that point was not dicta. *Williams*, 475 Mich. at 251, 716 N.W.2d at 212.

210. 438 Mich. 715, 475 N.W.2d 333.

211. *Id.* at 717-18, 475 N.W.2d at 334-35; *see also id.* at 719, 475 N.W.2d at 335 (Boyle, J. concurring).

212. *Williams*, 475 Mich. at 254, 716 N.W.2d at 214. By its decision in *Smith*, the court also overruled People v. Chavies, 234 Mich. App. 274, 593 N.W.2d 655 (1999) and People v. Falk, 244 Mich. App. 718, 625 N.W.2d 476 (2001). *See Williams*, 475 Mich. at 245, 716 N.W.2d 208. The court also noted that its decision would only apply to those pending cases on appeal where this issue was raised and preserved. *Id.* at 255, 716 N.W.2d at 214.

213. *See Williams*, 475 Mich. at 257, 716 N.W.2d at 216.

214. *See id.*

215. MCR 6.004(D), which at the time of defendant's case provided:

> (1) *The 180-Day Rule.* Except for crimes exempted by *MCL 780.131(2)*, the prosecutor must make a good faith effort to bring a criminal charge to trial within 180 days of either of the following:
>
> (a) the time from which the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or
>
> (b) the time from which the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained a local facility awaiting incarceration in a state prison.

MICH. CT. R. 6.004(D) (emphasis in original). The court rule was amended effective January, 2006 to comply with MCL section 780.131.

216. MICH. CT. R. 6.004(D)(2).

though the requirement in the statute that the prosecutor receive actual notice of his incarceration was not fulfilled.[217]

Again adhering to the plain language of the statute, the Court held that the court rule, to the extent it provides greater remedy than the statute, must yield to the statutory language.[218] While the Department of Corrections sent communications concerning defendant's status to the Detroit Police Department, the first qualifying notice to the prosecutor under MCL section 780.131 was received July 16, 2001.[219] Because the defendant was tried within 180 days of the time the prosecutor received actual notice, the Court concluded that he was not entitled to dismissal.[220]

At first blush, the Court's decision in *Williams* seems to suggest an expansion of defendants' rights by acknowledging that there is no exception to the 180-day rule's restrictions where the defendant is facing mandatory consecutive sentencing. However, the Court's ultimate strict reading of the statutory language suggests that motions for dismissal for violation of the 180-day will continue to be difficult to obtain.

VII. RIGHT TO JURY

One of the most significant issues addressed by the Michigan courts during this *Survey* period surrounds the application of the United States Supreme Court's decision in *Blakely v. Washington*[221] to Michigan's sentencing guidelines. In two cases decided the same day, the Michigan Supreme Court determined that a trial judge can use facts not determined by the jury in determining the minimum sentencing range without violating *Blakely*, even where the high end of the minimum guidelines dictates that the defendant receive an intermediate sentence.[222] Subsequently, the Court of Appeals determined that if the scored guidelines, including judicially determined facts, entitle the defendant to

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217. MICH. COMP. LAWS ANN. § 780.131(1) (West 2004) ("[T]he inmate shall be brought to trial 180 days after the department of corrections causes to be delivered to the prosecuting attorney . . . written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant. . . .").

218. *Williams*, 475 Mich. at 257, 716 N.W.2d at 215.

219. *Id.* at 255-56, 716 N.W.2d at 214-15.

220. *Id.* at 256, 716 N.W.2d at 215. The Court also concluded that the defendant's Constitutional right to speedy trial was not violated. *Id.* at 265, 716 N.W.2d at 219 (discussing U.S. Constitution's Sixth Amendment and Michigan Constitution's Article 1, Section 20). That issue was not surveyed because it had little precedential impact.

221. *Blakely*, 542 U.S. 296.

222. *See* People v. McCuller, 475 Mich. 176, 715 N.W.2d 798 (2006) [hereinafter McCuller I], *vacated*, ___U.S.___; 127 S.Ct. 1247 (2007) on remand to People v. McCuller, 479 Mich. 672, 739 N.W.2d 563 (2007) [hereinafter McCuller II], People v. Drohan, 475 Mich. 140, 715 N.W.2d 778 (2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 592 (2006).

an intermediate sanction, the Court cannot depart from that sentence except upon substantial and compelling facts proven to a jury.[223]

A. Michigan's Sentencing Guidelines

The analysis begins with Justice Markman's decision in *People v. Drohan*[224] where he considered "whether Michigan's indeterminate sentencing scheme, which allows a trial court to set a defendant's minimum sentence on the basis of factors determined by a preponderance of the evidence, violates the *Sixth Amendment of the United States Constitution.*"[225]

In *Drohan*, defendant was convicted of one count each of third and fourth degree criminal sexual conduct.[226] Defendant also pleaded guilty to being a three-time habitual offender.[227] The trial judge scored his offense and prior record variables based upon a preponderance of the evidence standard, and thereby sentenced defendant to 127 to 360 months of incarceration.[228] Defendant claimed that the judge's reliance on facts not proven to the jury beyond a reasonable doubt violated his Sixth Amendment jury trial right as discussed in *Blakely*.[229]

For purposes of sentencing, the Sixth Amendment requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt."[230] Yet a fact which supports a sentence within a particular range, but still under the statutory maximum, is not implicated by this rule.[231] To resolve this inquiry, it is most important therefore to determine what is meant by "statutory maximum." This was the task of the United States Supreme Court in *Blakely*. The Court determined that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or*

223. *See Uphaus*, 275 Mich. App. 158, 737 N.W.2d 519.

224. 475 Mich. 140, 715 N.W.2d 778.

225. *Id.* at 142-43, 715 N.W.2d at 780 (emphasis added). The Sixth Amendment of the Constitution of the United States states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . .

U.S. CONST. amend. VI.

226. *Drohan*, 475 Mich. at 144, 715 N.W.2d at 781; MICH. COMP. LAWS ANN. §§ 750.520d(1)(b), 750.520e(1)(b) (West 2004).

227. *Drohan*, 475 Mich. at 144, 715 N.W.2d at 781; MICH. COMP. LAWS ANN. § 769.11 (West 2006).

228. *Drohan*, 475 Mich. at 145, 715 N.W.2d at 781.

229. *See id.*

230. Apprendi v. New Jersey, 530 U.S. 466, 525 (2000).

231. *Id.* at 494 n.19; *see also* Harris v. United States, 536 U.S. 545 (2002).

admitted by the defendant. . . ."[232] "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[233]

In Michigan's indeterminate sentencing scheme, the statutory maximum is that set by law as the maximum penalty for the charged offense[234] and the minimum is set as a range based upon the guidelines.[235] The Court may depart from the minimum guideline range, but only with substantial and compelling reasons[236] and in any event may not exceed 2/3 of the statutory maximum.[237] Therefore, according to the Court in *Drohan*, the sentence imposed in Michigan is "always derived from the jury's verdict, because the 'maximum-minimum' sentence will always fall within the range authorized by the jury's verdict."[238] Therefore, the Court held in *Drohan*, that "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict."[239] By its ruling, the Court specifically noted that it was affirming its comment in *People v. Claypool*[240] that the Michigan indeterminate sentencing guidelines are not implicated by *Blakely*.[241] Furthermore, the Court noted that after *Blakely*, Michigan's mandatory minimum sentences needed to be addressed, but "[w]e settle this issue today by holding that departures from the minimum guidelines are not implicated by *Blakely*."[242]

B. Intermediate Sanctions

On the same day as *Drohan*, the Court considered whether the result would differ if the defendant were entitled to intermediate sanctions prior

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232. *Drohan*, 475 Mich. at 153, 715 N.W.2d at 785 (quoting *Blakely*, 542 U.S. at 303) (emphasis in original).

233. *Id.* at 153, 715 N.W.2d at 785-86 (emphasis in original). The *Blakely* Court also commented on indeterminate sentencing schemes, by noting that "[indeterminate sentencing] increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. . . . In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail." *Blakely*, 542 U.S. at 309.

234. MICH. COMP. LAWS ANN. § 769.8(1) (West 2000) ("The maximum penalty provided by law shall be the maximum sentence in all cases expect as provided in this chapter and shall be stated by the judge in imposing the sentence.").

235. MICH. COMP. LAWS ANN. § 769.34 (West 2006).

236. MICH. COMP. LAWS ANN. § 769.34(3) (West 2006).

237. MICH. COMP. LAWS ANN. § 769.34(2)(b) (West 2006).

238. *Drohan*, 475 Mich. at 162, 715 N.W.2d at 790.

239. *Id.* at 164, 715 N.W.2d at 792.

240. 470 Mich. 715, 684 N.W.2d 278 (2004).

241. *Drohan*, 475 Mich. at 159-60, 715 N.W.2d at 789 (citing *Claypool*, 470 Mich. at 730 n.14, 684 N.W.2d at 286 n.14).

242. *See id.* at 162 n.15, 715 N.W.2d at 790 n.15.

to scoring of his offense variables. In *People v. McCuller*[243] defendant was convicted of assault with intent to do great bodily harm less than murder, and was sentenced to two to fifteen years of imprisonment.[244] He claimed that the trial judge engaged in judicial fact finding in violation of *Blakely*[245] because the Court scored the offense variables based upon facts not proven to the jury beyond a reasonable doubt.[246] If the Court relied on the prior record variables alone, he would have been entitled to an intermediate sanction,[247] which would not include prison.[248]

The Court held that the sentencing guidelines explicitly require the sentencing judge to consider the prior record variables, offense class and the offense variables in determining the minimum guideline range.[249] Therefore, the Court concluded that the defendant was not entitled to an intermediate sanction until after all the variables were scored and at that point, the upper limit of the minimum range was 18 months or less.[250] Because defendant's properly scored guidelines put the upper limit of his statutory minimum beyond 18 months, he was not entitled to intermediate sanctions.[251]

The defendant in *McCuller* then petitioned for a writ of certiorari to the United States Supreme Court, which granted the petition, vacated the judgment and remanded the case back to the Michigan Supreme Court[252] in light of its decision in *Cunningham v. California.*[253] The California guidelines in *Cunningham* were determinate guidelines, where the statutory definition includes potential sentences in three tiers: lower, middle, upper.[254] The California statutes require that the trial judge impose a sentence in the middle range unless he finds circumstances in mitigation or aggravation justifying deviation.[255] Therefore, the *Cunningham* Court concluded that the statutory maximum is that described in the middle tier, and deviation from that tier must be based upon facts decided by a jury beyond a reasonable doubt.[256]

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243. *McCuller I*, 475 Mich. 176, 715 N.W.2d 798.
244. *Id.* at 178-79, 715 N.W.2d at 798-99.
245. *See id.* at 179, 715 N.W.2d at 799.
246. *See id.* at 180, 715 N.W.2d at 799.
247. *See id.*
248. *Id.* Intermediate sanctions apply when the upper limit of the minimum range under the guidelines is 18 months or less. MICH. COMP. LAWS ANN. § 769.34(4)(a) (West 2006).
249. *McCuller I*, 475 Mich. at 181, 715 N.W.2d at 800 (citing MICH. COMP. LAWS ANN. § 771.21 (West 2006)).
250. *Id.* at 182-83, 715 N.W.2d at 800-01.
251. *Id.* at 182-83, 715 N.W.2d at 801.
252. McCuller v. Michigan, ___U.S. ___, 127 S.Ct. 1247 (2007).
253. 549 U.S.___, 127 S.Ct. 856 (2007)
254. *Id.* at 861.
255. *Id.*
256. *See id.* at 871.

The Michigan Supreme Court has since reexamined its holding in *McCuller I* in light of *Cunnigham* and reaffirmed its previous decision.[257] The Court concluded that *Cunningham* did not affect the Court's ruling that both the previous record variables and the offense variables must be scored in order to determine the appropriate minimum range, even where intermediate sanctions would otherwise apply.[258] The Court also decided that Michigan's sentencing scheme is distinguishable from California's because Michigan's is truly indeterminate, and California's is a determinate scheme.[259] Finally, the Court ruled that any error was harmless.[260] Based upon the Court's ruling in *McCuller II*, it would appear that the issue in Michigan is final. *Blakely* does not affect Michigan's sentencing guidelines in nearly every circumstance.

C. Departure from Intermediate Sanctions

The remaining issue for the Court is whether *Blakely* affects a court's determination to depart from an intermediate sanction. In other words, once a court determines that defendant is entitled to an intermediate sanction, can the Court rely upon judicially determined facts to order departure from that sanction? The Michigan Court of Appeals addressed the issue squarely in *People v. Uphaus*.[261] The Court in *Uphaus* held that once a trial judge determines that a defendant is entitled to intermediate sanctions, he cannot depart from that sentence except upon facts proven to a jury beyond a reasonable doubt.[262] In *Uphaus,* after scoring the defendant's prior record variables, offense variables and considering the offense class, the Court calculated defendant's minimum range from zero to nine months.[263] Because the upper limit of his minimum range was less than 18 months after completely calculating the variables, defendant was entitled to an intermediate sanction.[264] Intermediate sanctions can include "probation or any sanction, other than imprisonment in a state prison or state reformatory . . . ."[265] A judge can depart from intermediate sanctions, but only after establishing substantial and compelling reasons on the record for the departure.[266]

257. *McCuller II*, 479 Mich. 672, 739 N.W.2d 563 (2007).
258. *Id.* at 676-77, 739 N.W.2d at 565-66.
259. *Id.* at 677, 739 N.W.2d at 566.
260. *Id.* at 678, 739 N.W.2d at 566.
261. *Uphaus*, 275 Mich. App. 158, 737 N.W.2d 519.
262. *Id.* at 161, 737 N.W.2d at 522.
263. *See id.* at 163, 737 N.W.2d at 523.
264. *Id.* (citing MICH. COMP. LAWS ANN. § 769.34(4)(a) (West 2006)).
265. *Id.* at 163, 737 N.W.2d at 523 (citing MICH. COMP. LAWS ANN. § 769.31(b) (West 2006)).
266. *Id.* at 163, 737 N.W.2d at 523 (citing MICH. COMP. LAWS ANN. § 769.34(4)(a) (West 2006)).

The defendant in *Uphaus* was convicted of one count of delivery of marijuana,[267] one count of possession of marijuana with the intent to deliver, [268] and four counts of possession of a firearm in the commission of a felony.[269] After determining that defendant was entitled to intermediate sanctions, the Court determined that the defendant was a threat to society and the officers in the case, and elected to depart from the guidelines, imposing a sentence of four to eight years in prison.[270]

The Court concluded that this deviation violated *Blakely* because MCL section 769.34(4)(a)[271] is "mandatory and places specific limits on the trial court's ability to sentence the defendant, [and] once it applies [it] becomes the relevant maximum."[272] Because it becomes the new statutory maximum, *Blakely* prohibits the use of judicial findings to justify a departure.[273] A departure from intermediate sanctions in these circumstances can only be made on the basis of facts tried to a jury and proven beyond a reasonable doubt.[274]

While the Court in *Uphaus* considered both *Cunningham* and *McCuller II*, it is unclear what the Supreme Court will rule when it considers the case. The Supreme Court, in its order granting immediate consideration of the case, noted in its opinion that *Drohan* remains controlling authority pending resolution of the appeal.[275]

VIII. RIGHT TO COUNSEL

A. Guilty Pleas

In *People v. James,*[276] the Court of Appeals considered the impact of *Halbert v. Michigan*[277] when defendants seek leave to appeal following a guilty plea.[278] In *James*, defendant pleaded guilty in circuit court and requested court appointed counsel for an appeal.[279] After considering the

267. *Uphaus*, 275 Mich. App. at 160, 737 N.W.2d at 521; MICH. COMP. LAWS ANN. § 333.7401(2)(d)(iii) (West 2001).

268. *Uphaus*, 275 Mich. App. at 160, 737 N.W.2d at 521; MICH. COMP. LAWS ANN. § 333.7401(2)(d)(iii) (West 2001).

269. *Uphaus*, 275 Mich. App. at 160, 737 N.W.2d at 521; MICH. COMP. LAWS ANN. § 750.227b (West 2004). The court vacated three of the felony firearm charges on double jeopardy grounds. *Uphaus*, 275 Mich. App. at 176, 737 N.W.2d at 530.

270. *Uphaus*, 275 Mich. App. at 164, 737 N.W.2d at 523.

271. MICH. COMP. LAWS ANN. § 769.34(4)(a) (West 2006).

272. *Uphaus*, 275 Mich. App. at 171, 737 N.W.2d at 527.

273. *See id.*

274. *Id.* at 172, 737 N.W.2d at 527-28.

275. People v. Uphaus, ___Mich.___, 733 N.W.2d 21 (2007).

276. 272 Mich. App. 182, 725 N.W.2d 71 (2006).

277. 545 U.S. 605 (2005).

278. *See James*, 272 Mich. App. at 182, 725 N.W.2d at 71.

279. *Id.* at 184, 725 N.W.2d at 72-73.

impact of *Halbert*, the circuit court judge concluded that the case did not apply to defendants convicted before *Halbert* was decided.[280]

In *Halbert*, the United States Supreme Court evaluated the constitutionality of MCL section 770.3a.[281] Pursuant to that statute, a court could not appoint counsel for a defendant who pleaded guilty, nolo contendere, or guilty but mentally ill, except under limited exceptions.[282] The statute also required that a court advise a defendant who pleaded guilty that by doing so, they had waived their right to appointed appellate counsel:

> While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal . . . .[283]

Halbert concluded that because Michigan provides defendants the right to appellate review of their convictions and sentences, those defendants have a federal constitutional right to appellate counsel, even when those convictions are obtained by way of plea.[284] Therefore, the Court concluded that MCL section 770.3a was unconstitutional as applied.[285] The *Halbert* Court also rejected the state's claim that even if Halbert had a right to counsel on appeal, that he had waived that right.[286] The Supreme Court held that a waiver must be a knowing, intelligent and voluntary waiver, and such a waiver did not occur in that case.[287]

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280. *Id.* at 185, 725 N.W.2d at 73. The circuit judge initially denied defendant's request pursuant to MCL section 770.3a (*repealed by* P.A. 2006, Mich. Pub. Acts, No. 655 §1), which denied access to appointed counsel for a defendant pleading guilty. *See id.* at 184, 725 N.W.2d at 73. After the *Halbert* decision, defendant again requested appointed counsel. *Id.* at 185, 725 N.W.2d at 73. The circuit judge denied the request a second time indicating that there was insufficient information that defendant was indigent. *Id.* After a third request, the circuit judge indicated as stated, that *Halbert* did not apply and that defendant had waived his rights to counsel. *Id.* After defendant requested leave to appeal, the circuit judge finally appointed counsel. *Id.* at 185-86, 725 N.W.2d at 73.

281. *See generally Halbert*, 545 U.S. at 605.

282. *James*, 72 Mich. App. at 187, 725 N.W.2d at 74, (citing MICH. COMP. LAWS ANN. §§ 770.3a(2)-(3) (West 2007)).

283. MICH. COMP. LAWS § 770.3a(4), *repealed by* 2006 Mich. Pub. Acts 655 § 1.

284. *Halbert*, 545 U.S. at 609-10.

285. *Id.* MCL section 770.3a has since been repealed. MICH. COMP. LAWS § 770.3a, *repealed by* 2006 Mich. Pub. Acts 655 § 1.

286. *Halbert*, 545 U.S. at 623-24.

287. *Id.* at 624 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

When the Circuit Court in *James* denied appointed counsel based upon waiver, it also concluded that the discussion in *Halbert* concerning waiver was mere dictum, and therefore not controlling.[288] The *James* Court rejected this contention, holding that the discussion in *Halbert* concerning waiver was not dictum.[289] The *Halbert* Court determined that MCL section 770.3a was unconstitutional as applied, based in part on the language in the statute which exacted a waiver of appellate counsel for defendants convicted by way of plea.[290] Instead, to waive counsel for appeal, the Court must still determine that the defendant intentionally relinquished a known right.[291] The Court concluded that under the circumstances in *James*, the defendant did not waive counsel because he "did not intentionally relinquish a known right."[292]

The impact of *Halbert* on Michigan criminal procedure practice was largely resolved following the decision and repeal of the offending statute. For future application, it is important to note that *James* specifically reserves opinion on one remaining issue. The Court refused to address the issue whether a defendant may ever waive appellate counsel. The Court concluded that they "need not, and do not, decide this latter question."[293] The Court will likely be asked to resolve this issue in future cases.

IX. SENTENCING

A. Scoring Guidelines

During this *Survey* period, the Court of Appeals decided two cases which clarify when to score particular offense variables. In *People v. Melton*,[294] the Court examined the appropriate scoring of offense variable 9, described in full as:

> (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Multiple deaths occurred . . . 100 points
>
> (b) There were 10 or more victims . . . 25 points

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288. *James*, 272 Mich. App. at 193, 725 N.W.2d at 77.
289. *Id.* at 194, 725 N.W.2d at 78.
290. *See id.* at 196, 725 N.W.2d at 78-79 (citing *Halbert*, 545 U.S. at 624 n.8).
291. *Id.* at 195, 725 N.W.2d at 78.
292. *Id.* at 196-97, 725 N.W.2d at 79 (citing People v. Carter, 462 Mich. 206, 215, 612 N.W.2d 144, 149 (2000)).
293. *Id.* at 198, 725 N.W.2d at 79-80.
294. 271 Mich. App. 590, 722 N.W.2d 698 (2006).

(c) There were 2 to 9 victims . . . 10 points

(d) There were fewer than 2 victims . . . 0 points

(2) All of the following apply to scoring offense variable 9:

(a) Count each person who was placed in *danger of injury* or loss of life as a victim.

(b) Score 100 points only in homicide cases.[295]

Melton was convicted of multiple counts of larceny of a firearm, home invasion, larceny in a building and possession of a firearm in the commission of a felony.[296] Melton broke into the victims' home and stole property, while neither victim was at home.[297] The Court scored 10 points for offense variable 9.[298] Defendant argued that the variable should not have been scored at all, because no one was home when she committed the crimes.[299] The Court of Appeals resolved a conflict in panels on the issue of whether "injury" in offense variable 9 included financial injury, or was restricted to cases where the victim is in danger of physical injury.[300]

The Court noted first that the plain language of the statute does not restrict its application by use of the word "physical."[301] However, the Court noted that the word "injury" must be read in the context of the rest of the statute in order to determine the legislature's intent.[302] The Court concluded that the legislature must not have intended such an open-ended application of the variable to include non-physical injuries, especially where "[t]he remainder of the statute clearly indicates that only physical injuries were contemplated."[303] The Court held that offense variable 9 applies only when there is a danger of physical injury, and overruled previous decisions decided otherwise.[304]

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295. MICH. COMP. LAWS ANN. § 777.39 (West 2006), *amended by*, 2006 Mich. Pub. Acts 548 (emphasis added).

296. *Melton*, 271 Mich. App. at 593, 722 N.W.2d at 699.

297. *Id.* at 592, 722 N.W.2d at 699.

298. *Id.* at 593, 722 N.W.2d at 699.

299. *Id.*

300. *Id.* at 592, 722 N.W.2d at 699. The court referenced two prior cases: People v. Knowles, 256 Mich. App. 53, 662 N.W.2d 824 (2003) and People v. Dewald, 267 Mich. App. 365, 705 N.W.2d 167 (2005), both of which held that the variable could be scored for financial injuries. *Melton*, 271 Mich. App. at 592, 722 N.W.2d at 699. The court specifically overruled *Knowles*. *Id.* at 592, 722 N.W.2d at 699.

301. *Melton*, 271 Mich. App. at 594, 722 N.W.2d at 700.

302. *Id.* at 594-95, 722 N.W.2d at 700.

303. *Id.* at 595, 722 N.W.2d at 700-01.

304. *See id.* at 596, 722 N.W.2d at 701.

The Court turned its focus to offense variable 7 in *People v. Mattoon III*,[305] and addressed for the first time whether it can be scored only where there is actual physical abuse.[306] Despite language in the title of this variable that it concerns "aggravated physical abuse," the Court relied on the context of the remaining language to conclude, unlike *Melton*,[307] that this variable has broader application.[308] Offense variable 7 states in relevant part:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense . . . 50 points
>
> (b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense . . . 0 points . . .
>
> . . . .
>
> (3) As used in this section, "sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.[309]

Defendant in *Mattoon III* was convicted of various charges arising from an incident where he held his girlfriend in their home at gunpoint for nearly nine hours.[310] The Court initially scored the variable at 50 points, but later reversed itself, finding that the plain language restricted its application to crimes involving physical abuse to the victim.[311] The Court of Appeals concluded that the statutory language "aggravated physical abuse" was more of a "catch line heading" than a substantive restriction.[312] As such, it should not be used to interpret the statute.[313] Instead, the remaining language reflected a legislative intent to include

305. 271 Mich. App. 275, 721 N.W.2d 269 (2006).
306. *See id.* at 276, 721 N.W.2d at 270.
307. *Melton*, 271 Mich. App. 590, 722 N.W.2d 698.
308. *See Mattoon III*, 271 Mich. App. at 277-78, 721 N.W.2d at 270-71.
309. MICH. COMP. LAWS ANN. § 777.37 (West 2006).
310. *Mattoon III*, 271 Mich. App. at 276, 721 N.W.2d at 270.
311. *See id.*
312. *Id.* at 278, 721 N.W.2d at 271.
313. *Id.*

cases of psychological injury, therefore the Court refused to read a restriction to physical abuse into the statute.[314]

Seemingly inconsistent, the decisions in *Melton* and *Mattoon III* are actually decided on the same basis. The Michigan Courts embarked, in this context and others, on a practice of restrictive statutory analysis during this *Survey* period. Both cases reflect the Courts' desire to give true meaning to statutory language and their refusal to engage in judicial legislation.

B. Sexual Offender's Registration Act

In *People v. Golba*,[315] the Court of Appeals addressed whether a defendant had to register as a sexual offender under the Sexual Offender's Registration Act ("SORA"),[316] where his ultimate conviction was not for a listed offense.[317] Defendant was originally charged with one count of possession of child sexually abusive material[318] and one count of unauthorized access to computers.[319] The jury returned a guilty verdict on the computer charge alone.[320]

At issue in *Golba* was the "catch-all" provision of SORA, where registration for a listed offense under the statute includes "[a] . . . violation of a law of this state or a local ordinance of a municipality that by *its nature* constitutes a sexual offense against an individual who is less than 18 years of age."[321] The question for the Court was whether the adjudicated computer charge was "by its nature" a sexual offense requiring registration under SORA, especially in light of the acquittal on the sexual offense.[322]

The Court of Appeals previously addressed this issue in *People v. Meyers*[323] where it held that three conditions must exist before a defendant is required to register under SORA:

> (1) the defendant must have been convicted of a state-law violation or a municipal-ordinance violation,
>
> (2) the violation must, "by it's nature," constitute a "sexual offense," and

314. *See id.*
315. 273 Mich. App. 603, 729 N.W.2d 916 (2007).
316. MICH. COMP. LAWS ANN. §§ 28.721-.736 (West 2004).
317. *See Golba*, 273 Mich. App. at 605, 729 N.W.2d at 919.
318. *See id.*; MICH. COMP. LAWS ANN. § 750.145c(4) (West 2004).
319. *See Golba*, 273 Mich. App. at 605, 729 N.W.2d at 919; MICH. COMP. LAWS ANN. § 752.795 (West 2004).
320. *Golba*, 273 Mich. App. at 605, 729 N.W.2d at 919.
321. MICH. COMP. LAWS ANN. § 28.772(e)(xi) (West 2004) (emphasis added).
322. *See Golba*, 273 Mich. App. at 607-08, 729 N.W.2d at 920.
323. 250 Mich. App. 637, 649 N.W.2d 123 (2002).

(3) the victim of the violation must be under 18 years of age.[324]

At issue was the second requirement – was Golba's conviction one that was a sexual offense by its nature? The Court concluded that it was, because the offense had "inherent qualities" that were sexual, and involved a "'transgression' that is 'of or pertaining to sex.'"[325] Golba downloaded pornography to his school computer, and against school policy, gave access to his computer to other students, viewed the pornography in the presence of a 16 year old student, and used the school's e-mail system to solicit sex from the student.[326] The Court of Appeals concluded that the Trial Court did not err in concluding that the offense was a sexual offense "by its nature" and properly ordered defendant to register under SORA.[327]

The defendant in *Golba* also argued that by requiring his SORA registration, the Trial Court violated his "Sixth Amendment rights to due process[328] and his Sixth Amendment right to a jury trial,[329] as enforced upon the states by the Fourteenth Amendment."[330] He claimed that the Court violated these rights as described in *Blakley*[331] by imposing additional punishment beyond the statutory maximum of his sentence on the basis of facts not submitted to the jury and found beyond a

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324. *Golba*, 273 Mich. App. at 607, 729 N.W.2d at 920 (citing *Meyers*, 250 Mich. App. at 647, 649 N.W.2d at 129).

325. *Id.* at 608, 729 N.W.2d at 920 (citing *Meyers*, 250 Mich. App. at 647, 649 N.W.2d at 129).

326. *Id.* at 612, 729 N.W.2d at 922-23.

327. *Id.* at 613, 729 N.W.2d at 923.

328. U.S. CONST. amend. V reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

329. U.S. CONST. amend. VI reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [*sic*].

Id.

330. *Golba*, 273 Mich. App. at 615, 729 N.W.2d at 924; U.S. CONST. amend XIV, § 1 (". . . nor shall any State deprive any person of life, liberty, or property, without due process of law.").

331. *Blakely*, 542 U.S. 296.

reasonable doubt.[332] The *Golba* Court admitted that the trial judge imposed the SORA requirement on the basis of judicially determined facts.[333] Therefore, "the crux of the issue presented here is whether compliance with SORA is a 'penalty' within the meaning of the *Apprendi-Blakely* rule."[334] The Court concluded that "SORA does not impose a penalty" in the same manner that criminal statutes express penalties, it does not subject the defendant to increased risk of loss of liberty, or increased fines.[335] SORA is not a criminal sanction, but instead is a remedial regulatory scheme designed to protect the public.[336] As such, the analysis under *Blakely* does not apply to the imposition of SORA requirements.[337]

X. POST CONVICTION RELIEF

A. Motion for Relief from Judgment

In *People v. Clark*,[338] the Court of Appeals clarified the requirements for seeking relief from judgment pursuant to MCR 6.508(D)(3).[339] The Court in *Clark* also made clear that those requirements are not relaxed when a defendant files the motion *in propria persona*.[340]

Defendant in *Clark* was convicted of armed robbery.[341] The Court of Appeals affirmed his conviction.[342] Defendant then appeared *in propria persona* and filed two motions for relief from judgment under MCR

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332. *See Golba*, 273 Mich. App. at 615, 729 N.W.2d at 924.

333. *Id.*

334. *Id.* at 615, 729 N.W.2d at 924.

335. *Id.* at 620, 729 N.W.2d at 927.

336. *Id.*

337. *See id.* The court points out that this conclusion is supported by federal and state decisions which previously held that registration under SORA is not criminal punishment. *Id.* at 616-17, 729 N.W.2d at 925; *see also* Doe v. Kelley, 961 F.Supp. 1105 (W.D. Mich. 1997); Lanni v. Engler, 994 F.Supp. 849 (E.D. Mich. 1998); People v. Pennington, 240 Mich. App. 188, 610 N.W.2d 608 (2000).

338. 274 Mich. App. 248, 732 N.W.2d 605 (2007).

339. *See id.* at 251, 732 N.W.2d at 607. MCR 6.508(D) establishes the grounds for relief from judgment. MICH. CT. R. 6.508(D). The rule indicates that the court may not grant relief from judgment if the motion:

> . . . .
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
> (b) actual prejudice from the alleged irregularities that support the claim for relief . . . .

MICH. CT. R. 6.508(D).

340. *Clark*, 274 Mich. App. at 254, 732 N.W.2d at 609.

341. *Id.* at 249, 732 N.W.2d at 607.

342. *Id.*

6.508, both of which were denied.[343] He filed a third motion, arguing for the first time that the jury instructions at trial were improper.[344] The Trial Court found that defendant established the requirement for good cause, because both of his appellate counsels were ineffective for failing to address the jury instructions on appeal or previous motions.[345]

The Court of Appeals found the language in the court rule slightly ambiguous, and relied on the purpose of the rule to determine its meaning.[346] The language in rule 6.508(D)(3) indicates that a defendant cannot get relief from judgment unless he establishes "good cause for failure to raise such grounds on appeal *or* in a prior motion."[347] Defendant attempted to argue that the "or" implies that he need only show that he has good cause to raise it in one of his previous attempts.[348] However, the Court noted that the rule "protects [against] unremedied manifest injustice, preserves professional independence, conserves judicial resources, and enhances the finality of judgments."[349] That being the case, in order to get relief, the "defendant to show good cause for failure to raise the claim in an appeal if one is filed, or in a prior motion if one is filed, or in both if both are filed."[350] The Court made clear in its holding that the requirement of good cause under the statute is the same whether the motion is filed by counsel, or *in propria persona*, thereby quelling any suggestion by the Trial Court that a lower standard may apply.[351]

B. Return of Records

Under certain circumstances, the Michigan State Police Criminal Justice Information Center ("MSP") is required by statute to return or destroy a person's arrest and fingerprint cards.[352] As an issue of first impression, the Court of Appeals in *McElroy v. Michigan State Police Criminal Justice Information Center*[353] determined that MSP is not

343. *Id.* at 249-50, 732 N.W.2d at 607.
344. *Id.* at 250, 732 N.W.2d at 607.
345. *Id.* at 250, 732 N.W.2d at 607.
346. *See Clark*, 274 Mich. App. at 253, 732 N.W.2d at 608.
347. MICH. CT. RULE 6.508(D)(3)(a) (emphasis added).
348. *See Clark*, 274 Mich. App. at 251, 732 N.W.2d at 607-08.
349. *Id.* at 253, 732 N.W.2d at 609 (citing People v. Reed, 449 Mich. 375, 378-79, 535 N.W.2d 496, 499 (1995) (alteration in original)).
350. *Id.* at 253, 732 N.W.2d at 609.
351. *See id.* at 254, 732 N.W.2d at 609.
352. MICH. COMP. LAWS ANN. § 28.243(8) (West 2004) ("[I]f an accused is found not guilty of an offense for which he or she was fingerprinted under this section, upon final disposition of the charge against the accused or juvenile, the fingerprints and arrest card shall be destroyed . . . .").
353. 274 Mich. App. 32, 731 N.W.2d 138 (2007).

required to destroy these documents when defendant's case was dismissed following a domestic violence deferral.[354]

McElroy was charged with domestic violence and pleaded no contest pursuant to an agreement that if he did so, the charge would be dismissed following a successful term of probation.[355] Defendant did complete his term of probation, and the Court issued an order of dismissal.[356] The question becomes whether such dismissal is the equivalent of an acquittal for purposes of MCL section 28.243, which would mandate the destruction or return of defendant's arrest and fingerprint cards.

This issue is addressed directly in the Spouse Abuse Act,[357] and the Court relied upon its language in rendering its conclusion.[358] The statute states that "[u]pon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the person. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section . . . ."[359] The Court concluded that because no adjudication of guilt occurred in response to his plea under MCL section 769.4a, defendant cannot show he was found not guilty.[360] As such, MSP was not mandated to destroy the requested documents.[361]

McElroy clarified any remaining question about the impact of a plea under the Spousal Abuse Act. By its holding, the Court of Appeals established that dismissal of charges under the statute is not the same as a factual determination of acquittal.

XII. CONCLUSION

Michigan courts addressed several issues during this *Survey* period which will have significant impact on criminal procedure jurisprudence. Common to nearly all of the decisions is the reflection in the courts' holdings of the desire to judge with restraint, and the refusal to extend rulings beyond the plain language of the statute at issue. With the current Michigan Supreme Court, future survey periods will likely also witness the reversal of standing cases if a more strict reading of legislative intent dictates that result.

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354. *Id.* at 38-39, 731 N.W.2d at 142. Defendant's plea was made pursuant to MCL section 769.4a. MICH. COMP. LAWS ANN. § 769.4a (West 2000).

355. *McElroy*, 274 Mich. App. at 33-34, 731 N.W.2d at 139.

356. *Id.* at 34, 731 N.W.2d at 139-40.

357. MICH. COMP. LAWS ANN. § 769.4a (West 2000).

358. *See McElroy*, 274 Mich. App. at 36-37, 731 N.W.2d at 140-41.

359. MICH. COMP. LAWS ANN. § 769.4a (West 2000).

360. *McElroy*, 274 Mich. App. at 38, 731 N.W.2d at 141.

361. *Id.*